Plenary 1

A Roundtable on Mediation Impasse-Breaking Techniques

Moderator: Gabrielle Y. Vazquez, Esq.

Panelists: Jennifer Lupo, Esq.

Charles M. Newman, Esq.

Ruth D. Raisfeld, Esq.

Stephen Sonnenberg, Esq.

New York Law Journal

NEW YORK LAW JOURNAL SPECIAL REPORT

An ALM Publication

Alternative Dispute Resolution

WWW.NYLJ.COM

VOLUME 259—NO. 52

MONDAY, MARCH 19, 2018

Mediating **Highly Emotional** Workplace Disputes

BY STEPHEN P. SONNENBERG

SHUTTERSTOCK

Workplace disputes provide fertile ground for intense emotional conflict. While the #MeToo movement has focused attention on workplace harassment and the psychological impact of sexual misconduct, many other types of workplace disputes generate emotional turmoil. Discrimination and termination claims, allegations of pay disparity and even claims of unpaid wages often are impacted by strong emotions.

When employees and employers turn to a mediator to help resolve their legal disputes, they bring not only evidence and arguments, but emotional reactions that are definitely not "one size fits all." Workplace conflict that leads to anxiety and depression in one employee may promote anger and outrage in another. Nor are individuals identically resilient. The same experience that engenders a long-term traumatic reaction within one individual may give rise to only mild discomfort within another. Coworkers or supervisors accused of misconduct will also have intense, but not identical, reactions. Deciding whether or how to address varied emotions that stand in the way of resolution often is a key to a successful mediation.

Doing so does not mean that the mediator acts as a psychotherapist. Although mediation and psychotherapy address the ways in which individuals feel, think and make decisions, they are far from synonymous. This may reassure those who contend that the resolution of legal disputes should be grounded solely on facts and the law. As a former psychotherapist, employment lawyer and now mediator at JAMS, I have been asked two critical questions: Are the intense emotions generated by employment disputes really pertinent to settlement of the legal claims and, if so, why? After all,

STEPHEN P. SONNENBERG *is a JAMS panelist based in New York. He previously practiced labor and employment law for 25 years at Paul Hastings, before which he was a psychotherapist. He can be reached at ssonnenberg@jamsdar.com.*

some assert, the prima facie case for discrimination under Title VII of the Civil Rights Act of 1964, or workplace harassment under state and city laws, does not include "intense emotions" as a formal element of a claim.

The response is straightforward, with a caveat. Attending to intense emotions in employment disputes increases the chances of resolution. Emotions affect not only the way in which individuals *feel*, but the way in which they *think,* and therefore the manner in which they negotiate. Instead of impeding resolution, intense emotions often provide opportunities for the mediator to convey a measure of understanding and respect for the parties. This, in turn, supports the parties' ability to examine the legal claims and defenses from different perspectives, consider their options and make clear-headed decisions. That said, it is important for the parties, attorneys and the mediator to recognize the distinctions between the roles of mediator and therapist.

The Impact of Intense Emotions

Although many people strive to separate facts from emotions, strong emotions often influence an individual's perception of the facts, and "what happened." Understanding how the parties' feelings impact their perception of their legal claims and defenses is one of the mediator's tasks. Emotions and cognition directly influence each other. On the one hand, emotions create beliefs and may distort memories. On the other hand, thoughts and memories impact the way individuals feel. Together they have a substantial impact on behavior, including not only the manner in which individuals interact, but the strategy and tactics they adopt while negotiating with each other.

Individuals who bring harassment, discrimination or retaliation claims and believe they have been victimized may experience feelings of anger, anxiety, helplessness and depression. See, e.g., Reed, M.E., Collinsworth, L.L., Lawson, A.K. et al., "The Psychological Impact of Previous Victimization: Examining the 'Abuse Defense' in a Sample of Harassment Litigants," Psychol. Inj. and Law (2016) 9: 230. Even claims for unpaid compensation grounded on wage-and-hour law technicalities or the interpretation of contracts and workplace policies may involve strong emotions. Claims alleging pay inequality, promotions denied, or unwarranted terminations are often grounded on fundamental disagreements over the value and utility of individuals, not inanimate objects. These disagreements may impact an employee's self-esteem and cause significant distress.

When employees and employers turn to a mediator to help resolve their legal disputes, they bring not only evidence and arguments, **but emotional reactions that are definitely not "one size fits all."**

Employees who bring claims do not have a monopoly on strong emotions. Reactions by those accused of discrimination, harassment or retaliation may include anger, anxiety, embarrassment and depression. Co-workers or managers accused of wrongdoing are not emotionally insulated simply because they may have acted on behalf of their employer. Some feel insufficiently supported or even abandoned by their co-workers and employer, fearful that their job, reputation and future prospects will be irretrievably damaged. This, too, causes distress for those accused.

Mediation, Not Psychotherapy

Psychotherapy generally involves the treatment of mental or emotional disorders or related bodily ills by psychological means. See, e.g., Definition of Psychotherapy, Merriam-Webster.com. Mediators, in contrast, assist individuals involved in conflict to come to an agreement, rather than focusing on psychological "disorders" or "illness." Attending to the emotions that motivate parties to bring, maintain, and ultimately let go of their legal claims and defenses does not require a mediator to formulate diagnoses or even think in terms of pathology. Rather, the mediator understands that emotions influence the ways in which individuals think and, therefore, the manner in which they negotiate.

A mediator has the opportunity to attend to strong emotions by actively listening and openly acknowledging a party's emotional experience. One of the mediator's goals is to respectfully convey compassion for employee and employer alike. There is no specific formula or magic phrase for the mediator to use when acknowledging strong emotions. Timed well, a simple

statement that the mediator understands that a party feels outraged, or wounded, for example, may be just right. Active listening and acknowledgment are not the same as encouraging a party to simply "vent," which under some circumstances in mediation may be quite counterproductive.

The distinctions between a mediator's and psychotherapist's role are varied. While mediators may have more than one meeting with parties and their counsel, they do not have the therapist's opportunity to develop trust and rapport through sustained discussions. They must do so quickly.

Therapists often focus on the impact that prior experiences have had on an individual's emotions and decisions. They may interpret patterns of prior behavior, or an individual's current thoughts and emotions, in ways that differ from and expand their clients' self-perception. Mediators focus on the past to ensure that they understand the relevant factual and legal issues and their impact on the parties. Understanding the chronology of events and the emotions they generate is far different than analyzing and interpreting them for a client. In mediation, the former will likely be welcome, the latter unwelcome.

Therapists rely primarily, sometimes exclusively, on their client's subjective reports regarding past and current events. Although mediators adhere to certain rules and protocols regarding confidentiality, they have access to information from all sides to a dispute. This enables them to talk with the parties relatively quickly about different perspectives on the facts and the law and to encourage the parties to step into the proverbial shoes of the judge and jury. It also allows the mediator to explore the risks inherent in the parties' positions. In my experience, this fundamental difference between the mediator and therapist role benefits all who attend mediation.

Cultural Influences On Emotional Expression

A discussion of emotionally laden disputes is incomplete without mention of cultural differences in the manner in which individuals experience and express their emotions. If overlooked or misconstrued they make such disputes more difficult to resolve.

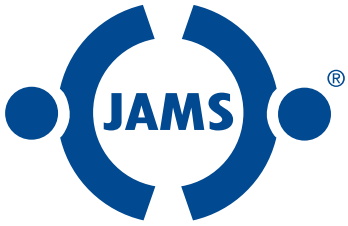
The basic premise is that culture influences how individuals understand, interpret and express their emotions. Norms specific to a given culture impact how an individual within that culture feels he or she *should* express emotions. In mediations involving a party who suppresses his or her expression of negative emotions, it would be a mistake for the mediator or counsel to assume that a calm demeanor signifies the absence of emotional turmoil. Of course, a mediator typically does not have an opportunity to conduct, prior to mediation, a thorough assessment of the impact of the parties' respective cultures on their emotional styles. There are opportunities, however, to seek clues. During separate pre-mediation conference calls, for example, the mediator may ask each party's counsel about the client and how the client is coping with litigation.

This does not mean that the mediator should presume that an individual's cultural background dictates or guarantees a particular emotional posture in an employment mediation. To presume so risks stereotyping individuals.

A Greater Chance of Success

Attention to the parties' emotions helps not only the parties but the mediator. Understanding the parties' emotional styles and concerns enables the mediator to employ a line of reasoning that the parties are most likely to find compelling. An individual uncomfortable with the outward expression of intense or negative emotions, for example, may not find arguments based on strong emotion persuasive. An individual who expresses intense emotions with ease may not be impressed by a highly intellectual line of reasoning. A mediator's approach should be in tune with each party's emotional style and comfort level.

Mediators and therapists share the goal of empowering individuals to make important decisions *informed*, not *dictated*, by their emotions. Doing so allows the parties to consider perspectives different than the ones they brought to mediation, and to consider their options well informed as to the potential outcomes of their dispute.



Changing Faces to Change Positions

Ruth D. Raisfeld, Esq.

Summary: Successful mediations require flexible negotiators

Successful outcomes in mediation are not dependent on any one person or any one factor. The parties and their counsel hire a mediator because they need help, not because they do not want a role or part in the dispute resolution process. However, the mediator may be the only person in the process who is capable of observing and evaluating what roles each of the individuals in attendance can play at the negotiation. The mediator should never assume that he or she must be the focal point or sole agent of all discussions. Indeed, many mediators subscribe to the view that the mediator is there to let the parties negotiate and only to intervene when necessary.

A critical skill for the mediator, but also for the attorneys and parties, is to assess who should be in the joint session, separate caucuses, and how to reconfigure the individuals who participate in the discussion as necessary. The mediator must constantly be a subtle stage manager to sense when a change in negotiating agents might be helpful to change negotiating positions.[1] A variety of permutations on changing the composition of the negotiators should be considered.

I. Traditional First-Approach: Mediator and Counsel

Typically, one, both or all counsel, initially contact the mediator to determine the mediator's availability and readiness to serve in a particular matter. Even during this initial call or e-mail, counsel may reveal a negotiating style or may disclose whether or not they intend to bring clients to the mediation and why. The mediator may initially ask the open-ended question: *"Who will be attending for your client in addition to you?"* It is important for the mediator to listen carefully to counsel's answer for this may disclose whether counsel has fully thought through this issue and what counsel's preference may be. Counsel may also seek the mediator's view. Even at this early stage, the mediator should be thinking about helping counsel to select the right representative to be in attendance.

It is also possible during the initial phases of convening a mediation that counsel may have a timid, anxious, or angry client who is either unwilling or resistant to attending a mediation. This is an opportunity for the mediator to offer to be available for a pre-mediation conference call to afford the client an opportunity to "meet" the mediator and learn more about the process and the mediator's protocols so that the client will be more comfortable submitting to the mediation process.

[1] Following a successful mediation of a difficult employment dispute, one of the attorneys who participated wrote me: "somehow we all felt like actors on your stage. I am not complaining, just acknowledging. Thanks for making it happen."

Further, the mediator may learn in the initial stages that one or both sides will not proceed in the absence or presence of another individual. While the mediator may have certain best practices in mind with regard to whether it is essential for one person or another individual to be present, the mediator should at least have some basic information if not more about the matter before taking a position or making a recommendation as to who must be in attendance. The mediator should be open-minded and not doctrinaire about attendees until the mediator is aware of the issues.

II. Joint Session: Mediator, Counsel, Client Representatives

While the trend in some camps is to dispense with a joint session, I am a proponent of joint sessions except in the most difficult circumstances: it is important for both sides to demonstrate that they can be in the same room together in order to conduct an effective dispute ending resolution. Further, it is almost always an opportunity to learn something new about someone or something. However, the joint opening session is an important opportunity to consider appropriate representatives. For example, counsel should give consideration to balance of power. If counsel or the party is going to take the position in an opening that *"we are here in good faith but think this case is a nuisance,"* they may want to refrain from bringing extraneous people or multiple attorneys to the joint session which typically signals that the case is anything but minor. On the other hand, a particularly strong show of force during the opening session may disarm the other side and signal that hard-bargaining lies ahead.

Similarly, deciding who will speak for a party in a joint session is almost as significant as what to say. While lawyer advocates view the joint session as an opportunity to press the strengths of legal arguments and the weaknesses of the opposing side's case, it is a critical opportunity for clients to speak. Whether they read from a prepared statement or answer questions from their counsel, clients who wish to speak should be prepared and the mediator should set ground-rules that the client is not there to be deposed.

Given the many permutations that may take place both during a joint session and in subsequent caucuses, it is a good practice for mediators to mention in their opening remarks that the mediator may meet separately, together, or with different representatives at different times of the day and that attendees should not be surprised by this or draw any conclusions from it. By mentioning this before-hand, the mediator will encourage the parties themselves to consider "mixing it up" and to offer such ideas to the mediator. It is also a good idea for the mediator to build trust with the attorneys by noting that he or she will not speak privately with their clients without first asking permission to do so. Mediators must remember that the attorney-client privilege is inviolate even if the mediator believes that an attorney is a stumbling block. The mediator should not be so zealous in the efforts to settle a case as to undermine an attorney-client relationship.

III. Separate Caucuses: Mediator, Counsel and the Clients

Another hallmark of mediation is the separate caucus which occurs when the parties and their counsel retreat to separate conference rooms for private, confidential discussions with the mediator. Here the mediator receives information and argument in support of bargaining positions and interests may be identified. These separate caucuses may continue in a "shuttle diplomacy" sequence for many hours, and may result in agreement even without ever bringing the parties together again or staging any alteration in process. However, sometimes the mediator may feel that issues are too delicate or too personal for the message to be carried by the mediator. This is

when creativity on the part of the mediator, counsel or the parties as to changing faces to change positions comes to play.

A. Mediator takes Counsel aside, separately

A mediator may ask to speak with counsel outside the presence of the client under a variety of circumstances. The mediator may sense that counsel is taking too hard a position in front of the client which interferes with the mediator's ability to make progress; on the other hand, the mediator may wish to seek the counsel's view of whether the mediator needs to try a different tack in communicating with the client. Similarly, the mediator may wish to test an approach with counsel before revealing it to the client or taking it to the other side and wants to give the counsel an opportunity to assess it without doing so in front of the client. This gives both the mediator and counsel an opportunity to "rehearse" an idea before playing it out.

Taking counsel aside may also give the client a "breather" and may give the client an opportunity to think things through without being "counseled" and without being distracted by conversations with counsel or the mediator. Often the entire dynamic may change just by giving the intense "attorney-client relationship" a rest.

B. Mediator takes Counsel aside, together

Sometimes it is helpful to call an "all attorneys" meeting. Once again, this gives the "attorney-client" relationship a break. Further, it enables the attorneys to have a meeting on a "lawyer's level" where cases, statutes, and legal risks can be spoken of without talking "over the heads" of the clients. Further, the reality is that the mediator is "new" to the case; the attorneys have been living with it and will live with it if the case does not settle. All attorneys want to feel like they are representing their clients zealously and want to feel like they are capable of steering the train into the station. So at an appropriate point, the mediator may want to bring the attorneys together to discuss a particularly thorny issue or to allow one of them to drive a point home. There is no reason why the mediator has to do all the talking or be the only one to carry offers and counter-offers back and forth.

C. Clients talk to each other, with or without Counsel, with or without the mediator

Both in commercial and employment cases, there may be so much "law of the shop" that it is beneficial for the clients to get into a room and talk to each other in an attempt to find a resolution. Whether it is a business-to-business dispute, a family business dispute, or an employment dispute, the circumstances leading to the dispute are best known by those who were involved in the events. In appropriate situations, it is helpful to allow the disputants to speak directly with each other. The setting of the stage and the timing are issues the mediator must address.

1. Clients talk to each other, without Counsel or the Mediator

Depending on the circumstances, it may be appropriate for the disputants to speak with each other privately. In a family dispute or an employment dispute, there may be circumstances that the disputants want to discuss and that they do not want to share with their attorneys or the mediator. The mediation provides a safe, confidential setting in which they can have this conversation. The mediator must help to set the ground rules: where will this talk take place, will they take notes, will the attorneys be nearby, etc.? Often this conversation enables the parties to share perspectives and heart-felt personal messages (whether friendly or hostile) that need to take

place before the legal dispute can be addressed. If counsel is particularly risk-averse, it may take some mediator facilitating to frame the private conversation in such a way that all feel comfortable that subsequent legal positions will not be compromised.

Examples of client-client conversations that have broken impasse and set the stage for successful negotiations include:

- sexual harassment case that followed the break-up of a consensual relationship settled once the alleged victim had an opportunity to tell the harasser just how difficult the relationship was and the harsh impact of the subsequent termination of the relationship and employment relationship;

- former partners sat together in a conference room together divvying up the clients upon dissolution of the partnership;

-a financial services executive seeking a finder's fee on a big deal sat alone with his former boss and discussed ways they could do business together if the compensation dispute could resolve.

2. Clients talk to each other, with Counsel and the Mediator present

Often during the course of a mediation clients may feel that the lawyers and mediators are doing all the talking and they may feel that they have not had "their day in court" or an "opportunity to be heard." The offers that are passed back-and-forth seem sterile to them or that their message is not being communicated as they had intended. This provides an excellent opportunity for another joint session, with particular ground rules, that will enable the clients to have a face-to-face conversation. The mediator should lead the individuals back to a joint conference area and should remind the parties that this is their opportunity to speak, that lawyers will not be taking notes or asking questions, but are merely "potted plants," there to listen but not react. The clients feel empowered and protected in this setting and may be therefore able to have a cathartic conversation that leads to resolution.

IV. Participants consult with an outsider

A. Mediator talks to a third-person, who is not in attendance at the mediation setting

The dreaded scenario is the absence of the real decision-maker or the absence of an influencer who has not had an opportunity to hear the give-and-take or sense the atmosphere in the negotiations. This may be the principal of a company who does not attend the mediation session and has given his representatives limited authority. It can be the central player in the dispute whose presence may be seen as inflammatory. It can be someone whose presence is critical but not feasible due to illness, geography or competing demands. In such circumstances, it may be appropriate for the mediator to get on the phone with this person to give a report on the progress or impediments to the process that are operating during the mediation. Sometimes this mediator's report, or mediator's ability to hear and understand another perspective, refuels the process and can help lead to a settlement. Typical of the outside, but influential, third party is an insurance company which may have access to additional funds but needs to hear for him or herself a good reason for authorizing the proposed settlement. In other cases, a trusted advisor – spouse, partner, clergy member – may be able to reframe the consequences of not settling for the party who is resistant and the mediator can bring this person into the mediation setting even if they are not in attendance.

B. A Subject Matter Expert helps with disputed issue

It is also possible to have an expert – an appraiser, accountant, physician, or other third party witness – attend the mediation or provide a report on an issue that distances the parties. This can be arranged in advance, or can be scheduled to break an impasse.

V. CONCLUSION

The mediator must be the eyes-ears-sensory perceiver for the parties to a negotiation. Mediation is a process and part of the process may require changing faces to change positions.

New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 25
MONDAY, FEBRUARY 8, 2016

Outside Counsel

Expert Analysis

Overcoming Impasse at Mediation: Bargaining with Brackets

By **Michael D. Young**

And **Marc E. Isserles**

Imagine this familiar mediation scenario: Plaintiff makes an initial demand of $2 million. Defendant counters with $50,000, to which plaintiff responds by moving to $1.6 million. Defendant then moves to $95,000, and plaintiff responds with $1.4 million. It is now 3 p.m. After six hours of negotiating, the parties are tired and frustrated and appear to be at an impasse.

Plaintiff thinks it has shown flexibility and a willingness to compromise, and is disappointed that defendant will not put "real money" on the table. Defendant, however, sees the negotiation quite differently. It thinks the $2 million demand was "completely unrealistic," and that plaintiff's movement to $1.4 million, which is still "way too high," shows only that plaintiff is "unwilling to accept reality." Defendant, after much prodding from the mediator, reluctantly agrees to move to $125,000 but says that, if plaintiff does not respond with a "legitimate number," the mediation is over. Upon hearing defendant's last move, plaintiff tells the mediator it is time to call it quits.

What can be done? The parties have told the mediator privately that they have significant room to negotiate; however, neither side is willing to make a significant move because of the perception that the other side has not moved far enough. And because the gap is so large, both sides believe it would be pointless to continue making small moves. The parties find themselves with a sizable gap yet seemingly no way to bridge it.

In this situation, the mediator might suggest a number of tools to help break the impasse. One of the most effective negotiation tools available to the mediator and the parties is a "bracket." A "bracket" is a conditional proposal in which a negotiator says: "We will go to X if you will go to Y." X and Y create a "bracket" between which the offering party proposes to limit negotiations.

MICHAEL D. YOUNG *and* MARC E. ISSERLES *are JAMS neutrals, based in New York. They can be reached at myoung@jamsadr.com and misserles@jamsadr.com.*

In the scenario laid out above, plaintiff could respond to defendant's last offer by saying, just by way of example: "We will come down to $800,000, if defendant agrees to go to $350,000." Defendant may choose to accept the proposed bracket, in which case the parties would negotiate within that range. More likely, defendant would offer a "counter-bracket" proposing a different negotiation range. For example, defendant might say: "We reject your bracket. But we will come up to $250,000 if you will come down to $400,000." Typically, when parties agree to bargain with brackets, they will trade proposed brackets and counter-brackets for at least several rounds of negotiation with the aim of moving closer to a mutually agreeable negotiation range.

> Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives.

Effective Tool

There are five reasons why bracketing is such an effective tool for breaking impasse.

1. Communicating Signals About Where a Party Is Heading. Proposals that take the form of an unconditional number typically provide very little information beyond the number itself. Limited to such proposals, the parties in our scenario lack a tool for communicating signals about where they might be heading and how far apart they actually are from each other. A bracket provides that tool.

By exchanging one round of brackets, our hypothetical parties have communicated, at a minimum, that plaintiff would accept $800,000 and defendant would pay $250,000. That might not be enough information to settle the case. But it is valuable information—which the parties might never have received without bracketing—that could break the logjam.

A bracket also communicates helpful information about the parties' expectations. Bargaining without brackets can involve a fair amount of guesswork. A party may think it is making a significant move but then learn its counterpart was expecting much more, leading to frustration and disappointment on both sides. However, when our plaintiff offers a bracket with a lower end of $350,000, it is clearly communicating: "We think $350,000, although not enough to settle the case, is a reasonable next move for defendant to make." That information helps defendant formulate an offer that will have predictable consequences—the closer defendant is to $350,000 on its next move, the more likely plaintiff will react positively. The same holds true for defendant's counter-bracket: it sends the message that plaintiff must come below $400,000 to be in what defendant regards as a "reasonable" settlement range. In this way, brackets help reduce the guesswork and resulting misunderstandings that can derail a mediation.

Finally, a bracket communicates useful data about the potential significance of a party's "midpoint." In our hypothetical, the midpoint of plaintiff's $800,000-$350,000 bracket is $575,000; the midpoint of defendant's $250,000-$400,000 bracket is $325,000. The party offering a bracket might be signaling a potential settlement at the midpoint. Sometimes parties say that expressly, for example: "The midpoint of our bracket is

meaningful." But the party offering a bracket may not be willing (at least not yet) to go to the midpoint, and so might deliver a very different message with the bracket: "Do not interpret this bracket as a signal that we will take (or offer) the midpoint; we won't!"

As with any message in a negotiation, statements about the midpoint should be taken with a grain of salt. Indeed, because bracketing is typically a multi-round process, the midpoints of the parties' brackets tend to move closer together over time. And regardless of what a party says about the midpoint's significance, it ultimately may be willing to go past the midpoint of an early bracket to get a deal done. At the same time, the midpoint of any given bracketed proposal remains a useful data point because it gives the recipient some idea of where the offering party might be prepared to go.

2. Shifting Focus. Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives. When parties fixate on the size of the other side's movement, they tend to get trapped in a vicious cycle of "tit for tat," reactive bidding in which the moves, and the chances for resolution, get increasingly smaller.

The exercise of constructing a bracket helps parties break free from that counterproductive dynamic and strike a positive, constructive tone. By offering a bracket, a party in effect says: "What really matters is not the size of the moves so far, but the number that can settle this case. Here is a bracket defining what we think is a reasonable negotiation range."

3. Encouraging Significant Moves. Because a bracket is a conditional ("if, then") proposal, it provides a kind of protection that tends to encourage "significant" moves. A party contemplating a significant, unconditional move will typically worry about what happens if the other side refuses to reciprocate with a significant move. It might be concerned about "running out of room," "signaling weakness," or having the number used against it (setting a "floor" or "ceiling") in future negotiations. These concerns, while valid, tend to eclipse all other considerations and limit a party to making small moves, which may not be the most effective strategy.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement. By bracketing $800,000 with a demand that defendant come up to $350,000, plaintiff can signal a dramatic movement—dropping from $1.4 million to $800,000 in one move—without jeopardizing its bargaining position. The same holds true for defendant's counter-bracket: It allows defendant to signal a substantial move (doubling its offer from $125,000 to $250,000) without making a firm commitment to settle at that amount.

4. Generating Momentum. By encouraging significant moves, bracketing tends to create a positive negotiating atmosphere and the possibility of a "domino effect" of significant movement. Because brackets tend to represent significant movement, they tend to be interpreted as a signal that the offering party is "serious" about settlement. And although parties worry about making large moves that go unreciprocated, large moves frequently induce large moves by one's counterpart.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement.

When our plaintiff proposes a bracket in which it offers to move all the way to $800,000 (albeit with a condition), defendant is likely to interpret that proposal as significant movement. That can trigger a reciprocal response from defendant, which is likely to be interpreted as significant by plaintiff. For example, even though our defendant rejected plaintiff's bracket, plaintiff is nonetheless likely to respond positively to a counter-bracket in which the bottom number is twice the amount of, and $125,000 more than, defendant's last unconditional offer. After trading a series of significant, bracketed moves like these, the parties would likely experience a sense of real progress and negotiating momentum that could be instrumental in settling the case.

5. Keeping Negotiators at the Table. Brackets work because they often keep parties negotiating until they are ready to signal or reveal their true bottom lines. Parties typically will not (and indeed should not) reveal their best numbers when a settlement seems out of reach. By the time our hypothetical mediation threatens to fall apart, it is probably too late in the day to continue to exchange unconditional numbers productively, yet far too early in the day for the parties to reveal to each other "best and final" numbers.

Bracketing works as a kind of bridge that helps carry negotiators far enough toward the other side, and far enough into the negotiating process, that they are prepared to reveal their cards and see whether resolution is possible. It serves the very practical function of keeping parties at the table when further bargaining seems, but is not in fact, hopeless.

Timing

A final word about timing. Parties sometimes express reluctance to use brackets "too soon." Because a bracket is neither a firm commitment from plaintiff to settle, nor "real money" from defendant, parties may not experience a sense of actual progress until they exchange a few rounds of unconditional numbers. However, we have also seen brackets used effectively during the early stages of negotiations that could not have otherwise gotten off the ground. In our view, it is never "too soon" to consider brackets—at least if the negotiation might end without them.

When is the right time to stop using brackets? After a certain point, an exchange of "if, then" brackets and counter-brackets can take on a kind of surreal quality, and one or both of the parties, or the mediator, might propose reverting to actual dollars. This usually happens when the parties have made enough progress narrowing the gap with brackets, and moving the midpoints of those brackets closer together, that they are optimistic about getting a deal done. Indeed, the very idea of shifting from brackets back to unconditional numbers is often a signal that brackets have done their job and carried the parties far enough along that they are prepared to make the final push toward settlement.

Conclusion

Mediation negotiations tend to bog down in familiar ways when limited to a traditional exchange of unconditional numbers. Bracketing is a highly effective negotiating tool for breaking that impasse. Brackets are not for everyone, and negotiators may have strategic reasons for deciding not to use them in a particular mediation. But we would encourage negotiators to consider the many upsides to bracketing before rejecting what is, in our view, an indispensable tool in the negotiator's, as well as the mediator's, toolbox.

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

VOL. 30 NO. 6 JUNE 2012

ADR Skills

The Mediator's Proposal: Whether, When and How It Should Be Used

BY STEPHEN A. HOCHMAN

As most neutrals know, a mediator's proposal is a settlement offer that the mediator makes to all parties, and each party is requested to accept or reject it on the exact terms proposed, in a confidential communication to the mediator.

It calls for either an unconditional "yes" or "no" response, without modification, and the mediator is not permitted to disclose the responses that he or she receives unless both responses are "yes." Thus, if one party says "yes" and the other party says "no," the one who said "yes" will not be prejudiced if settlement negotiations (or subsequent mediations) occur at a later litigation stage.

This article assumes that the dispute that is the subject of the mediation is *ostensibly* a money dispute that is either in litigation or, if not settled in the mediation, would proceed to litigation (or arbitration), and that all parties are represented by counsel. The reason I state that the dispute is *ostensibly* about money is that, in almost all cases—including the money cases—there is an emotional component. That is why, as noted below, it is important for the mediator to permit the parties to vent their feelings—usually anger at their adversary. It is also important for the mediator to validate those feelings, whether or not the mediator considers those feelings rational, before beginning the mediation's risk analysis and reality testing phase.

For simplicity, I will assume that there are only two parties and one dispute, which could involve more than one issue, but a mediator's proposal can also work when there are multiple parties and multiple disputes.

The author is a mediator, arbitrator and ADR trainer who writes, consults and lectures frequently on the subjects of mediation and arbitration and is active on various ADR-related bar associations and advisory committees. He has an office in New York and can be reached at shochman@prodigy.net.

WHEN IS THE RIGHT TIME?

A mediator's proposal should be used only as an endgame—that is, only after all other attempts to avoid impasse have failed. Before considering the use of a mediator's proposal, the mediator should first avoid making what I consider the 10 mistakes that even good mediators may make. Those 10 mistakes are:

1. Failing to get the right persons to the table.
2. Failing to explain the mediator's role as "agent of reality."
3. Permitting settlement negotiations to begin prematurely– i.e.,
   a. prior to permitting the parties to vent; and
   b. prior to risk analysis and reality testing.
4. Failing to orchestrate the negotiations
   a. by discouraging "out of the ballpark" offers or demands; and
   b. by discouraging moves that send the wrong signal.
5. Failing to recognize that unrealistic expectations must be lowered gradually.

(continued on page 126)

Alternatives DOI: 10.1002/alt.20342

ADR Skills

(continued from first page)

6. Being evaluative (a) too early or (b) in a joint session.
7. Failing to suggest ways to avoid reactive devaluation of sensible settlement proposals from the adversary.
8. Believing "bottom line" offers or demands.
9. Failing to "test the waters" before making a mediator's proposal.
10. Being impatient or failing to be persistent or giving up prematurely.

Although a full examination of these 10 mistakes is beyond the scope of this article, some of these mistakes will be discussed below.

It is important to emphasize that every other possible impasse-breaking technique should be used by the mediator before resorting to a mediator's proposal, including attempting to narrow the gap by using the conditional offer technique. For example, by asking the defendant in caucus, "If I could convince the plaintiff to reduce its demand to $X, would you be willing to increase your offer to $Y?"

Conversely, in a caucus with plaintiff, you can ask "If I could convince the defendant to come up to $Y, would you be willing to come down to $X?" The mediator may know from a confidential caucus communication that a party is willing to come down to $X or up to $Y, but an offer that a party perceives that its adversary needs to be convinced to make may have a greater psychic value to the party than if that offer was freely given by the adversary.

The longer the negotiation process continues, the easier it becomes to close the gap and help the parties reach agreement without the need to resort to a mediator's proposal. That is because the more time that the parties have invested in the mediation process, the more they are motivated to have it succeed rather than fail.

In cases where the definitive settlement agreement is likely to have contentious issues—for example, provisions relating to confidentiality, noncompetition and non-disparagement, and provisions for liquidated damage or other remedies if those provisions are breached—it may make sense to suggest that the parties first try to agree on the terms of the definitive settlement agreement, leaving the dollar amount blank for later negotiation.

Once the parties have agreed on the terms of the definitive settlement agreement, the likelihood of reaching agreement on the dollars increases because the parties are more motivated to avoid a failed mediation in which

they have already invested the time to agree on the non-monetary issues.

WHEN SHOULD IT NOT BE USED?

My preference is to suggest the idea of a mediator's proposal, and wait to see if either party objects, rather than first asking permission from the parties to allow me to make a mediator's proposal. That is because I am less likely to get an objection if I first state my belief that a mediator's proposal is likely to overcome the impasse and avoid a failed mediation.

Some mediators believe it would not be appropriate to make a mediator's proposal if either party objects after the mediator suggests a mediator's proposal. Because either party is free to reject the mediator's proposal, I do not believe that either party should have a right to veto the neutral's use of a mediator's proposal as a last resort to avoid a failed mediation. However, if one party requests the mediator to defer making a mediator's proposal because it believes that further negotiations might succeed without it, that request should be honored.

WHAT ARE THE DISADVANTAGES?

The main reason that many mediators oppose using the mediator's proposal is that if a mediator gets a reputation of using a mediator's proposal as an impasse-breaking technique, the parties are likely to spin the mediator by posturing and taking unrealistic positions in order to create an impasse rather than being candid with the mediator and negotiating in good faith by admitting their weaknesses. However, the parties rarely admit the weaknesses in their case. Instead, they do their best to convince me that they have a winning case in the hope that I will make their arguments when caucusing with their adversary and lean in their direction if and when I make a mediator's proposal.

Another reason that some oppose the use of a mediator's proposal is their belief that it is directive rather than merely evaluative, and thus inconsistent with the principle of party autonomy, which means that each party should make its own decision free from the influence of the mediator. However, most parties want the mediator to help them be realistic about their litigation alternative. They hope that a mediator's proposal will influence their adversary's decision toward settlement at least as much as it may influence their own decision.

The reality is that, by making a mediator's proposal, the mediator is not interfering with the parties' unfettered right to make their own independent decisions to choose between "the lesser of the two evils"—i.e., a less-than-ideal settlement compared to the uncertain and expensive litigation alternative.

Another objection expressed by some critics is that the mediator's proposal may create the appearance that the mediator is not impartial because one or both parties may perceive that the proposal is more favorable to its adversary than its own interests. That misperception can be overcome by the mediator making it clear that the proposal represents his or her independent and objective evaluation of the dispute and best effort to recommend a settlement that is better for both parties than their litigation alternative.

Breaking Through

The problem: The mediation is at impasse. Nothing has worked.

The last attempt: A mediator's proposal can unstick the parties.

The drawbacks: They are minor. But it's not simple. This article describes how to carefully maximize the potential for a last-chance resolution.

Whether or not the parties anticipate that I will, if necessary, make a mediator's proposal to avoid a failed mediation, they rarely tell me their weaknesses because they want me to focus on the strengths of their case when I caucus with the other party. Nor do they tell me what they consider to be their bottom line or worst-case settlement alternative to litigation.

Whenever parties tell me their bottom line, I thank them for sharing with me their present thinking. Most attorneys experienced in mediation advocacy will spin the mediator to some degree because they are hoping to get a better result for their client than a worst-case settlement. The most experienced attorneys, however, will avoid insulting the mediator by claiming to have a bottom line that is totally out of the ballpark of reality. As discussed below, in deciding on the terms of a mediator's proposal, I avoid being influenced by what the parties tell me is their bottom line in our private caucuses.

PREPARING THE DELIVERY

Before making a proposal, it is important that the mediator explain that part of the neutral's job is to play the role of "agent of reality" and thus avoid making mistake No. 2 in the above list of 10 mistakes.

It is important for the parties to understand that, in the confidential caucus with each party, part of the mediator's job is to focus the party on its case's weaknesses, rather than its strengths—and that does not mean that the mediator is favoring their adversary. I repeatedly remind the side that I am caucusing with that, when I caucus with their adversary, I will similarly be playing the devil's advocate role with them.

In my introduction to the mediation, I usually explain to the parties that I am the only person in the room with no stake in the outcome. To emphasize my impartiality, I make it clear that I have no interest in whether the case settles on the high end, in the middle, or on the low end of the possible settlement ranges. My only agenda, I tell the participants, is to help the parties settle on terms that both parties decide is better than their litigation alternative.

It has been clinically proven that those with a stake in the outcome, including the attorney/advocates, cannot be totally objective in evaluating their likely litigation outcome. Because the lawyers are hired to focus their efforts on supporting the strengths of their client's case, they tend to underweight the weaknesses. They often fall in love with their most creative arguments. So it is not uncommon for the lawyers to have "advocacy bias" that anchors them to their initial evaluations and to devalue and reject what they hear from their adversary. They are at least more likely to listen to and objectively evaluate what the mediator says.

(continued on next page)

ADR Skills

(continued from previous page)

FORMULATING CRITERIA

Most mediators try to choose a number for their mediator's proposal that they believe has a chance of being accepted by both parties without taking into account what the mediator believes is the value of the case. It is preferable for the mediator to try to select a number that, in addition to having a chance of being accepted by both parties, is in the win-win range based on the mediator's objective analysis of the case value.

An example of the win-win range: If the mediator believes the plaintiff has a 50-50 likelihood of winning $1 million at trial, and the parties will each spend $100,000 to get a court to give them an all-or-nothing decision, the win-win range is $400,000 to $600,000. It is not unusual for both parties in a 50-50 case to come to the mediation believing that they are at least 70-75% likely to win. Of course, they cannot both be right. That is why it is important for the mediator to avoid making mistake No. 3.b. in the list of 10 mistakes, by being sure to do risk analysis and reality testing before permitting the parties to begin negotiating numbers.

I believe that the dollar number that the mediator proposes should be based on the mediator's independent judgment as to the case value, based on an objective decision-tree analysis and not on the midpoint between what the parties claimed to be their respective bottom lines. Ideally, the mediator should propose a number in the middle of what he or she believes is the win-win range—$500,000 in the above example. I would not be comfortable in the above example of proposing a number below $400,000 or above $600,000 merely because I thought it might be accepted by both parties. The issue is not what the mediator believes is fair—a totally subjective standard—but what the mediator objectively believes is better for both parties than their litigation alternative.

I never believe bottom lines that are outside of the objective win-win range. Of course, even if both parties in the above example honestly believe they are more than 60% likely to win despite the risk analysis and the reality testing that they heard from the mediator in caucus, they still may accept a $500,000 mediator's proposal based on their nonmonetary interests and needs, including the need to avoid risk and put the dispute behind them.

Before revealing the dollar number of the mediator's proposal, it is important for the mediator to avoid making mistake No. 9, which is failing to "test the waters" in caucuses with each party before revealing the dollar number of the mediator's proposal. For example, if the mediator tells the plaintiff in the above example that she is considering a number it the range of $450,000 to $500,000, the mediator can gauge the plaintiff's reaction. Similarly, the mediator can gauge the defendant's reaction to a number in the range of $500,000 to $550,000. If the plaintiff rejects the $450,000 out of hand more strongly than the $500,000, and the defendant similarly rejects the $550,000 more strongly than $500,000, the mediator can feel that there is a good chance that both parties will accept a $500,000 mediator's proposal.

Often a party will agree to the dollar number in a mediator's proposal even though it would never have agreed to the same number if it were an ultimatum by its adversary. Because the number is the mediator's number and not the adversary's, it eliminates reactive devaluation, an effect that causes some parties to reject offers because of who they come from, not for the content. It often boils down to the parties choosing between the lesser of the two evils—either a less-than-ideal settlement or an uncertain and costly litigation.

PROPOSAL ADVANTAGES

The most important advantage is that a mediator's proposal can overcome the posturing that often goes on in negotiations. Of course, there is a number below which the plaintiff would be rational in refusing to accept, and there is a number above which the defendant would be rational in refusing to pay. However, the parties rarely offer to settle for that worst case number and prefer to shoot for a better number. The beauty of using the mediator's proposal as a last resort is that, from the plaintiff's perspective, the money is "on the table," at least conditionally. Both parties may accept it, albeit reluctantly, even if it is slightly worse than what they considered their worst case number during the negotiation process.

The fact that the parties know that the mediator will not choose a number that is outside of the objectively determined win-win range often will increase the likelihood that it will be accepted by both parties. That is because it comes with a stamp of objectivity and legitimacy, assuming the parties respect the mediator's competence and integrity.

DEALING WITH THE HOLDOUT

On the rare occasion that only one party accepts my mediator's proposal, I might ask the accepting party if it would be willing to release me from the pledge of confidentiality and let me tell the rejecting party that the accepting party would be willing to make a slight improvement in my mediator's proposal in the interest of avoiding a failed mediation.

In a case where the defendant gave me permission to make a second mediator's proposal if it was no more than 10% above my mediator's proposal, the plaintiff agreed to accept that slightly increased number. That was because it met the emotional need of the plaintiff to feel that it squeezed the proverbial "last nickel" out of the defendant, who the plaintiff felt had treated him unfairly.

Even in cases that are ostensibly only about money, I have found that the percentage of those cases that have an emotional component is, give or take . . . 100%.

PARTIES' RESPONSES

I always prefer to get the answers to my mediator's proposal from both parties at the same time, and I usually ask each party how much time it thinks it will need to decide on their answer. By getting answers at the same time (*e.g.*, by asking each party to send me a one word "yes" or "no" E-mail between noon and 5:00 PM on the agreed date), it avoids the situation where I am reluctant to continue my attempt to explain to the more unrealistic party why I believe my proposal is better than its litigation alternative.

If the unrealistic party finds out or suspects that I previously received an answer from its adversary—who I believe is more likely to accept my proposal—continuing my attempts to do reality testing with the unrealistic party

could compromise the confidentiality that I promised to both parties when I said that I would not disclose the answers to my proposal, either by words or actions, unless both parties responded with a "yes."

In the box at right is an example of instructions that I sent to counsel for both parties explaining the procedure for replying to my mediator's proposal in a case that I knew would be difficult for the plaintiffs to accept because of their unrealistic expectations as to the case's value. It was a case where I spent many hours with the parties helping them agree on the wording of a complicated definitive settlement agreement. I knew it would be difficult to help the plaintiffs realize that my proposal's dollar number was preferable for them than their litigation alternative.

Fortunately, the plaintiffs' attorney realized that my mediator's proposal was clearly better for his clients than their litigation alternative. However, he needed my help in convincing his clients to overcome their anger at the defendant and avoid what would most likely be a worse result for them if the case went to litigation.

Because I expected that it would take much time for me and plaintiffs' counsel to convince the three plaintiffs in the matter to accept my proposal, I instructed the parties to each let me know when they were ready to give a "yes" or "no" answer. But I also asked them to refrain from telling me what that answer was until I was told that both sides were ready to give their answers. That way, I could continue to help the plaintiffs' counsel convince his clients to accept the proposal as being preferable to the litigation alternative without causing the plaintiffs to suspect that the defendants had previously accepted the proposal.

* * *

I believe that the mediator's proposal is an effective endgame to break impasse for those mediators who are willing to be evaluative when necessary. I find it almost always works. To give up without attempting to use the mediator's proposal as a last resort is a missed opportunity, assuming that the parties hired the mediator to help them settle their dispute on terms that they ultimately decide are better than their litigation alternative.

Instructions for Replying To a Mediator's Proposal

Here is a form letter from the neutral designed to find out whether the parties will agree to the mediator's proposal, while maximizing the likelihood of reaching an agreement:

Dear [Plaintiffs' attorney] and [Defendants' attorney],

Now that you both know that $_____ is the dollar amount that I propose be inserted in the previously agreed final draft of the Settlement Agreement, I want to explain the procedure for communicating to me, in confidence, your clients' "yes" or "no" response to my mediator's proposal.

I realize that neither of your clients will be happy with the number I proposed. One definition of a good settlement is when both sides are equally unhappy. Particularly because I know that both sides will be unhappy with my proposal, it is important that neither side make a hasty decision as to whether to accept or reject it.

In order to give both sides ample time to make a rational business decision, I am requesting each of you to let me know **when** your client has reached a decision, without telling me at that time **what** that decision is. Once I hear that both sides have made a decision, I will then ask each of you to simultaneously send me a confidential email in which you indicate your client's decision, which must be either an unconditional "yes" or "no." The reason that I do not want to know the answer from either side prior to knowing the answer from the other side is to give me an opportunity to do some additional risk analysis with one side without that side believing that I would not be doing that risk analysis if the other side had not previously said "yes." Getting simultaneous responses will enable the side that says "yes" to be sure that, if the other side says "no," the party that said "no" will not know whether the other side said "yes" or "no." That way, if we don't end up with a settlement that is acceptable to both parties, the party that said "yes" will not be prejudiced in any possible future settlement negotiations.

As I previously explained, the mediator's proposal is an "end-game" which a mediator should use only after all other efforts to settle have failed and the parties have reached an unbreakable impasse in the negotiation process. It is a last resort effort to see if we can salvage what would otherwise be a failed mediation. Although it is a non-negotiable "take it or leave it" settlement proposal, it represents what I believe should be better for both parties after factoring in the risks, uncertainty and costs of the litigation, including the intangible costs. In the more than 350 cases that I have mediated, there were only seven in which I did not get two yeses to my mediator's proposal. In six of those cases I got one "yes" and one "no," and in all of those six cases the side that said "no" ended up with a worse litigation or arbitration result than it would have had if it had accepted my proposal.

My hope is that we can avoid that happening in this case so that neither side will end up having "non-settler's remorse."

Please feel free to contact me at any time with any questions, and I hope to be having conference calls with you and your clients in the near future.

Sincerely,

Stephen A. Hochman, Esq.
[Address]

CHAPTER NINETEEN

THE TECHNIQUE OF NO TECHNIQUE: A PAEAN TO THE *TAO-TE CHING* AND PENULTIMATE WORD ON BREAKING IMPASSE

Simeon H. Baum, Esq.

Mediators and ADR aficionados love to discuss impasse. Transformative mediators remind us that fostering party empowerment and recognition—not settlement or problem solving—should be the mediator's driving purpose.[1] Still, we confess that for many of us, impasse remains a bugaboo. Those of us who seek to maintain and generate "constructive" discussion and even problem solving in a mediation aptly value the treasure trove of techniques and suggestions that can be found in a book like this one.

[19.0] I. TECHNIQUES

While recognizing the value of these suggested "how-to's," a compendium of impasse breakers for mediation is well served by a final corrective: the technique of no technique. About a dozen years ago, this author moderated a program titled "Impasse Breaking," hosted by the New York County Lawyers' Association. That night, four excellent, experienced mediators presented one technique apiece.

Professor Lela Love suggested that when the parties are snagged on one issue, the mediator can change the agenda. The parties can "pin" the frustrating issue for the time being, lifting a phrase from the entertainment industry, and shift to another potentially more workable issue. With a history of success behind them, they can later return to the troubling issue if, in fact, it has not dissolved or morphed into a more easily resolvable form.

Margaret Shaw suggested applying standards coupled with a transaction cost analysis. In her example, drawn from the employment context, one could derive a back pay number from considering the standard that would be applied by a court, and then compare it to the cost of litigation (which might be even greater).

Judge Kathy Roberts suggested use of the "mediator's proposal." While Steve Hochman develops this concept in his chapter within this compendium, Judge Roberts differed from Mr. Hochman by selecting "doability" as the standard for her proposal—is it likely to settle the case?—rather than fairness or predicted case outcome. This proposal generated a very interesting debate with Professor Love on whether use of a mediator's proposal distorts the mediation process. There were multiple concerns. First, Professor Love questioned whether it is even the media-

1 See, for example, Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation—Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass 1994), which sets out this transformative manifesto.

tor's role to provide evaluative feedback or direction to the degree reflected in the mediator's proposal. Moreover, where parties have been encouraged to be candid, exposing case weaknesses and settlement thoughts in caucus, there is a question of whether they might regret that candor if it were now factored into an endgame solution. Conversely, if parties anticipate that there will be a "mediator's proposal," there might be excessive emphasis on spinning the mediator—whether it is with their thoughts on what might settle the case (in the doability model) or their thoughts on legal risks (in a case outcome or fairness model). Over time, its use could stifle candor and creativity. Overall, there is a risk that mediation would shift from partycentric to mediatorcentric. Rather than fostering party empowerment and recognition, or joint, mutual gains problem solving, using the mediator's proposal as the cherry on top of the ice cream sundae threatens to convert that open, fluid, meaningful, and enriching process into an alter ego of court or settlement conferences, where the mediator, and not the parties, is the star of the show.

Roger Deitz suggested use of a "ball and chain." He advises parties at the commencement of the mediation that there might come a time when they wish to leave the mediation. He extracts, *ab initio*, a commitment from each party that if that time arises, he or she will stay if so requested by the mediator. Considering that one of the most valuable services rendered by the mediator is keeping people at the table, this is a useful thought indeed.

[19.1] II. NO TECHNIQUE

At some point that evening, I had the opportunity to suggest the approach I raise here, terming it the "technique of no technique." The core point was that the greatest value a mediator brings to the table is not a set of skills or a bag of tricks; rather, it is the character of the mediator, and particularly the ability to communicate and engender trust. Cultivating trust in the mediator encourages the development of trust among the participants. Essential to this is the mediator's presence. The mediator brings a quality of open awareness that is expressed in all conceivable ways. It is not simply what the mediator says or does. It includes posture, bearing, tone of voice, eye contact, and the power of omission. It involves a sensitive awareness, deep listening, flexibility, and a genuine quality of connectedness or relatedness. The mediator models a mode of being with the parties that implicitly communicates a message. The silent message is we are all decent, capable people of good will who are all in this world together, and can work through this problem together. Underpinning this

message is the sense that there is a force in and embracing us that will work it out, if we persist and let it happen.

Now, this might sound a bit vague or even otherworldly. But the power of attitude cannot be overrated. This intuition finds support in two recent studies by Margaret Shaw and Stephen Goldberg. In a study they did in 2007 polling users of mediators with no judicial background, and in a more recent study they did with Jeane M. Brett, which included users of former judge mediators, they received responses from hundreds of lawyers on what made the mediator effective in moving a matter to resolution. The researchers grouped answers into three broad categories: (1) confidence-building skills (the ability to gain the trust and confidence of the parties), (2) evaluative skills (the ability to encourage agreement by evaluating a party's likelihood of achieving its goals in court or arbitration), and (3) process skills (skills by which a mediator seeks to encourage agreement, not including evaluative skills). By far, the greatest source of success of was confidence-building skills, with 60% of the responses identifying this quality. This was followed by process skills (35%) including patience and perseverance, with evaluative skills being the least significant (33%).[2]

[19.2] A. Attitude

A core takeaway from the Shaw-Goldberg studies is that trust and confidence is key to success in mediation. The highlighted attributes that build trust and confidence relate to character and attitude: "Friendly, empathetic, likeable, relates to all, respectful, conveys sense of caring, wants to find solutions"; "High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional." There are many traits and acts that can be identified. Yet, central to all, I would submit, is the fundamental attitude—call it the mediator spirit—described above, before our mention of this study. The point of using this type of term is to emphasize that there is something whole, something integrative, something at the heart of the mediator that cannot be divided, manipulated, juggled and parsed—a gestalt, to borrow from Fritz Perls[3]—that is essential to the mediator's power. That power, of course is the spe-

2 Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three,* 23 Negotiation J. 4, 393–418 (Oct. 2007). Confidence-building attributes included interpersonal skills of empathy, friendliness, caring, respect, trustworthiness, integrity, intelligence, the readiness to find solutions that comes with obvious preparation. Process skills included patience and persistence, good listening, and diplomatic tact.

3 *See, e.g.*, Frederick S. Perls et al., Gestalt Therapy: Excitement and Growth in the Human Personality (1951).

cial power that comes precisely from powerlessness. In place of judicial or other form of authority, might, or coercive force, is the quality of the mediator that fills this void. That is a power of trust—trusting and trustworthiness, cultivating trust in others. An attitude that values freedom and recognizes that the parties themselves are the valued decision makers. It is a letting go that brings with it the embrace of the whole.

The aspect of the mediator highlighted here affects atmospherics. It does not have to be showy. (Hopefully it is not!) But it makes a major difference in keeping people in the room. It supports communication and creativity. It communicates positive regard for the participants, reinforcing their willingness to continue what can be a difficult discussion.

[19.3] B. Non-Doing

A central point of the "technique of no technique" is not that the various approaches and methods are not valuable. They certainly are. Still, there is something perhaps more essential. There is a time-honored term drawn from China, *wu wei*, which can be translated as "non-doing." This loaded term can be found in the 2,500-year-old classic, the *Tao-te Ching*. If there is any text which could serve as the mediator's bible, my vote would be for this one. Attributed to Lao Tzu, there are hundreds of English-language translations of this seminal text in the Taoist tradition.[4] Discussing the meaning and philosophy of the *Tao-te Ching* and its application to mediation is a major topic that could support a book and is beyond the scope of this chapter. Moreover, there is certainly no intent here to persuade readers that one must adhere to a particular religious or cultural tradition in order to be an effective mediator. But, in *wu wei*, the

4 Two lovely translations of the *Tao-te Ching* are Stephen Mitchell, *Tao-te Ching* (Harper & Row 1988) (with broad poetic license) and Wing-tsit Chan, *The Way of Lao Tzu* (*Tao-te Ching*) (Prentice Hall 1st ed. 1963).

Taoists supply us with a very useful and suggestive concept.[5] One insight of *wu wei* is that sometimes one makes greater progress by not interfering with the activities of others. Rather, letting a course of events develop on its own, as it were, with patience, confidence, and open, accepting attention, can permit the being or event to develop as it should. *Wu wei* suggests stepping out of the way, rather than directing, controlling and manipulating events. To draw on an overused term, it suggests a holistic approach, where the mediator recognizes that larger forces are at play and permits, encourages or assists in their constructive movement.

There are many practical applications of "non-doing" with which we are all familiar. We all know that sometimes it makes sense to hold one's tongue. We all have experienced moments when, by letting someone struggle with a problem, we permit them to arrive at a solution which our intermeddling might have blocked. Our silence can permit a truthful expression or insight to develop in a dialogue that our speech might have stifled. Tact is based on non-doing.

[19.4] C. Stepping Aside

In negotiation, the negotiators have an inner drive towards resolution. They want a solution that will meet their needs. They have their own fears and concerns about legal outcomes. Moreover, extrinsic forces and circumstances support resolution. Costs continue to mount. All the forces of the business, legal, and broader community continue to operate and impinge on the players. Time ticks away. These things are already operating without our encouragement. Non-doing simply helps them find a way of expression, of recognition, and then of choices to take action to dissipate concerns and satisfy needs, to limit risks and reduce costs which no rational or even emotional actor genuinely wants to incur.

5 At least 10 of the 81 chapters (or quatrains) of the *Tao-te Ching* specifically recommend or observe the benefits of *wu wei*. *See* W.T. Chan, *The Way of Lao Tzu (Tao-te Ching)*, chapters 2, 3, 10, 37, 38, 43, 48, 57, 63 and 64. *Wu wei* involves action so integrated with larger reality that the actor is more like one participating in a dance to a universal tune. This actor does not claim credit (Ch. 2), and effectively lets things happen without imposing his will on them or taking possession of them (Ch. 10). This actor does not rely on her own ability (Ch. 2) and has a quality of tranquility (Ch. 57), simplicity (Ch. 48, 57), and softness (Ch. 38): "The softest things in the world overcome the hardest things in the world. Non-being penetrates that in which there is no space. Through this I know the advantage of *taking no action*." Some clues to *wu wei* are found in recommendations to pursue a "stitch in nine" philosophy—dealing with problems before they become too large—and fractionation—breaking down big problems into more workable component parts (Ch. 63, 64). The approach of *wu wei* implies a profound discernment of the power of spontaneous transformation (Ch. 37). To proceed with *wu wei* is to proceed with no *a priori* plan or purpose, and, at a minimum with a high degree of flexibility, sensitivity and adaptiveness.

The preceding examples are just a fraction of the meanings which can be drawn from *wu wei*. A classic image from the *Tao-te Ching* is water. It moves without effort or conscious force, finding the low places, from shape of terrain and force of gravity. The mediator's presence can similarly have influence, without any particular effort on the mediator's part. A handshake, a smile, a nod. We can point to these things and note what a difference they might make in reducing the interpersonal temperature in a room. Yet often, like leaves falling in autumn, they are simply a natural consequence of the mediator's overall character and nature—a character that is supported by disciplined self consciousness.

Continuing with the Taoist theme, while we are at it, we can take another example from *tai chi,* a martial art itself imbued with the philosophy found in the *Tao-te Ching*. We have seen tai chi players in the park, with their flowing, continuous, graceful movements. One component of that martial arts practice is "push hands." Push hands involves two players standing facing each other. As party A places his hands on the other's arm, party B senses the force. As party A presses, party B shifts direction and recedes, so that at no time does he confront or oppose party A's force. Party B, in turn shifts to press party A, who likewise shifts direction and recedes. The main objective in the execution of the four simple push hands moves of "ward off, rollback, press and push" is for the players to maintain contact throughout, forming a harmonious whole, with no more than four ounces of pressure building up at any time. While this practice can be used as a model of non-confrontation, the most significant point to be derived here is of continuous relatedness or connection.

Like a push hands player, the mediator preserves a gentle connection with all participants through the mediator's presence and broad, affirming awareness. The importance of this presence to preserving continuity of constructive dialogue cannot be underestimated. Just as, when things get knotty in push hands, the skilled player neither breaks away nor erupts with force, but maintains sensitivity and lets the form work itself out, so too, the mediator neither breaks off the session, nor necessarily rushes to caucus, nor desperately argues the parties into doing something. Most effective is gently remaining present, perhaps just waiting, listening

deeply, and sensing what is happening, what perhaps is driving this interaction, while also seeing the broader context.[6]

In one employment mediation, conducted a decade ago, an attorney complained that "the mediator did nothing; we settled it ourselves." Assuming the mediator was there throughout and supported continuing talks, staying out of the parties' way, this, too, is non-doing. It is well beyond the role of simple message bearer. One quotation from Stephen Mitchell's translation of the *Tao-te Ching* is apt here:

> When the Master governs, the people
> are hardly aware that he exists.
> Next best is a leader who is loved.
> Next, one who is feared.
> The worst is one who is despised.
> If you don't trust the people,
> you make them untrustworthy.
> The Master doesn't talk, he acts.
> When his work is done,
> the people say, "Amazing:
> we did it, all by ourselves!"[7]

6 With apologies to transformatives who assert that a mediator should maintain a microfocus—not seeking the "big picture"—this statement is made with a recognition that both ends of the microscope and telescope may reveal an opening to something that can move people from the snag of apparent impasse. But living with the impasse is the heart of non-doing. To quote mediator Barry Berkman (of the Himmelstein Friedman school), it is the "paradoxical nature of change" that change can develop when we recognize and accept the reality of a given situation—even of one that seems undesirable.

7 Stephen Mitchell, Tao-te Ching, Ch. 17. Here is Wing-tsit Chan's translation:

> The best (rulers) are those whose existence is (merely) known by the people. The next best are those who are loved and praised. The next are those who are feared. And the next are those who are despised.
> It is only when one does not have enough faith in others that others will have no faith in him.
> (The great rulers) value their words highly. They accomplish their task; they complete their work. Nevertheless their people say that they simply follow Nature.

Wing-tsit Chan, The Way of Lao Tzu (Tao-te ching), Ch. 17. Although both versions of Chapter 17 speak of the ruler's acting, it is noteworthy that this is seen as others doing it themselves or the ruler's just following Nature. *Cf.* citations in note 4, *supra.*

In 2010, Gerald Lepp, ADR Administrator for the mediation panel of the United States District Court for the Eastern District of New York, held an "ADR Cross Cultural Workshop" structured and facilitated by Hal Abramson of Touro Law School, with Dina Jansenson and Jeremy Lack as panelists. Professor Abramson presented a number of scenarios depicting cross-cultural misunderstandings and elicited suggestions from the audience/participants on how to correct them. At the end of this session, Dina Jansenson wisely observed that most of the time in mediation, the mediator will, appropriately, do nothing more than be aware of the dynamic.

There is much to be said for recognizing that often, less is more. We do not have to fix everything. Beyond this, silence itself is a tremendous force. As noted above, refraining from filling the void is often the greatest wisdom. It leaves space for meaning, creativity, and a host of valuable and significant expressions to emerge.

Professor Len Riskin made a splash in the mediation field in the mid-1990s with his seminal article, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed."[8] "Riskin's Grid," which created a typology of mediators ranging from evaluative and directive to facilitative, and from narrowly to broadly focused, fostered great debate on whether it was within the mediator's purview to conduct evaluations or to direct parties at all.[9] Since 2002, Riskin has embarked upon another groundbreaking path within the legal and ADR field: promoting mindfulness meditation.[10] Drawing on Buddhist Vipassana teachings, Riskin observes that disciplined practice of awareness of one's breathing, and of one's physical, emotional and mental states, can increase relaxation, calm, alertness, and sensitivity to others. He suggests that this can enhance the humane practice of the law and of dispute resolution.

8 1 Harv. Negot. L. Rev. 7 (1996).

9 *See, e.g.,* Kimberlee K. Kovach and Lela P. Love, *"Evaluative" Mediation Is an Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937 (1997). Riskin's 1997 poetic rejoinder can be found online at: http://www.law.fsu.edu/journals/lawreview/downloads/244/riskin.pdf.

10 *See, e.g.,* Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients,* 7 Harv. Neg. L. Rev. 1 (2002); Leonard. L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution,* 54 Journal of Legal Education 79 (2004); Leonard L. Riskin, *Knowing Yourself: Mindfulness,* The Negotiator's Fieldbook—The Desk Reference for the Experienced Negotiator (A. K. Schneider, C. Honeyman, ed.) (ABA Section of Dispute Resolution 2006).

Interestingly, I remember years ago reading about a Zen master who mediated a deadly dispute between warlords in medieval Japan. He remained calm, gave recognition to each party, identified interests, promoted a resolution that permitted the saving of face, and was detached from identifying with one side or the other. While, unfortunately, I have not been able to recover this reference, I recall that it struck me at the time as not insignificant that the practice of meditation supported this function. Profound awareness of self enhances calm and deep awareness of others. That, in turn, supports connection and presence.

The "technique of no technique" includes the suggestion that mediators not be stuck on any one technique or approach. In the ABA Dispute Resolution's *Negotiator's Fieldbook*, Peter S. Adler exhorts negotiators not get boxed into a single type defined by two pairs of opposites—moral or pragmatic, competitive or cooperative—but rather, remain flexible: the Protean negotiator. The same recommendation applies to mediators facing impasse. Definitely, we should peruse our bag of tricks. But, whatever our preferred strategy, style, or approach, we might be alert to the possibility that it makes sense, under the circumstances, to break the rules. Even the attentive, trust-generating, integral, flexible, supportive mediator—who modulates presence and relatedness—ought to be ready, at times to try one of the approaches recommended in this compendium.

Plenary 2

Sharpening our Communication Skills in the Online World: Strategies and Tips for Mediators, Arbitrators, and Advocates

Moderator: Theodore K. Cheng, Esq.

Speaker: David A. Hoffman, Esq.

NYSBA Dispute Resolution Section
2018 Fall Meeting

October 22, 2018

Sharpening our Communication Skills in the Online World:
Strategies and Tips for Mediators, Arbitrators, and Advocates

David A. Hoffman
Boston Law Collaborative LLC

CLE MATERIALS

Julio César Betancourt and Elina Zlatansa, "Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?," *Int'l J. of Arbitration, Mediation and Dispute Mgmt.*, Vol. 79, Issue 3 (2013)

Noam Ebner and Jeff Thompson, "@Face Value? Nonverbal Communication & Trust Development in Online Video-based Mediation," *Int'l J. of Online Dispute Resolution* (forthcoming)

Noam Ebner and John Zeleznikow, "Fairness, Trust and Security in Online Dispute Resolution," *Hamline Univ.'s Sch. of L.'s J. of Public L. and Policy*, Vol. 36, Issue 2, Art. 6 (2015), available at http://digitalcommons.hamline.edu/jplp/vol36/iss2/6

David A. Hoffman, "Communicating Collaboratively in Cyberspace: What Couples Counselors Can Teach Dispute Resolvers about Email," reprinted from *Collaborative L. J.* (Fall 2007)

Ethan Katsh and Colin Rule, "What We Know and Need to Know About Online Dispute Resolution," South Carolina L. Rev., Vol. 67, at 329 (2016)

OTHER RESOURCES

Noam Ebner, "E-Mediation," in M.S. Abdel Wahab, E. Katsh & D. Rainey (eds.), "Online Dispute Resolution: Theory and Practice," at 357 (Eleven International Publishing 2012), available at SSRN: https://ssrn.com/abstract=2161451

Noam Ebner, "Negotiating via Email," in Honeyman, C. & Schneider, A.K. (eds.), "The Negotiator's Desk Reference," at 115 (St. Paul: DRI Press 2017), available at SSRN: https://ssrn.com/abstract=2348111

[Reprinted with permission from the Collaborative Law Journal, Fall, 2007]

Communicating Collaboratively in Cyberspace: What Couples Counselors Can Teach Dispute Resolvers about Email

By David A. Hoffman

Mediators and Collaborative Practice ("CP") professionals receive training in communication skills, but that training typically involves in-person communications. In a world where email is beginning to replace much of our face-to-face and telephonic communication, there is a need for training that addresses email communications. The purpose of this article is to begin to fill that void in training by examining some of the ways in which e-mail communication differs from other types of communication. In addition, the article will explore the lessons we can learn from mental health professionals about how to communicate more effectively using electronic media.

Although email is unlikely to replace in-person, face-to-face communications entirely, it has become increasingly useful as an adjunct to direct in-person communication in CP, mediation, or other forms of dispute resolution. In some cases, particularly those in which in-person meetings are impractical or prohibitively expensive, email has become virtually indispensable. And even in cases where four-way meetings are used extensively, email plays an important role as a medium in which the parties and counsel exchange information and proposals between meetings.

There is a growing literature on what has come to be called "netiquette" – the set of rules that guide e-mail users who wish to avoid inflaming anger and otherwise offending people through their electronic communications. For example, even occasional email users quickly learn that the use of CAPITAL LETTERS is interpreted in cyberspace as "shouting" and therefore should be used cautiously, if at all.[1]

The purpose of this article is not to summarize the principles of netiquette.[2] Instead, the focus here will be applying research about relationships to computer-based communications. One of the foundation stones of the CP movement is the recognition that attorneys and other professionals develop reputations for collaboration or competition, and that those reputations have value in a marketplace in which clients are seeking services that will meet their objectives.[3] In the world of CP, practitioners generally seek to cultivate a

---

[1] Despite this admonition, it seems that shouting a positive message might be a good thing – e.g., "I think your proposal is TERRIFIC!!"

[2] For a good summary of those rules, see the guidelines published by the Yale University Library at http://www.library.yale.edu/training/netiquette/index.html.

[3] For an excellent discussion of this principle, *see* R. Mnookin & R. Gilson, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 *Colum. L. Rev.* 509 (1994).

reputation for collaboration, and therefore the quality of their professional relationships matters a great deal. It has been my experience that some CP practitioners who value their reputations for collaboration nevertheless sometimes send emails that do not communicate that collaborative intention as effectively as the practitioners do in person.

Why should that be the case? The discussion below addresses some of the reasons why email, despite its advantages, can be so easily misinterpreted. The article then provides some guidelines, based on social science research, for overcoming the problem of misinterpretation.

1. Advantages and Disadvantages of Email

Before addressing the question of what mental health professionals can teach us about email, it is worth consider some of the salient characteristics of email communications.

a. Revisable. One of the main virtues of e-mail communication is that the messages are revisable – i.e., the author has the ability to edit the message before sending it (not possible, of course, in direct, face-to-face or telephonic communications). Experience shows that liberal use of the "save draft" button on our email programs when we are in doubt about sending a message is a sound practice.

b. Enduring. A second important feature of email – both an advantage and a disadvantage – is that the message leaves an enduring record. Email messages can be saved electronically or in printed form, and therefore are in some ways more useful than oral communications because they can be reviewed long after they are received. This is also a disadvantage because mistakes and miscommunications sometimes assume an unintended importance and can acquire a life of their own. Email messages can be forwarded to other people, and this feature underscores the wisdom of never sending an email that one would not wish to see published in a newspaper.

c. Asynchronous. Another advantage and disadvantage of email communications is that they are asynchronous. In other words, there is often a significant time lapse between sending, receiving, and responding to messages. More time can mean more potential for misunderstanding, and more time for negative reactions to a message to fester, but it can also mean more time for reflection and for crafting a more thoughtful response.

d. Narrow Bandwidth. The most significant disadvantage of e-mail communication is its limited ability to communicate meaning and emotion. The research of UCLA psychology professor Albert Mehrabian on the communication of emotion shows that:

- 7% of the meaning that people derive from communication comes from the choice of words that the speaker chooses;
- 38% percent of the meaning comes from the speaker's tone of voice and inflection, and

- 55% of the meaning comes from facial expressions and body language.[4]

Email and other text-only messages force word choice to do much more work than it ordinarily would. In the absence of intonation, facial expression and body language, word choice must be very careful indeed.

It is, of course, possible to create a more varied lexicon of emotion in an e-mail communication by using variations of typeface, type size, color, and even images or other attachments. For the most part, however, the haste with which e-mail messages are exchanged impedes our efforts to shade meaning in that way.

One of the problems with a communication medium in which there is little data about the emotional state of the person sending the message is that there is a tendency on the part of the recipient to fill that void with a projection about the intent behind the message. Accordingly, there is often a disparity between intention (which may be positive) and impact (which may be more ambiguous or even negative).[5] Especially when a communication is between two people who have an existing cordial professional relationship, it can sometimes cause concern for the recipient of a message that is devoid of the pleasantries and positive non-verbal communications that come with in-person communication. Consider, for example, the following exchange:

> Message:
>
> *"Hi Sam: Thanks for your email with your client's proposal. I think it will be very helpful in moving the case along. Are you available next week to discuss it? If so, please let me know what would be a good time. I look forward to talking with you. Thanks, Sarah"*
>
> Response:
>
> *"Not available next week"*

In this exchange, there is no mistaking the positive emotion behind the first message, but what about the curt response? Was it a rebuff or simply a rushed reply intended to keep the flow of information moving quickly? Is this professional relationship so strong that an occasional hasty reply or inartful response will have no effect, or is this a new professional relationship in which the expression of positive emotion is needed to foster collaboration?

---

[4] *See* A. Mehrabian, *Silent Messages* (1971).

[5] I am indebted to Kyle Glover for this observation.

2. Research about Couples

Couples counselors have identified a number of communication guidelines that foster strong relationships, and many of these are useful in the realm of email – for example:[6]

- Avoid personal attacks (focus on actions, not personal characteristics).
- Use "I" statements instead of "you" statements (focus on impact of the other person's actions instead of claiming to know the other person's intentions).
- Avoid "I" statements that are really "you" statements (such as "I feel betrayed" or "I feel abused"), which are judgments more than they are statements about feelings.
- Avoid absolute statements (such "never" or "always").
- Focus on interests instead of positions (the basic teaching of the book *Getting to "Yes"*[7]).
- Avoid invective and inflammatory expressions (such as profanities).
- Ask clarifying questions to foster understanding (i.e., don't make assumptions).
- Ask questions as an expression of curiosity not cross-examination (which is a form of argument not inquiry) – e.g., using open-ended questions.
- Refrain from problem-solving (unless it is requested).
- Do not psychoanalyze the speaker (save that for licensed professionals).
- Stop the discussion if either party starts yelling – e.g., taking a break or switching to another mode of communication if the discussion gets heated.
- Focus on the present.

Anecdotal evidence suggests that these guidelines are useful not only for couples counseling but also for negotiations in the setting of a CP case or a

---

[6] I am indebted to Beth Andrews, LICSW, for contributing to and refining this list, which is based on her experience as a couples counselor and her educational programs on communication for couples.

[7] *See* R. Fisher, W. Ury & B. Patton, *Getting to "Yes": Negotiating Agreement Without Giving In* (2d. ed. 1991), in which the authors describe interests as the reasons for the positions that people take. For example, if a divorced wife takes the position that her ex-husband "must pay a portion of Junior's college tuition," the underlying interest might be either that she lacks the money to pay all of the tuition, or that she thinks it would better for Junior if both parents demonstrate their involvement in his upbringing. Inquiry enables people to determine the specific interest underlying a position.

mediation. In addition to such anecdotal evidence, there are now scientific findings that identify a small group of especially robust predictors of success and failure in relationships, and those findings suggest guidelines for email and other modes of communication where the preservation and enhancement of relationships is a goal.

a. The Four Horsemen of the Apocalypse. One of the leading experts in the area of couples research, Professor John Gottman at the University of Washington, has found that the four most reliable predictors of difficulty in marital relationships are (1) criticism, (2) defensiveness, (3) stonewalling, and (4) contempt. He calls these the "Four Horsemen of the Apocalypse."[8] Gottman and his fellow researchers use video tape recordings to study the nuances of facial expression and intonation that suggest the presence of these elements, as well as paying attention to the words spoken by the couple. He and his colleagues have studied the longevity of the couples' relationships and correlated that data with their initial observations of the couples' communications, and based on that correlation, they have found that they can predict with 95% certainty whether the marriage will endure for 15 years.[9]

When one applies these communication principles to email – i.e., avoiding criticism, defensiveness, stonewalling, and contempt – there is an inherent difficulty because (a) email is a medium of communication in which intonation and facial expression are absent, and therefore (b) there is a potential for ambiguity regarding the intentions and emotions of the author of an email message. Thus, in structuring an email message, one should consider even more carefully whether the communication could be interpreted as indicating criticism, defensiveness, stonewalling, or contempt. Consider the following examples:

- *"Please don't send me any more proposals that are riddled with errors."* (Criticism)
- *"Please don't use such hyper-technical complaints about typos in the documents to divert attention from your client's delays in responding."* (Defensiveness)
- *"My client's delays? As far as I am concerned, the ball is still in your court, and I am not going to spend any more time on this file until we get a reasonable proposal."* (Stonewalling)
- *"This so typical of how you have been handling this case – the impasse here is just what my client warned me would happen."* (A two-fer: contempt for both the lawyer *and* the client)

Of course, criticism of an idea, a proposal, or a party's action or inaction in a case may be needed and perfectly appropriate. And, as we all know, criticism

---

[8] *See* J. Gottman, *Why Marriages Succeed or Fail: And How You Can Make Yours Last* 72 (1994).

[9] *See* M. Gladwell, *Blink: The Power of Thinking without Thinking* 21 (2005).

lands more gently when the criticism is clearly focused on an action or a statement, rather than the person or the person's mental state. (For example, "your asset-split proposal was lower than what you previously proposed" as opposed to "what kind of lawyer makes a bad proposal and then counters with one that's even worse?")

Experience suggests that even when a critical message is narrowly focused and avoids personal attack, it is probably best delivered by a more direct means of communication such as a phone call or in-person meeting. By communicating such a message in that way, the speaker can add the reassuring elements of communication that will indicate a desire to maintain a cordial, collaborative professional relationship.

In some instances, it may be impractical to rely on more direct means (such as a phone call or a meeting) because the message has to be delivered quickly. Thus, consider how the messages above could have been more skillfully expressed:

- *"Could you please take another look at your proposal – I think there might be some typos, and I want to make sure that I understand all the elements of what you are proposing. Thanks!!"* (Criticism blunted)
- *"Sorry about the typos – I will take a look at it and get back to you as soon as I can. Thanks for being so careful about getting things right – it helps the process."* (Apology and appreciation replace defensiveness)
- *"OK, I will hold off on the case til I hear from you – we all want to do this case as efficiently as possible."* (Statement of common interest replaces stonewalling)
- *"Is a week soon enough for me to get back you? I'm quite busy right now (and I know you are too), but I also want to honor our clients' interest in moving things forward."* (Respect replaces contempt)

The common element in the messages above is the injection of an unambiguously positive emotion or intention. The impact of such elements can be seen in one of the remarkable findings by Professor Gottman with regard to his quantitative analysis of interactions in a relationship. Gottman and his researchers discovered what they call a "critical ratio" of positive to negative interactions in the communications between husbands and wives, and they found that this ratio is a robust predictor of success or failure of marriage. Their research showed that if the positive interactions in a relationship outnumber the negative interactions by a ratio of 5 to 1 or more, the relationship is very likely to endure. But if the ratio is below 5 to 1 – or, worse yet, a negative ratio – the relationship is headed for trouble.[10]

[10] *See* J. Gottman, *Why Marriages Succeed or Fail: And How You Can Make Yours Last* 57 (1994).

The positive interactions that the researchers looked for were often simply minor affirmations, validations, humor, pleasantries, or appreciation. The negative interactions involved such elements as anger, complaints, and fault-finding.

If one "unpacks" the content of an e-mail message, one can see the elements that may contribute, even when a critical message needs to be delivered, to an overall positive communication. For example, imagine the following message being sent with no salutation and no signature other than the sender's identifying information:

"Your most recent proposal is a non-starter."

It is difficult to tell from that message whether the sender is angry or simply rushed, or perhaps so disgusted by the proposal, the process, and/or the sender that s/he does not wish to devote the energy it might take to explain the reasons why the proposal is unacceptable. The author of this message may want the negotiations to continue or to end – the meaning and intention are unclear. Consider the following alternative version of the message:

> *"Dear Sam: Thank you for sending me your proposal. I have reviewed it with my client, and she has a number of concerns about it that I would like to discuss with you. I'm wondering if you'll have any time this week – I know your calendar has been quite full this month. When you have a chance, would you please call me or send me an e-mail so that we can arrange a time to talk. I'm encouraged that our clients are continuing to work toward a collaborative resolution of this matter, and I know that both of us share their strong intention in that regard. I look forward to talking to you sometime soon. Best regards, Sarah Smith."*

In this version of the message, the ratio of positive elements to negative elements is far in excess of 5 to 1. Apart from the comment about "a number of concerns" (negative), there are the following additional (positive) elements:

- A salutation, using the person's name – everyone likes the sound of their name, and it is a signal of respect.
- Appreciation – always welcome, as long as the "thank you" is sincere and not sarcastic.
- Taking the recipient's prior message seriously – "I reviewed it with my client"
- Openness – a request for discussion
- Question about schedule – instead of insisting on a particular time
- Acknowledgement -- "I know you're busy"
- Request – "please call"
- Flexibility – "when you have a chance"
- Validation of the parties' endeavor – "I'm encouraged"

- Optimism – "continuing to work toward collaborative resolution"
- Common commitment – we "share their strong intention"
- Affiliation[11] – "looking forward to talking to you"
- Good feelings – "best regards"
- Personal touch – signing one's name rather than just ending the message with a name-and-address block

It may seem like a lot of effort to include all of these elements, but in a medium such as email in which there is such a narrow bandwidth for emotion to be expressed, communication of positive emotion must be intentional and robust in order to be unambiguous. And, after all, a short paragraph like the one above can be dashed off in about a minute or so, and therefore the cost/benefit ratio associated with making the extra effort is likely to be positive.

3. Non-adversarial Communications

Wholly apart from the ratio of positive to negative elements in an email message, there are structural elements that one should consider including. In his book, *Non-violent Communication,* Marshall Rosenberg articulates four elements for non-adversarial communication:[12]

- Observation – based on facts or perceptions instead of judgments
- Sensitivity to emotion – looking for the feelings that lie behind the words
- Focus on interests – identifying the person's unmet needs
- Request – the other person is free to honor or decline the request (i.e., it is not a demand)

Applying these principles to the realm of email, one might structure a message to include all of these elements as follows:

> *"Dear Sarah: It was good talking with you today. As we prepare for our next four-way meeting about the parties' business, I have been thinking about the tensions that developed during our last meeting.* (Observation) *My client told me afterward that both of the parties were expressing strongly-felt emotions that have been part of their business relationship for a long time.* (Emotion) *What my client wants, more than anything else right now, is a speedy resolution – even if he does not get every dollar that he thinks his interest in the business is worth.* (Interests) *Would you*

---

[11] The term "affiliation" – meaning the sense of connectedness between people – is described in the recent book, *Beyond Reason: Using Emotions as You Negotiate* (2005), by Roger Fisher and Daniel Shapiro, as one of five core concerns that stimulate emotion: affiliation, appreciation, autonomy, role and status.

[12] *See* M. Rosenberg, *Non-Violent Communication: A Language of Life – Create Your Life, Your Relationships, and Your World in Harmony with Your Values* (2003).

please ask your client if she is willing to set as a goal for our next four-way meeting the drafting of a term sheet that both parties can live with? (Request) *Thanks very much. – Sam Jones*

4. Conclusion. We are all familiar with the distorting effects on communication illustrated by the children's game called "telephone," in which a message is passed from one person to the next until it comes back to the original speaker in a form that is not recognizable. In CP, four-way meetings overcome these distorting effects. The increasing use of email communications in CP cases, however, creates a new set of potentially distorting communication effects because, even if all of the links in the communication "chain" can be seen, the sender's meaning, emotions, and intentions may be less clear. Research from the field of couples counseling suggests that using guidelines of the kind described in this article can help make email communications more transparent and thus a positive adjunct to four-way meetings. Because email is such a new medium, however, the techniques for successful communication via computer may be less intuitive and require more conscious attention. Experience suggests that there is considerable potential in email communications for both misunderstanding and enhanced understanding. As Collaborative Practitioners, we have the added benefit of working on cases with colleagues who join forces with us in trying to achieve higher levels of understanding in all of our communications – in person as well as in cyberspace. By adding more effective email communication to our toolbox, we can achieve higher level of collaboration and thus better results for our clients.

[David A. Hoffman is a mediator, arbitrator, and Collaborative Law attorney at Boston Law Collaborative, LLC. He is the chair of the Collaborative Law Committee of the ABA Section of Dispute Resolution, co-founder of the Massachusetts Collaborative Law Council, and teaches Mediation at Harvard Law School. He can be reached at DHoffman@BostonLawCollaborative.com. *The author is grateful for research assistance by Kyle Glover, a second year law student at Harvard, and editing suggestions from Kyle, Beth Andrews, and Lily Hoffman-Andrews. This article is reprinted with permission from the Collaborative Law Journal (Fall 2007).]*

@ Face Value? Nonverbal Communication & Trust Development in Online Video-based Mediation

Noam Ebner & Jeff Thompson

Accepted for publication in the *International Journal of Online Dispute Resolution*, forthcoming.

Abstract:
Mediation is a process wherein a third party, or mediator, attempts to assist two conflicting parties in dealing with their dispute. Research has identified party trust in the mediator as a key element required for mediator effectiveness. In online video-based mediation, the addition of technology to the mix poses both challenges and opportunities to the capacity of the mediator to build trust with the parties through nonverbal communication. While authors researching the field of Online Dispute Resolution (ODR) have often focused on trust, their work has typically targeted text-based processes. As ODR embraces video-based processes, nonverbal communication becomes more salient. Nonverbal communication research has identified examples of specific actions that can contribute to trust. This paper combines that research with current scholarship on trust in mediation and on nonverbal communication in mediation, to map out the landscape mediators face while seeking to build trust through nonverbal communication in online video-based mediation. Suggestions for future research and implications for practice are noted, holding relevance to researchers and practitioners in any field in which trust, nonverbal communication and technology converge.

Author information

Noam Ebner
Associate Professor and Online Program Chair
The Werner Institute, Creighton University School of Law
2500 California Pl.
Omaha, NE 68178
NoamEbner@creighton.edu

Jeff Thompson
PhD candidate
Griffith University Law School
170 Kessels Road
Brisbane, Queensland
Australia 4111
Jeff.Thompson@griffithuni.edu.au

Keywords: trust, mediation, nonverbal communication, rapport, technology, video, ODR

Introduction

Mediation refers to a process for dispute resolution or joint decision making, in which two disputing parties voluntarily request the assistance of an uninvolved third party to help them work through their differences. The mainstream practice of professional mediation in western countries emphasizes two elements: Parties are free to leave the process at any time; and the third party, or mediator, does not have authority to impose a binding decision on them. Any outcome arrived at through the mediation process is that of an agreement reached between the parties themselves.

Given the non-coercive and voluntary nature of the process, it should come as no surprise that studies on mediator effectiveness have demonstrated the significant value assigned - both by mediators and by parties to mediation - to mediators' capacity to capture the parties' trust. How is this trust formed? The literature points out many individual elements of party-mediator trust (Ebner, 2012B). This includes the mediator's reputation and expertise as well as the skills possessed by the mediator. Reviewing the literature, however, leaves one with the sense that this search for a complete understanding of the mechanisms of trust in mediation is a work in progress.

Studies show the critical role nonverbal communication plays in creating trust between individuals. Generally, nonverbal communication has been described as being vital to having a successful interaction with others (Feldman, 1991) while more specifically, body congruence can create trust (Andersen, 2008), and eye contact has been

demonstrated to contribute to a person being perceived as trustworthy (Beebe, 1980; Zeigler-Kratz, 1990) and to creating "liking" (Mehrabian, 1967). Conversely, lack of eye contact, or gaze aversion, has been associated with a person being perceived as not being trustworthy (Andersen, 2008).

Given the potential for nonverbal communication tactics to directly affect trust, we find the relative scarcity of studies on nonverbal communication in mediation somewhat surprising, as we do the dearth of prescription towards specific nonverbal actions in mediation training and literature. The necessity of increased focus on the topic is supported by despite recent data showing that mediators overwhelmingly describe nonverbal communication in regards to mediation being "very important" (Thompson, 2013).

Mediation is currently facing a period of great change – evolution, if you will – as it increasingly embraces online communication. Online mediation offers a wide range of benefits over its face-to-face counterpart, ranging from saved costs, convenience and flexibility (Katsh & Rifkin, 2000; Rule 2002) to environmental protection (Ebner & Getz, 2012). As the feasibility of online dispute resolution gains acceptance in general, a rising number of individual practitioners offer to bring disputing parties together online to resolve their differences through mediation (Ebner, 2012A)

In online mediation processes, trust remains an important mediator attribute. The online environment poses a particularly rough playing ground to a mediator attempting to build trust. The literature on negotiation and dispute resolution, as along with the literature on other aspects of online communication, has noted many specific challenges

to trust -creation and -maintenance in the online environment (Ebner 2007; Ebner 2012B).

However, much of this literature has focused on text-based communication, primarily asynchronous - such as email –based communication – seeing such 'lean media' as the most challenging landscape to navigate (e.g., Barsness & Bhappu 2004; Ebner 2007; Ebner et al.; 2009, Exon, 2011). There seems to be an assumption, voiced or not, that in video-based communication the challenges to trust would diminish to their proportions in face-to-face communication. Indeed, while research has found video interactions to be generally more conducive to trust emergence than other media other than face-to-face interactions (Bos, Olson, Gergle, Olson & Wright, 2002), it does not follow that video communication does not pose its own, unique, challenges to trust.

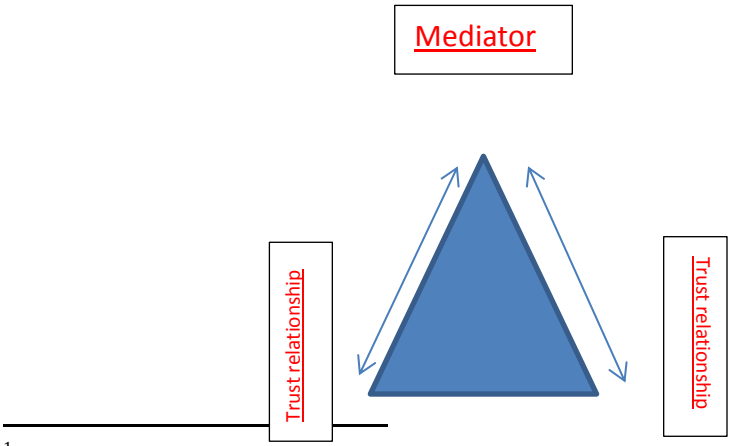
The aim of this article is, therefore, to establish and reinforce the range of techniques for trust building that mediators can bring to the virtual table through the channels provided by nonverbal communication in online video-based mediation. After establishing the role trust plays at the heart of mediators' efficacy, and the important role of nonverbal communication in engendering or diminishing this trust, we will explore the ways in which these roles play out in the online environment. Through specific examples of non-verbal transmission and reception of cues, we will demonstrate how trust in e-mediation processes – and indeed, the processes themselves - can be derailed or supported by close attention to nonverbal communication. We will then offer recommendations for further explorations the mediation field and the nonverbal communication field need to conduct in order to further develop our understanding of the juxtaposition of trust, the online environment and nonverbal communication. Finally, we

discussion implications of these suggestions for people operating in fields other than e-mediation, in which building trust is necessary for conducting successful interactions.

Mediation Explained

Mediation refers to a spectrum of process in which two disputing parties voluntarily accept the assistance of an uninvolved third party to help them work through their differences (for a simplified portrayal of mediation[1], see Figure 1). While there are many process-shades along this spectrum, two elements remain constant: the disputing parties' maintain their autonomy and are free to leave the process at any time; and the third party, or mediator, does not have authority to impose a binding decision on the disputants. Any outcome arrived at through mediation process is the result of an agreement reached between the parties themselves.

Figure 1: Mediation Triangle



[1]While a great many mediations do run along the lines indicated in Figure 1, two other factors often intervene to make mediation a more complex interaction. First, some professionals strongly advocate for 'co-mediation', in which two mediators team up to work with disputing parties. Second, disputes often involve multiple parties. As a result, it is not unusual to encounter mediation processes in which the lines of communication and trust-relationships form a web of great complexity.

Party A

Party B

While many schools of thought exist with regards to the purpose of mediation, the scope of issues to be covered in a process and the role of the mediator (Bush & Folger, 1994; Riskin, 1994; Moore, 2003) the limitations on mediator authority implicit in the two commonalities noted above require mediators to ground their ability to assist parties in areas other than in formal authority. Indeed, lacking the authority to impose participation in the process or any final outcome on parties, the fundamental attribute that mediators can bring to the table (or develop at the table) is parties' trust in them.[2]

These attributes of mediation are at the root of the transferability of the discussion in this paper to other areas in which professionals cannot dictate results during an interaction, but requires their engagement. Trust is key, and non-verbal communication is at the heart of trust building.

Trust In Mediation

It is well accepted a mediator needs to develop trust with the parties they are helping in a dispute in order for a successful outcome to be possible (Poitras, 2009). In

[2] A third trust relationship exists, of course – the trust relationship between the parties themselves. While certainly an important topic with regards to the mediator role, it is not the focus of this paper, which deals solely with affecting the degree of trust parties place in the mediator.

fact, surveys of mediators and of parties to mediation have clearly showed that the ability to gain a party's trust is held to be *the* most valuable skill of the effective mediator (Goldberg, 2005, Goldberg & Shaw, 2007). However, the current scholarship offers limited micro-tools a mediator might use with the specific aim of building trust with the parties. Instead, big-picture considerations are discussed in the context of trust; the effects of trust on mediation, rather than the effects of specific actions on trust. One such macro-finding is that parties' trust in their mediator is an important factor not only in the important question of whether parties actually reach settlement – but also in the preliminary question of whether they agree to participate in mediation at all (Carnevale & Pruitt, 1992).

The sparse discussion of micro-tools might be connected to a challenge of macro-definition. Without knowing what one is trying to achieve in a general sense, it is hard to point concrete steps he or she should take. Simply, trust is a tricky thing to define. It is often pointed out that there is no one universal way to define it, and that all suggestions made on this count are affected by the particular perspective of the definer (Boyd, 2003; Koehn, 2003; Wang & Emurian, 2005). Ebner has suggested, as a working definition of trust in the context of dispute resolution, that it is "an expectation that one's cooperation will be reciprocated, in a situation where one stands to lose if the other chooses not to cooperate" (Ebner, 2007, p. 141). In other words, the act of trusting someone involves accepting an element of risk, of betting on an unguaranteed occurrence. Applying this to party-mediator dynamics within the relation process, Ebner explains how mediators depend on parties to accept risk and, in essence, bet on the mediator:

> "As mediators, we also ask parties to trust *us* and to trust the mediation *process*, despite the risk and uncertainty involved and despite the fact that their expectations cannot, ultimately, be fully satisfied by us, but rather by the other party. We ask them to desist, delay, or act in parallel to other alternative processes for solving their problems, while at the same time explaining that there is no certainty regarding the outcome of the mediation process. We invite them to divulge information to us, to explore their interests with us, and to reconsider their assessments and offers – even when they are uncomfortable doing this together with the other party – and their agreeing to do so is predicated on their trust in the mediator." (Ebner, 2012B, p. 206)

Such a working definition might make it easier to address trust in an empirical and practical sense, rather than philosophic discussion. Indeed, it provides a lens through which mediators can address what may be their most important question: With so much riding on the mediator successfully engendering trust in parties, what, practically speaking, should a mediator do in order to develop this trust? How does trust 'happen', and how can it be nurtured? Or, simply what mediator actions might make parties more likely to bet on the mediator?

Formation of trust can be related to different elements inherent in a particular mediation process. Some of these elements might be structural or social in their nature: mediators often rely on their reputation or on their status in a particular community or network (Moore, 2003). Other elements relate to the mediator's personal in-the-room skill-set: in addition to their general competence at process-management, parties have

reported that effective mediators are those with good communication abilities, who are skilled at forming rapport with each party and who are able to engender trust in parties (Goldberg, 2005).

With regards to those last traits of communication, trust and rapport, we must ask: What, precisely, is it that good mediators do? 'Engendering trust', for example, is a very general concept. How does a mediator go about doing this in practice? Given the complex and hostile atmosphere mediation often provides, what can mediators do to form bonds of trust and rapport and how can their actions be applied to other professionals who need to build trust to be effective?

In order to draw together findings on trust building in mediation, one must cast a net wide enough to draw in other related notions and terms. The literature on mediation often relates to trust obliquely, or spotlights traits and dynamics that are closely connected to trust. Most notable is the term *rapport*. The ability of a mediator to form rapport with parties has been found to be the most important ability or skill a mediator can possess (Goldberg 2005; Goldberg & Shaw, 2007); a primary element of this rapport, as the term was used in this study, was parties' trust in the mediator, also discussed as the mediator gaining the *confidence* of the parties. Their negative counterparts support these findings: a lack of *integrity* (including trust-breaking behavior) has been found to be widely viewed as a cause of mediator failure (Goldberg 2005).

Reading the above though, one might remain frustrated by the generalities. Rapport, good communication and trust are all clearly interrelated and of critical importance for mediation, yet how does one go about creating and improving them?

Indeed, despite the clear links established between rapport-building and trust (see Braeutigam, 2006; Nadler, 2004; Poitras, 2009), and rapport's stated importance to being an effective mediator (Noone, 1997), one finds very little advice as to specific actions a mediator might take with the goal of developing it. This might be due to the mediation literature's tendency to focus primarily on verbal communication. However, as we shall see, nonverbal communication plays a major role in a mediator's ability to navigate these complex webs and help parties in their endeavor to work out their differences out – and the field of nonverbal communication contains specific and implementable findings related to improving communication, increasing rapport and building trust. We will focus on this in the next two sections.

First, however, we will note the few suggestions that have been made in the literature to operationalize trust, by pinning it down to specific phases of mediation, as well as to particular mediator actions and moves.

A mediator's positive reputation can garner him or her some measure of trust before parties even enter the room (Goldberg, 2005), as can displaying or detailing their credentials at the beginning of the process (Exon, 2011). A mediator being observant, showing the parties respect and identifying the issues of central importance to them (Yiu, 2009) have also been described as facilitating trust-development.

Trust has been described as developing at particular points throughout the course of mediation. In other words, temporally speaking, trust fluctuates; some stages in the process are particularly important for trust development. For example, some mediators pinpoint the opening stages of a mediation – the mediator's greeting of the parties, and his or her introduction of the mediation process itself – as being critical moments for trust

development. Others pinpoint mediator's private sessions with parties, or caucuses, to be laden with potential for trust building.

In one survey, mediators suggested that trust was most effectively built though the mediator's empathic listening, and to a lesser extent by the mediator displaying honesty and adherence to ethical considerations (Goldberg, 2005). *Parties* to mediation surveyed on this same question stressed other mechanisms and traits as affecting the degree of trust that mediators evoked in parties, highlighting mediators' friendliness, likability, integrity, neutrality, maintaining of confidentiality and level of preparedness for the process (Goldberg & Shaw, 2007).

One way or another, these findings close a circle of trust, or as Ebner (2012B, p. 210) put it: "…not only do many mediator moves *depend* on trust… many (or most) mediator moves *affect* trust as well."

However, this is only the tip of the iceberg, in terms of actions a mediator can take in order to affect trust-dynamics. In moving from generalities to specific actions, the role of nonverbal communication in mediation must be revisited. This revisiting is particularly important, in light of the trend, discussed below, towards video-based mediation - in which nonverbal communication plays an important role.

Nonverbal Communication in Mediation

In this paper, our exploration of nonverbal communication in e-mediation will relate to a wide range of cues (or actions) and elements (such as clothing or the environment) divided into five categories as part of the METTA (Movement, Environment, Touch, Tone, and Appearance) model (Thompson, 2011). The METTA

model was designed to raise awareness of each of the nonverbal elements potentially present in a mediation session by separating nonverbal elements and cues into five categories as described in the table below. Identifying each of the potential nonverbal elements and cues through METTA helps ensure that each is not overlooked. Additionally, it allows for mapping out each attribute in relation to all of the others. This is particularly important when exploring a macro trait such as trust. Trust is created through a cluster of nonverbal cues and elements that contribute to it being established in a gestalt-like manner in contrast to a single action. Another example of such a cluster-formed element is rapport building, which, as already discussed, is closely linked with trust.

Table 1: METTA Model of Nonverbal Communication

Movement	Gestures, posture, body orientation, eyes, facial expressions, and head nodding
Environment	Location, distance between people, time, and layout of the room
Touch	Hand shaking, adaptors, and object adaptors
Tone	Clarity, pauses, "ums", and "ahs"
Appearance	Clothing, accessories, and adornments

When compared to verbal communication, nonverbal communication can have a greater impact on social interactions (Patterson, 2011) and when incongruence exists between the two, it is the nonverbal cues people will rely on as being more truthful (Burgoon, Guerrero, & Floyd, 2010; Guerrero & Hecht, 2008).

While often mentioned in passing, nonverbal communication is rarely explored in-depth in the context of negotiation and dispute resolution. Most discussions in the literature on the subject of communication in mediation have focused on verbal elements of communication. In instances when nonverbal communication is described, it is often

limited to macro-level explanations. This includes rapport being described as contributing to generating understanding and mutually beneficial solutions (Goldberg & Shaw, 2007; Goldberg, 2005; Harmon, 2006) yet specific micro examples are not provided (Louis, 2008; New York Peace Institute Manual, 2008; Slocum & van Langenhove, 2003).

When nonverbal micro cues are spotlighted, they have often been linked with examples that seem to be accepted as common knowledge even though they have not been validated by research (as noted by Remland, 2009). Some works do reference the importance of nonverbal communication (e.g. Kolb, 1997) and others specifically explore the role of nonverbal communication in negotiation however the examples provided in the interpretation and application section is not specific to conflict resolution limiting its potential for guidance (Wheeler, 2009).

Wheeler (2009), Kestner and Ray (2002), Mondonik (2001), and Kolb's (1997) work do offer examples and tips that can be beneficial to mediators but also can be viewed as either introductory or limited in data pinpointing nonverbal actions that have been validated. What few validated suggestions have been made tend to focus on recommendations for incorporating nonverbal communication cues and elements in the use of active listening as a communication tool (Macfarlane, 2003). While each of these works offers a contribution to a greater understanding of nonverbal communication and its application in conflict resolution, there is obviously yet much to be uncovered in this area.

That fact notwithstanding, a few recent studies have offered initial substantiated findings in this area. Poitra's (2009) study, offers seven macro skills wherein specific mediator actions can be attributed with trust building by the mediators. The seven are: impartiality, mastery, explanation of the process, warmth and consideration, understanding, settlement focus, advice, and legal expertise. When reviewing the list provided by Poitras, multiple skills have clear nonverbal communication aspects to them. For example, mediator warmth is most likely not only an outcome of the mediator's verbal words but also a result of the nonverbal aspects of the mediator's actions.

Thompson's (2013) research expands on Poitras and Goldberg's work by specifically exploring nonverbal communication and mediators. His work provides quantitative and qualitative data of micro and macro nonverbal cues used by mediators specific to trust and rapport building.

The tendency to focus on verbal rather than nonverbal communication is reflected in the content of mediation training courses, which serve, for many professionals, as the mediation field's entry-level qualification. The communicative skills stressed tend towards verbal communication: listening, using questions, reframing messages and so on. Non-verbal communication exploration is usually limited to very perfunctory discussions of body language or facial expressions. While other issues we categorize as nonverbal communication sometimes also receive mention (such as the question of how to design a mediation room, or arrange seating at a table), they are not usually discussed through the lens of communication.

Nonverbal communication elements of trust

The role of a mediator is to guide and assist the parties during the mediation session (Harmon, 2006). Overt aspects of this guidance might include, for example, the mediator utilizing skills to directly help parties explore options and evaluate possible solutions. However, an underlying layer of guidance exists in the mediator's ability to demonstrate positive and productive actions that each party might pick up on, and use, during the mediation session. Therefore, key mediator skills have their roots in nonverbal communication - developing rapport, immediacy, mirroring, and mimicry. These skills are all related to party-mediator trust.

Research on rapport, which has been identified as being directly connected with mediators building trust with the parties (Harmon, 2006; Poitras, 2009; Thompson, 2011) is defined as containing three elements between interactants: positivity, coordination, and mutual attention (Tickle-Degnen & Rosenthal, 1990). Specific micro examples of rapport are linked with nonverbal actions (Nadler, 2004). This includes smiling, directional gaze, head nodding, forward trunk, postural mirroring, direct body orientation, uncrossed arms, and uncrossed legs (Tickle-Degnen & Rosenthal, 1990). Through intentional manipulation of the frequency and intensity of these cues, mediators can directly influence the degree of rapport with parties. And, with rapport comes trust.

Rapport builds trust and confidence in the mediator and has been described as being achieved when the mediator is "connected" with the parties (Honeyman, 2004). *Connectedness* occurs when the mediator is "one of us" with the parties. That rapport must be built skillfully, in order to co-exist with *authority*, another source of party trust. Authority is engendered when the sensation that the mediator is "one of us" does not limit the sense that the mediator is also "beyond being one of us", by virtue of his or her

being experienced and professional in working in conflict. This tricky juggling act is supported largely by nonverbal communication.

Immediacy – messages that signal warmth, closeness, and involvement - is another concept closely linked with trust. Immediacy has been shown to increase credibility, competence, and trustworthiness (Andersen, 2008). When looking at the research on the nonverbal actions that create immediacy (see Andersen, 2008, p. 221) one might not be surprised to see actions similar to those that have been listed as contributing to rapport and trust as well (including, e.g., direct body orientation, smiling, nodding, direct eye contact, and facially expressive). Robinson (2008) cautions us that with immediacy, as with trust building cues, it is a *cluster* of nonverbal actions that *collectively* contribute to creating immediacy; thus looking solely at one specific action, in isolation, is unlikely to give a dependable assessment of immediacy.

Mirroring and mimicry are actions, both verbal and nonverbal, that are described as being congruent between persons (Thompson, 2011). Congruent nonverbal movements, even when purposely acted out, result in that person being perceived as being more competent, trustworthy, and sociable (Woodhall & Burgoon, 1981).

Unconscious mimicry, or the repeating another's nonverbal behavior (Knapp, Hall, & Horgan, 2012), is more likely to occur when there is a mutual goal (Lakin & Chartrand, 2003). Mimicry has also been linked with politeness (Trees & Manusov, 1998) and is described as being able to increase rapport with people (Tickle-Degnen, 2006).

Postural mirroring has been linked to creating rapport (Hall, 2008; Tickle-Degnen & Rosenthal, 1990), empathy (Curhan &Pentland, 2007) and immediacy. Therefore, it

would wise for a mediator to incorporate mirroring and mimicry, into their ongoing mediator moves such as re-framing and summarizing parties' statements. Remland (2009) offers a note of caution however, stating that engaging intentionally in mimicry in a manner that is perceived as disingenuous may have a detrimental effect on your attempts at building rapport.

Each of these attributes is a basic building block of parties' trust in their mediator. As a guide, the parties look to the mediator, often subconsciously, for examples of how to act during their negotiation. This opens the door for the mediator to continually prime parties. "Priming", in this regard, involves one person engaging in subtle nonverbal actions performed with the intention of influencing the actions of others (Thaler & Sunstein, 2008).

In our context, mediators can prime parties towards initiating or responding to rapport building with the mediator or with each other, through the power inherent in their own nonverbal actions to change the thoughts, feelings, and behaviors of others (Patterson, 2011). In this context, we note parties' capacity to build rapport with each other, given that this occurring not only creates a generally more trust-conducive atmosphere; it also validates and reinforces the trust the party initially placed in the mediator-guide, which led the party to implement the rapport-building strategy in the first place.[3]

[3] The examples and research noted in this paper with regards to nonverbal communication are primarily grounded in findings referencing western-based culture. Some elements of nonverbal communication have been shown to transcend cultures and trigger universal understanding, such as seven basic facial expressions (Matsumoto, Frank, & Hwang, 2013). However, culture certainly has an impact on the use and understanding of nonverbal communication (See, e.g., Semnani-Azad & Adair's (2011) study exploring different nonverbal expressions of dominance

Taking mediation into the digital age:

Returning to mediation, with the aim applying the findings above to video-based mediation, we must first understand the roots of mediation's transition to the online venue.

Given the ever-increasing trend of people transferring of their activities online, and the growth of business and transactions at a distance, it should perhaps come as no surprise that Internet-based communication spurred the development of a subfield of the alternative dispute resolution (ADR) field focused on conducting dispute resolution processes online; this area of inquiry and mode of practice has been dubbed Online Dispute Resolution (ODR). ODR's origins begin in the mid-1990s as an area of exploration for academics and a challenging area for hobbyists. Successes in applying ODR to eBay's large-volume commercial caseload (Abernathy, 2003), as well as The Internet Corporation for Assigned Names and Numbers' decision to institutionalize ODR for resolving domain name disputes (ICAAN 1999; ICANN 2003), fueled ODR's growth, and ODR evolved through an entrepreneurial stage in which dozens of service providers offered a variety of models and processes for profit (for more on ODR's evolution and scope, see Katsh and Rifkin (2000); Rule (2001); Ebner, 2008; for a recent discussion of ODR development, see Farkas, (2012)).

---

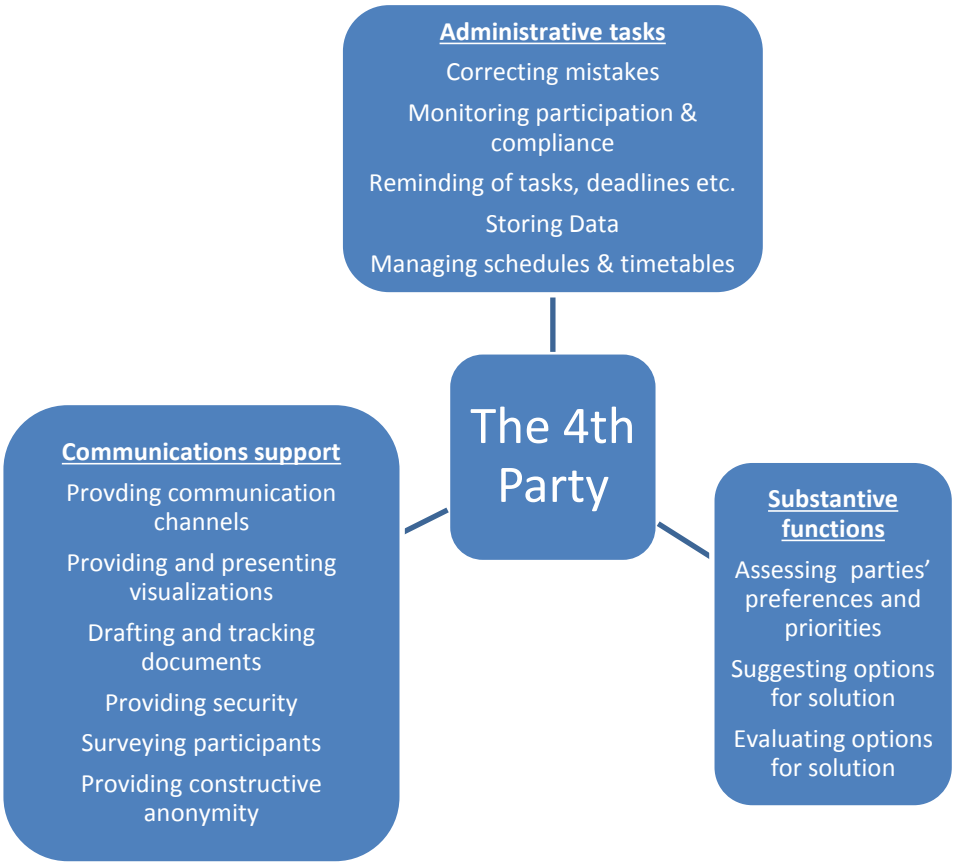
or submission, which suggests that Canadian and Chinese negotiators display different nonverbal actions).

The number and spread of ODR providers has fluctuated over the past fifteen years (for general global surveys, see Conley Tyler & Bretherton, 2003; Conley Tyler, 2004; Suquet, Poblet, Noriega & Gabarró, 2010; for recent regional surveys see Pearlstein, Hanson & Ebner, 2012 (North America); Abdel Wahab 2012 (Africa); Yun, Zhe, Li & Nagarajan, 2012 (Asia); Szlak (2012) (Latin America); Poblet & Ross, 2012 (Europe)).[4] However, ODR is clearly on the rise, and is making headways in multiple arenas: private sector, government, court systems and more (see Abdel Wahab, Katsh and Rainey, 2012).

Perhaps the best conceptualization of the potential of ODR for improving dispute resolution service delivery lies in Ethan Katsh and Janet Rifkin's (2001) dubbing of technology as "The Fourth Party", which can be utilized in many ways by third-party neutrals to help them with dispute resolution. The Fourth Party can facilitate performance of a wide variety of tasks, as demonstrated in Figure 2 below.

[4] In truth, probably no fully accurate and comprehensive count of ODR services, sites and providers has been conducted, despite researcher's best intentions. This is due to differences in the definition of what constitutes an ODR-related site, as well as to the natures of internet-based ventures and Internet searches. Some studies provided very specific discussion regarding their definitional approach and search parameters, e.g., Pearlstein, Hanson & Ebner, 2012; other studies, less so. In this sense, ODR's spread and growth is somewhat of a moving target.

Figure 2: The "Fourth Party"



In the case of e-mediation (mediation conducted online through a medium provided by information technology) which is the most commonly offered ODR service (at least in the US; see Pearlstein, Hanson, & Ebner 2012), the human third party mediator can view the technological fourth party as an ally, assistant and partner. The

fourth party can perform some mediation- related tasks on its own, simplify others and help human mediators perform still others in a more structured, organized and timely manner. In this paper we focus on technology's role in *providing communication channels* – and the challenges deriving from this.

In e-mediation, two current trends call the role of nonverbal communication to center stage. First, the primary model of tech-savvy companies with proprietary software branding themselves as e-mediation service providers seems to be in decline – giving way, instead, to a model in which individual practitioners of face-to-face mediation expand their market by offering their services online, relying on low- or no- cost technology. Another converging trend regards a developing shift in communications media. Most ODR service providers have, thus far, focused their efforts on text-based processes, with few service providers utilizing real-time video conferencing for resolving disputes. It would seem, however, that improvements in technology, changes in the nature and identity of ODR providers, and shifts in the public's comfort with technological platforms are on the cusp of reversing this tendency towards text (Ebner, 2012A). Indeed, we note that most of the new individual practitioners noted above do so using common videoconferencing platforms such as Adobe Connect or Skype. Given that video-conferencing has become a familiar and comfortable mode of communication for many in their business and personal life,[5] we suggest that increasingly, more mediators

[5] Recent data on the usage of such platforms leads us to believe this trend continues to grow. For example, one common platform, Skype has recently reached 250 million monthly users (Murph, 2012). Another, Google Hangouts is a part of Google+, a wide suite of communication and networking tools, which has more than 400 million users (Schroder, 2012).

and their potential parties are likely to feel comfortable with this medium for conducting mediation.[6]

Believing that this tendency towards online video-based mediation is indeed the wave of the future – even given the folly of trying to predict anything the future holds with regard to technology[7] – we find ourselves writing this article with a sense of urgency. Already in spin from being transitioned online, mediation practice once again needs to adapt to a new environment – the near-yet-distant environment of video-based communication. In this somewhat unfamiliar environment, nonverbal communication – of diminished importance in text-based communication - once again plays a major role. However, before we explore nonverbal communication in the online environment, we will explore a more basic issue challenging the feasibility of online mediation - the negative effects of online communication media on trust.

Trust in ODR

In e-mediation processes, the role of trust as a mediator's greatest asset does not diminish; indeed – it may be compounded. However, the online environment poses significant threats to the formation and maintenance of trust. Colin Rule, one of the

[6] In this regard, we note the work of Giuseppe Leon who, together with the Hawaii chapter of the Association for Conflict Resolution, is spearheading a project using Skype for conducting mediation simulations between parties situated at a distance, in order to train mediators. See, e.g., http://www.adrhub.com/profiles/blogs/mediators-around-the-world-improve-their-mediation-skills-with. Last accessed Feb 28th 2-13.

[7] Indeed, some authors are already looking beyond video and suggesting the benefits of holography for ODR (see Exon, 2002).

earliest advocates for ODR, suggested that trust might very well be the Internet's scarcest resource in a wide sense: "Transactions require trust, and the Internet is woefully lacking in trust" (Rule, 2002, p. 98). The literature on negotiation and dispute resolution, as well as the literature on other aspects of online communication, has noted many specific challenges to trust -creation and -maintenance in the online environment (Ebner 2007; Ebner 2012B).

Much of the literature on e-mediation, and on trust in computer mediated communication in general, has focused on text-based communication, primarily asynchronous, such as email –based communication. This lean media, providing few contextual cues for assessing trust seemed to present the greatest challenge to trust-investigators and warranted the most attention (Barsness and Bhappu 2004, Ebner et al., 2009). This has led to detailed mapping out of the topic, such as Ebner' s (2007) list of eight discrete challenges to trust and Exon's (2011) six building blocks for enhancing trust. However, while certain of these findings carry over to video communication, the lion's share of insight on this topic does not. Indeed, reading through the literature one gets the sense that there is an assumption, spoken or unspoken, that in video-based communication trust would not pose any more of a challenge than it does in face-to-face communication.

Indeed, research has found video interactions to be almost as good as face-to-face interactions for trust emergence. However, even if trust can emerge to the same degree through video interactions, in a quantitative sense, qualitative differences with regards to trust development and resiliency persist (Bos, Olson, Gergle, Olson, & Wright, 2002). We suggest that video presents new challenges to trust formation precisely owing to this

intuitive assumption that video and face-to-face communication are largely the same. In reality, video-based communication does not fill in the full range of cues and psychological impacts lacking in text-based communication. It only fills them in partially, and alters others – while giving the *impression* of providing them in full. Communicators' expectations that video would be the same as in-person may lead them to forgo conscious filtering of the unique set of contextual cues provided by online video communication. These could pose even greater challenges to mediators aiming to build trust, given the opportunities for misreading these cues by all communicators involved.

Developing Trust in video-based e-Mediation

Bringing the discussion above into mediators' attempts to develop trust with parties in the online, video-based environment, we first suggest that mediators are not venturing into wholly uncharted territory. Indeed, when using most commonly encountered videoconferencing platforms, a mediator will find that the attributes and actions conducive to building trust in in-person, face-to-face interactions carry over to the e-mediation setting to a large extent. Reviewing each of the previous mentioned nonverbal cues that contribute to trust, including those of rapport, mirroring, and mimicry, a mediator can apply each similarly in their e-mediation sessions.

However, this review and application must include care and adaptation, as characteristics of the online environment and the videoconferencing channel, do affect nonverbal communication. Awareness to some of the major effects can go a long way in facilitating simple adaptations - physical or technological. Such characteristics might include the potential for the Internet connection creating delay or disruptions in voice or

video, for poor lighting preventing people from being visible or shadowing them in particular ways; for noisy backgrounds and other audio issues, and for the camera's positioning not showing everyone who in the room.

Approaching these issues through the lens of nonverbal communication and utilizing the METTA model, some of the challenges to trust in video-based mediation, related to these characteristics of videoconferencing, are depicted in Table 2.

Table 2: METTA Model of Nonverbal Communication and nonverbal challenges in e-mediation

Movement	Are the movements of the mediator building rapport and creating trust? Are the movements of both the parties and the mediator visible? Is the mediator's eye contact with the screen or the webcam?
Environment	Is the location of the mediator and each party conducive to confidentiality? Is it too noisy? Are there distractions in the background such as people walking to and fro, or motion behind the mediator?
Touch	Is the mediator aware of movements that can be representative of anxiety or stress? Might the angle/frame of the camera restrict the mediator's ability to perceive such movements?
Tone	The tone of the mediator needs to be clear with limited "ums" and "ahs" while the technology has to not disrupt the fluency of the speakers by interrupting the audio channel.
Appearance	The mediator's clothing needs to display a professional presence while also ensuring the context is accounted for. Using earphones or some other type of headset might be perceived as inappropriate.

These concerns are formidable, not only to mediators but to other professionals in early stages of transitioning from face-to-face meetings, or from text communication, to video-based interactions. However, these characteristics are not inherently negative. On

the contrary, we suggest that through familiarity with their effects on nonverbal communication, and through approaching them with intentionality, mediators avoid trust pitfalls, but also harness these characteristics for enhancing trust-building.

In Table 3, we provide examples of how creating more opportunities for nonverbal channels to be used in video-based mediation increase the mediator's capacity to build trust with the parties.

Table 3: Using METTA to build trust

Movement	Make eye contact with the webcam, use open-handed gestures, orient your body towards the computer, head nod occasionally while listening, sit up right while occasionally lean forward.
Environment	Ensure each party participates from a quiet location to limits distractions.
Touch	Avoid fidgeting, playing with jewelry or your hair, avoid frequent touching of your face and your clothing.
Tone	Be prepared and confident – this helps ensure tone and paralanguage is positive.
Appearance	Dress suitably, the same as one would for conducting a face-to-face mediation process.

To demonstrate the particular characteristics of nonverbal communication through video, we will briefly expound on two issues: user-webcam proximity and the frame of vision, and eye contact and screen management.

Current videoconferencing technology allows for parties' and mediators' nonverbal actions to be visible to each other, reinstating the nonverbal communication cues that are absent in text based mediation. However, discussants' grasp of each other is not all-encompassing, and is more limited than it would probably be in a truly face-to-face, in-presence interaction. First, sensory information is limited to sight and sound.

Odor and touch are still missing. Second, even sight and sound are affected, and limited by the definition of webcams, the sensitivity of microphones, and the quality of internet connection. In addition to these limitations, one significant limitation exists with regard to the scope of vision. Parties and mediators do not see each other in their entirety. They see each other, on screen, in a window. The size of the window and how much of the user's body and background is visible might be affected by the choice of videoconferencing software and the hardware specifications of the webcam. However, one issue relating to the way each actor is viewed on-screen, which can be manipulated to serve trustbuilding, regards party-webcam proximity. Distance between the user and the webcam, as shown in the three examples below, can affect the process by contributing to, or hindering, trust building, based on the visibility of the nonverbal actions of the actor - parties or mediator.

Image 1

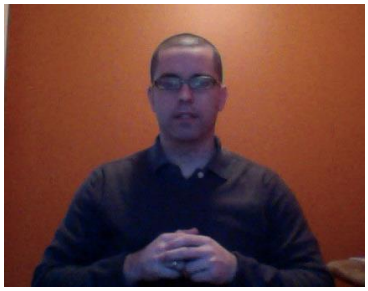


Image 2

Image 3

Image One demonstrates how one setting might limit the visibility of nonverbal cues, due to the actor being too close to the webcam. Due to this proximity, the screen is filled with his face – a somewhat artificial view in its own self – leaving his hands and body, as well as his background, invisible.

Image Two shows how another setting might serve to limit the visibility of nonverbal cues due to an excessive degree of distance between the actor and the webcam. While hands and body are now visible, micro expressions of the face and hands might easily go unnoticed or be misconstrued. In addition, external motion or actions in the background are easily visible and might distract or confuse.

Image Three demonstrates what we suggest as a "just right" balance for webcam-actor proximity in mediation settings. This distance allows for actor's facial expressions to be clearly visible as well as their hand gestures, posture, and body orientation; some background is visible for providing cues but attention is still directed towards the actor.

As noted above, making or maintaining eye contact is associated with trust, trustworthiness and liking (and by implication, rapport) (see Andersen, 2008; Beebe, 1980; Mehrabian, 1967; Zeigler-Kratz, 1990;); indeed this point is often made in mediation training. In the online video-based mediation setting, this important cue remains a bit elusive and contrived, due to the characteristics of most videoconferencing

platforms and the way computers are constructed. A mediator looking at a party's image on the screen, even if looking directly into the party's eyes, will appear to be looking elsewhere to the party. This is due to the fact that the mediator's computer webcam is not located behind the screen, but elsewhere - usually, although not always, at the top of the screen.[8] Looking at parties' eyes on the screen, in such a case, the mediator will appear to the party not to be focused on him or her, but rather to be looking downwards at something else, and not meeting their gaze. In this case, following the instinct to aim eyes towards eyes, and practicing training to the letter, would backfire due to the mediator adapting for media characteristics.

One solution is for mediators to retrain themselves from maintaining contact with parties' eyes, and instead to practice looking directly into the webcam, giving the impression that they are gazing directly at parties. This, however, hinders the mediator's own ability to view parties' nonverbal cues. Another simple solution to alleviate this issue, which works with many types of videoconferencing platforms (including, e.g., Skype, G-talk, Google Hangouts, and ooVoo), is to move - or "drag" - the video window showing the party to a point on the screen as close to the webcam as possible. This way, when looking at the party, the mediator's eyes are angled towards the party, giving the impression of eye contact. Of course given that in reality no *real* eye contact is made, mediators' actions in this regard will certainly feel artificial – however, they should enhance their ability to build trust and rapport with the parties.

[8] For example, parties using computers without integrated webcams might have the camera set up on their table, below the screen and to the side, pointing upwards.

These examples demonstrate how nonverbal communication through video, while sharing much in common with its off-camera, face-to-face counterpart, has unique characteristics that must be taken into consideration. Attention to the characteristics of video communication and how they affect the elements identified in the METTA model is likely to eliminate pitfalls and create uncover new opportunities for trust building.

Future research and implementation

Considering that online video-based mediation - and video-based interaction in general - is fairly new, there are many opportunities for research to be conducted measuring different aspects of the engagement process, the role of technology, and the impact nonverbal communication has on the session. Research can explore the initial expectations as well as post-process feedback from both mediators and parties offering for a multi-perspective view of video-based mediation.

Granted that mixed or combined methodologies offer unique perspectives into conflict resolution research (Druckman, 2005), both qualitative and quantitative means of research can be applied to this area of exploration. Surveys measuring various mediator skills and scale-based party feedback are current measures often employed in community mediation centers for measuring mediator effectiveness and process quality. These can be adapted and implemented for assessing nonverbal communication elements of online video- based mediation. These can be complemented by ethnographic interviewing of mediators and parties.

Research on video-based online mediation holds great promise for online as well as for traditional face-to-face mediation, owing to the capacity to record and review entire interactions in their original form. For example, a future study can explore the role of nonverbal communication during the mediator's introduction to the process. Having the mediator record his or her introduction and it being reviewed by expert raters allows many potential raters to be used regardless of their location as the file can be shared electronically. Additionally, because reviewing the process is conducted by means of the raters using the same technology and viewpoint encountered by parties in the actual mediation, it is arguably more accurate compared to people rating a mediator's introduction recording of an in-person mediation session. Simply, a recording of an online video-based mediation process contains all the information and cues that were experienced by parties in the actual recording. This, as opposed to reviewing a video-recording made of a face-to-face mediation session, in which case the reviewer is viewing a recording on a screen or monitor which was shot from a somewhat arbitrary point of view (not that of the actual parties), and which leaves out all the environmental and some of the nonverbal cues (e.g., the reviewer does not see a window in the corner which was not captured by the camera's frame, even though the actual parties did; the reviewer sees parties shaking hands with the mediator, but does not experience the sense of touch). Taking this into account, as further research emerges online video-based mediation will contribute to a greater understanding how mediators – online and in a traditional setting, can be effective and develop trust.

We suggest that our own suggestions, and any further research outcomes, are not limited to assisting mediators. Establishing interpersonal trust is always a challenge,

context notwithstanding. Findings on how to do it better will benefit other professionals whose efficacy depends on their ability to work with others at a distance in a collaborative manner based on establishing trust and rapport. Examples of such professionals might be team members engaged in projects spread across a large geographic area; corporate employees based in different locations; interviewers of any sort, such as academic researchers or journalists; diplomats engaged in international diplomacy; negotiators conducting their business online, online teachers and online counselors. Trust, so essential to mediators, has a market ranging far beyond mediation – and the ripples of research into trust in the context of mediation is likely to spread far.

Conclusion

Trust building is a necessary skill for mediators to be effective. Previous research has uncovered how mediators and parties believe trust can be created, while research in nonverbal communication has demonstrated the micro cues that correspond with trustbuilding. Similarly, other traits have been identified, which are based primarily on nonverbal cues - such as rapport, immediacy, mirroring and mimicry - that are associated with trust and support its development.

As Internet-based video technology proliferates as a communication channel for professional and private uses, mediators and other professionals whose practice relies on trust building must learn to operate in the video environment in a trust-promoting manner. Intentionality regarding nonverbal communication is an important component of this emerging new skillset. Mastering these skills will allow professionals to overcome trust-degrading media effects and conduct their business successfully at a distance.

References

Andersen, P. A. (2008). *Nonverbal communication: Forms and functions*. Long Grove, Il: Waveland Press.

Barsness, Z. I. & Bhappu, A. D. (2004). At the crossroads of technology and culture: Social influence, information sharing, and sense-making processes during negotiations. In M.J. Gelfand & J.M. Brett (Eds.), *The handbook of negotiation & culture*. Palo Alto, CA: Stanford University Press.

Beebe, S. A. (1980). Effects of eye contact, posture, and vocal inflection upon credibility and comprehension. *Australian Scan: Journal of Human Communication, 27*, 92-97.

Bos, N., Olson, J., Gergle, D., Olson, G., & Wright, Z. (2002). Effects of four computer-mediated communications channels on trust development [Electronic version]. In *Proceedings of SIGCHI Conference on Human Factors in Computing Systems* (pp. 135-140). NY: ACM Press.

Boulle, L. & Wade, J. (2010). Mediation workshop: basic course materials. DRC Resources. Paper 6. Retrieved from http://epublications.bond.edu.au/drc_pubs/6

Burgoon, J.K., Guerrero, L.K, & Floyd, K. (2010). *Nonverbal communication*. Upper Saddle River, NJ: Pearson.

Bush, R. A. B. & Folger, J. P. (1994). *The promise of mediation: Responding to conflict through empowerment and recognition*. San Francisco: Jossey-Bass.

Braeutigam, A.M. (2006). What I hear you writing is… issues in ODR: Building trust and rapport in the text-based environment. *University of Toledo Law Review, 38*, 101.

Carnevale, P. J. D. (1989). Contingent mediator behavior and its effectiveness. In K. Kressel and D. G. Pruitt, (Eds.), *Mediation research*. San Francisco: Jossey-Bass.

Curhan, J. R. & Pentland, A. (2007). Thin slices of negotiation: Predicting outcomes from conversational dynamics within the first five minutes. *Journal of Applied Psychology, 92*, 802-811.

Druckman, D. (2005). *Doing research: Methods of inquiry for conflict analysis*. Thousand Oaks, CA: SAGE.

Ebner, N. (2012A). E-Mediation. In M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.), *ODR: Theory and practice*. The Hague: Eleven International Publishing.

Ebner, N. (2012B). ODR and interpersonal trust. In M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.) *ODR: Theory and practice*. The Hague: Eleven International Publishing

Ebner, N. (2008). Online Dispute Resolution: Applications for e-HRM. In T. Torres-Coronas & M. Arias-Oliva (Eds.), *Encyclopedia of human resources information systems: Challenges in e-HRM*. Hershey, PA: Idea Group Reference Publishing.

Ebner, N. (2007) Trust-building in e-negotiation. In L. Brennan & V. Johnson (Eds.), *Computer-Mediated relationships and trust: Managerial and organizational effects.* Hershey, PA: Information Science Publishing.

Ebner, N. & Getz, C. (2012). ODR: The next green giant. *Conflict Resolution Quarterly 29*, 283-307.

Ebner, N., Bhappu, A., Brown, J.G., Kovach, K.K. & Kupfer Schneider, A. (2009) You've got agreement: Negoti@ing via email. In C. Honeyman, J. Coben & G. DiPalo (Eds.) *Rethinking negotiation teaching: Innovations for context and culture*. St Paul, MN: DRI Press.

Exon, S.N. (2002). The Internet meets Obi-Wan Kenobi in the court of next resort. *Boston University Journal of Science & Technology Law, 8,* 1-36.

Exon, S.N. (2011). *Maximizing technology to establish trust in an online, non-visual mediation setting. University of La Verne Law Review, 33,* 27.

Feldman, R. S. and B. Rime. (1991). *Fundamentals of nonverbal behavior*. New York: Cambridge University Press.

Gerzon, M. (2006). *Leading through conflict: How successful leaders transform differences into opportunities*. Boston: Harvard Business School Publishing.

Goldberg, S. B. (2005). The secrets of successful mediators. *Negotiation Journal, 21*(3), 365-375.

Goldberg, S. B., & Shaw, M. L. (2007). The secrets of successful (and unsuccessful) mediators continued: Studies two and three. *Negotiation Journal, 23,* 393-417.

Guerrero, L. K., & Hecht, M.L. (Eds.) (2008). *The nonverbal communication reader.* Long Grove, IL: Waveland.

Hall, J. A. (2008). *Nonverbal behavior in social psychology research: The good, the bad, the ugly*. Prepared for a volume based on Purdue Symposium on Behavior, May 5-6, 2008.

Harmon, K. M. J. (2006). The effective mediator. *Journal of Professional Issues In Engineering Education And Practice, 132,* 326-333.

Honeyman, C., Goh, B., & Kelly, L (2004). Skill is not enough: Seeking connectedness and authority in mediation. *Negotiation Journal, 20*(4), 489-511.

Kestner, P. B., & Ray, L. (2002). *The conflict resolution training program participants workbook.* San Francisco: Jossey-Bass.

Kolb, D. (1997) *When talk works*. San Francisco, CA: Jossey-Bass.

Lakin, J. L., & Chartrand, T. L. (2003). Using unconscious behavioral mimicry to create affiliation and rapport. *Psychological Science, 14,* 334-339.

Madonik, B. (2001). *I hear what you say, but what are you telling me? The strategic use of nonverbal communication in mediation.* San Francisco, CA: Jossey-Bass.

Matsumoto, D., Frank, M.G., & Hwang, H.S. (Eds.) (2013). *Nonverbal communication: Science and applications*. Thousand Oaks, CA: Sage.

Mehrabian, A. (1971). *Silent messages*. Belmont, CA: Wadsworth.

Mehrabian, A., & Ferris, S. R. (1967). Inference of attitudes from nonverbal communication in two channels. *Journal of Consulting Psychology, 31,* 248-252.

Moore, C. (2003). *The mediation process* (3rd ed.). San Francisco: Jossey Bass.

Murph, D. (2012). Skype CEO Tony Bates confirms 250m monthly users, talk Microsoft partnership and future plans. Retrieved from: http://www.engadget.com/2012/05/31/skype-ceo-tony-bates-microsoft-kinect-future-voip-communication-d10/

Nadler, J. (2004). Rapport in negotiation and conflict resolution. *Marquette Law Review, 87,* 875-882.

Nadler, J (2004). Rapport in legal negotiation: How small talk can facilitate e-mail deal making. *Harvard Negotiation Law Review, 9,* 223-253.

Patterson, M.L. (2011). *More than words: The power of nonverbal communication*. Spain: Aresta.

Pearlstein, A., Hanson, B. & Ebner, N. (2012). ODR in North America. In M.S. Abdel Wahab, E. Katsh & D. Rainey (Eds.) *ODR: Theory and practice*. The Hague: Eleven International Publishing.

Poitras, Jean. (2009). What makes parties trust mediators? *Negotiation Journal,* 25(3), 307-325.

Remland, M. S. (2009). *Nonverbal communication in everyday life* (3rd ed.). Boston, MA: Allyn & Bacon.

Riskin, L.L. (1994). Mediator orientations, strategies, and techniques. *Alternatives To High Costs of Litigation*, 11-112.

Robinson, J.D. (2008). Nonverbal communication in doctor-patient relationships. In L.K. Guerrero & M.L. Hecht (Eds.) *The nonverbal communication reader.* Long Grove, IL: Waveland.

Safe Horizon Community Mediation Basic Training Manual (2008).

Semnani-Azad, Z., Adair, W.L. (2011). The display of 'dominant' nonverbal cues in negotiation: the role of culture and gender. *International Negotiation, 16*(3), 451-479.

Scanlon, K. M. (1999). *Mediator's deskbook.* New York: CPR Institute for Dispute Resolution.

Schroder, D. (2012). Google+ has 400 million users. Retrieved from: http://mashable.com/2012/09/18/google-has-400-million-members/

Slocum, N. & Langenhove. L. (2004). The Meaning of Regional Integration: Introducing Positioning Theory in Regional Integration Studies. *Journal of European Integration, 26*(3), 227-252.

Tickle-Degnen, L. (2006). Nonverbal behavior in its functions in the ecosystem of rapport. In V. Manusov & M. Patterson (eds.), *The Sage handbook of nonverbal communication* (381-400). Thousand Oaks, CA: Sage.

Tickle-Degnen, L., & Rosenthal, R. (1990). The Nature of Rapport and Its Nonverbal Correlates. *Psychological Inquiry, 1*, 285-293.

Thaler, R.H., Sunstein, C.R. (2008). Nudge: Improving decisions about health, wealth, and happiness. New York, NY: Penguin Books.

Thompson, J. (2011). *Nonverbal communication and mediators: An ethnographic approach and semiotic analysis.* (Unpublished PhD candidature paper). Griffith Law School, Brisbane, Australia.

Thompson, J. (2013). *Nonverbal Communication & Mediators: Practical Tips Based on Research.* Presentation and infographic at the ABA Section on Dispute Resolution Conference. Chicago, IL.

Trees, A. R., & Manusov, V. (1998). Managing face concerns in criticism: Integrating nonverbal behaviors as a dimension of politeness in female friendship dyads. *Human Communication Research, 24*, 564-583.

Wheeler, M. (2003). *Nonverbal communication in negotiation*. Boston: Harvard Business

School Publishing.

Yiu, T. W. & Lai, W. Y. (2009). Efficacy of trust-building tactics in construction mediation. *Journal of Construction Engineering and Management, 135*(8), 683-689.

Zeigler-Kratz, N., & Marshall, L. L. (1990). Impressions of therapists: The effects of gaze, smiling and gender. *Journal of Psychology and the Behavioral Sciences, 5*, 115-129.

Zubek, J., Pruitt, D.G., Peirce, R.S., McGillicuddy, N.B., & Syna, H. (1992). Disputant and mediator behaviors affecting short-term success in mediation. *The Journal of Conflict Resolution, 36*(3), 546-572.

Hamline University's School of Law's Journal of Public Law and Policy

Volume 36 | Issue 2 Article 6

2015

Fairness, Trust and Security in Online Dispute Resolution

Noam Ebner
Creighton University, noamebner@creighton.edu

John Zeleznikow
Victoria University, Melbourne, Australia, john.zeleznikow@vu.edu.au

FAIRNESS, TRUST AND SECURITY IN ONLINE DISPUTE RESOLUTION

Noam Ebner & John Zeleznikow [1]

I. INTRODUCTION

The past fifteen years have witnessed immense growth in the application of technology in the field of conflict resolution. One area of particular interest is the growth of the practice and study of Online Dispute Resolution (ODR), which has its roots in the worlds of technology and of Alternative Dispute Resolution. As the field of ODR develops, its terminology and conceptual frameworks require exploration and clarification, with special care taken to convey shared meaning between participants coming from the two contributing worlds noted above.

In this article, we introduce three conceptual areas – key concepts in ODR – that would benefit from such clarification, showing the need for suitable terminology and demonstrating the value of refined conceptual frameworks. Part II of this article will provide a brief background of the history and development of ODR, will discuss many of the benefits of using ODR in the modern dispute resolution process, and will address the confusion regarding ODR terminology. Part III will focus upon three core elements of ODR: trust, fairness, and security. This section will pay particular attention to the unique benefits and risks of the ODR process through the lens of each element. Finally, Part IV concludes the article and presents the opportunity for further research.

II. BACKGROUND

A. What Is Online Dispute Resolution?

While there is no generally-accepted definition of Online Dispute Resolution (ODR), practitioners can think of ODR as using

---

[1] Noam Ebner, Creighton University, Omaha, NE, [NoamEbner@creighton,edu] and John Zeleznikow, Victoria University, Melbourne, Australia [John.Zeleznikow@vu.edu.au.] The first draft of this paper was presented at the Australian National Mediation Conference, Melbourne, Australia, September 8-12, 2014.

the Internet to perform Alternative Dispute Resolution (ADR).[2] While this is a helpful working definition, it is important to note that one difficulty in providing a more precise and widely accepted definition is that ODR is many things, to many people.

Generally speaking, ODR describes a field of activity that has developed since the mid-1990s. The e-commerce boom brought with it a wave of disputes resulting from online activity; resolving these disputes online seemed to be a logical act of "fitting the forum to the fuss,"[3] a long-held principle in the ADR field. Since this time, however, ODR has crossed many boundaries assumed by its early innovators, and is practiced across a wide range of contexts, regardless of whether the disputes it services originated online or in traditional settings.[4]

One perspective on ODR is, as we shall see, that ODR is not merely a tool helpful to e-commerce, but, instead, a natural evolution of the trend towards using alternative approaches to litigation across a wide range of civil, commercial, and family disputes.

One reason for this phenomenon is that average trials are getting longer and more complex, and the cost of pursuing traditional legal recourse is rising. Focusing on traditional disputes, researchers explain that the potential transaction costs of litigation provide an incentive for nearly *all* legal suits to settle.[5]

ODR provides solutions for cases that do not justify long, complex trials – such as in the case of low-value transactional disputes, in cross-border and cross-jurisdictional contexts. The unsatisfied purchaser of an item on eBay is more likely to prefer an

---

2 ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY (1st ed. 2010).

3 Frank E. Sanders & Stephan B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

4 Noam Ebner, *E-Mediation*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 203-206 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

5 George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

online process for achieving redress rather than pursuing litigation with the seller, who may be based in another country.[6]

A second reason for the trend towards ADR lies in its growing acceptance by mainstream conflict systems, including court systems.[7] This acceptance has trickled down to affect the attitudes of litigants themselves.[8] Focusing on this reason is, in many ways, the natural next step in the evolution of ADR's rise (which has spanned the past four decades.) While the focus of ADR has largely been on face-to-face processes, incorporating technology into ADR processes has quietly been commonplace for a long time. Primarily, this has taken the form of using the telephone[9] as a simple measure for convening people who cannot or should not be together in the same room, whether owing to geographical situations, to extremely vitriolic situations, or to situations where violence has occurred.[10]

As Internet technology has become widespread, much attention has been directed at using these tools for dispute

---

[6] Steve Abernethy, *The SquareTrade Experience in Online and Offline Disputes*, PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR 2003, *available at* http://www.mediate.com/Integrating/docs/Abernethy.pdf (last visited May 25, 2015).

[7] Modern alternatives to litigation have been heavily influenced by the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, which took place in Minneapolis, Minnesota from April 7 to 9 1976. At this conference, US Chief Justice Warren Burger encouraged the exploration and use of informal dispute resolution processes. *See* LODDER, *supra* note 1.

[8] *See, e.g.*, Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L REV. 637 (2014).

[9] *See* Jessica Carter, *What's New in Telephone Mediation? A Public Sector Mediation Service Steps Up to a New Level of Telephone Access for Parties in Mediation*, 11 *ADR BULLETIN* 1, art. 4 (2009); *see also* Mark Thomson, *Alternative Modes of Delivery for Family Dispute Resolution: The Telephone Dispute Resolution Service and the Online FDR Project*, 17 J. OF FAM. STUD. 253 (2011); Claudine SchWeber, *Your Telephone May be a Party Line: Mediation by Telephone*, 7 MEDIATION Q., 191 (1989).

[10] LODDER, *supra* note 1; *see also* Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34 (1994).

resolution.[11] In some ways, ODR is a natural evolution of convening over the telephone. Technology now offers parties different levels of immediacy, interactivity and media richness to choose from.[12] Through some platforms, parties can choose to communicate through text;[13] through others, they can convene in real-time video, allowing them to see each other and, possibly, a mediator.[14]

It is important to note, however, that ODR is far more than a range of new communication platforms. In fact, when discussing ODR one might be discussing any of the following:

The online communication platform used for exchanging messages and offers in an ODR process;[15]

A wide range of individual processes from the ADR spectrum that can be conducted online (e.g., online negotiation, online mediation);[16]

---

[11] For early work on the subject, see Ethan Katsch & Janet Rifkin, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICT IN CYBERSPACE (2001) and COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: FOR E-COMMERCE B2B, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS (2002). For a recent compendium of work, see MOHAMED S. ABDEL WAHAB, ETHAN KATSH & DANIEL RAINEY, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION (2012).

[12] *See* A. Bhappu & Z. Barsness, *Risks of Email*, *in* THE NEGOTIATOR'S FIELDBOOK 395-400 (Andrea Kupfer Schneider & Christopher Honeyman eds. 2006).

[13] *See, e.g.*, Anne-Marie G. Hammond, *How Do You Write Yes? A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RES. Q. 261 (2003).

[14] For discussion of video mediation see, Noam Ebner & Jeff Thompson, *@Face Value? Nonverbal Communication and Trust Development in Online Video-Based Mediation*, 1 INT'L J. ONLINE DIS. (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395857.

[15] This communication platform might be intended for the general public and widely accessible, whether for free (e.g., Skype) or at cost (e.g., telephone). On the other hand, it might be a specifically designed internet-based platform tailor-made to conduct dispute resolution process through, such as the platforms offered by companies such as eBay and PayPal or by ODR service providers such as Modria and Juripax. These platforms are tailored to support the types of communication and case-management encountered in dispute resolution.

[16] The spectrum of ODR, in terms of the processes offered online, is far too wide to detail here. For discussion of a variety of contexts in which ODR is offered, and

An ODR system - an environment in which parties to specific types of disputes are led through a particular process or set of processes on their way to a resolution, or;[17]

ODR technology / software, aiming far beyond the 'communications platforms' discussed above.[18]

B. Terminology and the Development of ODR

The ambiguity of terminology regarding the very meaning of the term "ODR" is not reserved solely for top-level terms. We certainly do not say this disparagingly, but rather encouragingly. ODR is a very young field and is advancing in leaps and bounds; it is little wonder that conceptual work, particularly of an academic nature, will lag somewhat behind. In our view, much of the work in the domain of ODR has focused upon practice rather than theory. A recent book edited by Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey is probably the first to delve conceptually into some of ODR's major themes[19]; in addition to chapters surveying ODR practice on six continents,[20] the book includes chapters zooming in on specific topics: artificial intelligence, mobile devices, e-commerce, consumer conflicts, government, courts and

---

the range of processes designed to address them, see WAHAB ET AL., *supra* note 11.

[17] As opposed to an individual process, the system is a component of a larger environment. The best example of such a system is eBay's dispute resolution system. According to Colin Rule, former director of Dispute Resolution at E-Bay, thirty-five million disputes were filed with E-Bay in 2006. Colin Rule, Address at the Fourth International Conference on Online Dispute Resolution (June 8 2007); *see About Us*, MODRIA, http://www.modria.com/our-story/ (last visited May 15, 2015). The number of cases jumped to about sixty million disputes by 2012. *See* Arthur Pearlstein, Bryan Hanson & Noam Ebner *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 203-206 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

[18] ODR developers are seeking to create intelligent agents, and robust negotiation support systems (NSS). These systems aim to assist humans in achieving better outcomes then they would themselves, even when performing to the peak of their abilities.

[19] WAHAB ET AL., *supra* note 11.

[20] North America, Europe, Australia, Asia, Latin America and Africa. *Id.*

ombudsmanship.[21] This book is a worthy springboard for continued engaging with other theoretical principles of ODR.

In that spirit, this article aims to uncover other conceptual ambiguities and point out how the field can develop better through making distinctions between similar, yet different, concepts. In particular, this article will spotlight concepts and terms whose blurring are a logical part of ODR's evolution, given that the marriage between the world of technology and that of dispute resolution has led to reciprocal adoption of some of the most commonly used terms originating from either side. As precision gives way to convenience, and specific intent to general understanding, it is certainly understandable if some blurring of terminological usage and intent occurs.

As a young and rapidly growing interdisciplinary area of practice and inquiry, ODR has been served well by having areas of constructive vagueness, in which theorists and developers from different backgrounds could engage with each other using generally-understood terminology (even if not scientifically precise.) Our suggestion that ODR has reached a stage at which this terminological expansion can be revisited, with newly created or spotlighted frameworks, is in essence a suggestion that ODR has reached a milestone of maturity.

This clarification process is in no way a linguistic or theoretical endeavor; it we hope it to have immediate and significant practical impact. By providing new frameworks for exploring ODR platforms, processes, technology and systems, we hope to assist ODR developers and practitioners with new, sophisticated, tools for their work.

III. CORE ELEMENTS OF ONLINE DISPUTE RESOLUTION

In this paper, we will briefly introduce three specific elements that are core to ODR and would benefit from having a clarifying, discerning spotlight aimed their way: fairness, trust and security. In

---

[21] *Id.*

a general sense, all three of these issues are important to any discussion of ADR, including in face-to-face settings.[22] In the realm of online processes and systems, they arguably have even greater importance. However, in the transition from discussing the familiar face-to-face setting, to discussing the online, the meanings associated with these terms have multiplied.[23] Since engendering senses of trust, security and fairness may be crucial to ODR's development and acceptance, we suggest that accurate understanding of these terms is essential.

As we discuss below[24], it seems clear that these concepts are important to all the connotations associated with the term ODR, and are key whether one is focusing on a communication platform, a dispute system, an individual process or a particular form of technology.[25] For example, one might posit that without access to secure, trusted and fair online dispute resolution systems, consumers would be reluctant to purchase products over the World Wide Web, whether from eBay, Amazon, low cost airlines or a multitude of other companies. Lacking trust in their counterpart, or in the neutral assisting them, individuals might not participate in a mediation process. Wary of insecure communications platforms, they may refrain from disclosures that could lead to quick resolution of conflicts. Further, concerned that a technological platform is programmed in way that is unfair to them, they may refrain from accepting its advice. Hence, to advance the field of ODR, we need to consider and develop issues of fairness, trust and security.

A. Fairness in Online Dispute Resolution

One of the major concerns raised by people using negotiation processes is about the fairness or justice of the process. [26] Individuals undertake negotiation to derive better outcomes than would

---

[22] *See infra* Part III(A)-(C).
[23] *See infra* Part III(A)-(C).
[24] *See infra* Part III(A)-(C).
[25] *See supra* Part II(A).
[26] John Zeleznikow & Andrew Vincent, *Providing Decision Support for Negotiation: The Need for Adding Notions of Fairness to Those of Interests*, 38 UNIV. TOLEDO. L. REV. 101 (2007).

otherwise occur (either through abandoning the engagement with the other, or through engaging in other modes of conflict).[27] Negotiation processes can be classified as distributive or integrative.[28] In distributive approaches, the problems are seen as *zero sum* and resources are imagined as fixed: *divide the pie*.[29] In integrative approaches, problems are seen as having more potential solutions than are immediately obvious, and the goal is to *expand the pie* before dividing it.[30] Parties attempt to accommodate as many interests of each of the parties as possible, leading to the so-called "win-win," or "all gain," approach.[31] Traditional negotiation decision support has focused upon providing users with decision support on how they might best obtain their goals.[32]

Both of these approaches to negotiation might be understood to include commonly expressed notions of "fairness." For example, in integrative negotiation, one might consider that meeting the interests of all parties involves meeting these *equally*. One might also encounter parties who, while negotiating integratively, [33] express an interest in "being treated fairly", or relying on an objective criteria of "fairness" to assess any potential agreement.[34] In distributive negotiation, one party might frame her offer to split things down the middle as being "fair"; however, one notion of "fairness" which is not focused on in either of these approaches is the notion of an objective legal measure of "fairness" – that is, legal justness.

In some negotiation contexts, however, legal fairness is important.[35] For example, in Australian Family Law, the interests of

---

[27] Id.

[28] RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Zeleznikow & Vincent, *supra* note 26.

[33] Such terms often appear in the seminal work of Roger Fisher and William Ury on interest-based negotiation (an approach related to integrative negotiation. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

[34] *Id.*

[35] Zeleznikow & Vincent, *supra* note 26.

the child are considered paramount, so the interests of the parents are negligible in negotiations between them.[36] Similarly, in employment law, individual bargaining between employers and employees might lead to basic needs and rights, such as recreation leave and sick leave, to be whittled away.[37] In both of these cases, parties have restricting standards of "fairness" imposed on them by law and the courts, limiting their negotiation range.

Expanding on the notion of an integrative or interest-based negotiation, scholars developed the notion of principled negotiation.[38] Principled negotiation promotes deciding issues on their merits rather than through a haggling process focused on what each side says it will and will not do.[39] In the domain of legal negotiation, Mnookin and Kornhauser introduced the notion of bargaining in the shadow of the trial (or law).[40] By examining the case of divorce law, they contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes.[41] The question of "What would a judge do in this case?" is therefore looming over parties' shoulders at an out-of-court negotiation session.[42] Thus, legal norms find their way into negotiation. The threat of a judicial decision is one way in which their effect is posed;[43] another is as a set of rules which parties might naturally adhere to, given that they are objective criteria,— standards legitimized by the law or society and not only by one party's say-so.[44]

---

[36] *See* John Zeleznikow & Emilia Bellucci, *Legal Fairness in Alternative Dispute Resolution Processes – Implications for Research and Teaching*, 23 AUSTRALASIAN DISP. RESOL., J. 265 (2012).

[37] *Id.*

[38] FISHER & URY, *supra* note 33.

[39] *Id.*

[40] Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 850 (1979).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* FISHER & URY, *supra* note 33.

The role of fairness and justice in negotiation and other ADR processes is complex. Fairness includes several different aspects, with the foremost divide being that between distributive (or outcome) fairness, and procedural fairness.[45] In the environment created by the Internet, these complexities are compounded.

One challenge with adding "*legally just*" elements into ODR systems lies in the notion that ODR systems, by their nature, lend themselves to trans-jurisdictional situations and interactions.[46] Of course, Negotiation Support Systems[47] created for particular situations/jurisdictions (such as for Australian Family Law) can be more easily calibrated in this regard;[48] particular parameters can be pre-set according to law, and topics requiring resolution under law can be designated as mandatory fields in the system.[49] On the other hand, contexts or marketplaces in which there is no generally-applicable set of legal norms might greatly benefit from the development of measures, or at the very least principles, for the construction of negotiation support systems.[50] Alternatively, these marketplaces could benefit from the creation of dispute systems designs which are, in some way resembling legal, "just" and "fair."[51]

Through an examination of the relevant literature in a variety of domains – including international conflicts, family law, and sentencing and plea bargaining – and an in-depth discussion of negotiation support tools in Australian family law, Zeleznikow and Bellucci (2012) have developed a set of important factors that should

---

[45] For elaboration on this topic see, Nancy A. Welsh, *Perceptions of Fairness, in* THE NEGOTIATOR'S FIELDBOOK, 165-74 (Andrea K. Schneider et al. eds., 2006).

[46] *See* Abernathy, *supra* note 8.

[47] *See* note 18 and accompanying text.

[48] John Zeleznikow, *Methods for Incorporating Fairness into Development of an Online Family Dispute Resolution Environment*, 22 AUSTRALASIAN DISPUTE RESOLUTION J. 16 (2011).

[49] *Id.*

[50] *Id.*

[51] ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 357-386 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

be incorporated into "fair" negotiation support processes and tools.[52] These factors include:

Transparency[53] - For a negotiation to be fair, it is essential to be able to understand - and, if necessary, replicate - the process in which decisions are made.[54] In this way unfair negotiated decisions can be examined, and if necessary, be altered;[55]

Highlighting and clarifying the shadow of the law[56] –In legal contexts, awareness to the probable outcomes of litigation provides parties with beacons or norms for the commencement of any negotiations – as they inform them of their alternatives to negotiation.[57] Bargaining in the shadow of the law thus provides standards for adhering to *legally just* and *fair* norms.[58] Providing disputants with advice about likely court outcomes by incorporating such advice in negotiation support systems can help support fairness in such systems.[59] In non-legal contexts, and in contexts in which multiple legal norms compete and clash, which norms cast this shadow? Without answering this question, we suggest that considering it, and, if possible, providing parties with a set of rules that will determine outcomes, might promote a sense of fairness.

Limited discovery[60] - Even when the negotiation process is transparent, it can still be flawed if there is a failure to disclose vital information.[61] Discovery processes increase settlements and decrease trials by organizing the voluntary exchange of information.[62] This benefit is often lost in a negotiation, especially if important information is not disclosed, or even worse, hidden.[63]

---

52 Zeleznikow & Bellucci, *supra* note 36.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 Zeleznikow & Bellucci, *supra* note 36.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*

Requiring specified aspects of disclosure in a negotiation might help enhance the fairness of the negotiation process.[64] Incorporating these factors does, however, have some drawbacks for the development of negotiation support systems:

(1) Disputants might be reluctant to be frank;

(2) Disputants may see mediators as biased;

(3) There is difficulty and danger in incorporating discovery, both in terms of time and money; and

(4) There is a difficulty in realising, ahead of time, the potential repercussions of disclosing confidential information to one's negotiation counterpart.

However, in thinking about incorporating fairness into a platform or a system, it may be that considering ways to organize, support and encourage information-sharing, rather than coercing the same, may be very helpful for promoting a sense of fairness.[65]

B. Trust in Online Dispute Resolution

We now discuss two central concepts that seem to have acquired multiple meanings, contexts and applications when discussed in the literature on ODR. "Trust" has deep roots in the context of dispute resolution, and stretching the concept to include technological aspects has strained its meaning to some extent. "Security" has deep roots in the field of computing and online communications, but its application to issues in dispute resolution requires refining.

Beginning with trust, this inconsistency in the discussion of trust in the ODR literature has been noted by Ebner, who suggests differentiating categorically between usages of the term "trust" as it relates to ODR.[66] Elaborating on this model, we suggest that four such categories exist.

i. ODR as a trust provider/facilitator.

---

[64] Zeleznikow & Bellucci, *supra* note 36.

[65] *Id.*

[66] Noam Ebner, *ODR and Interpersonal Trust*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 357-386 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

Incorporating ODR into systems such as e-commerce is one measure expected to raise consumers' level of trust in the system.[67] Continuing development of the Internet, from a financial perspective, has always depended on the success of e-commerce, which is, in turn, absolutely dependent on trust.[68] This fragile condition has been summarized by Colin Rule's statement: "Transactions require trust, and the Internet is woefully lacking in trust."[69]

ii. User's trust in ODR

ODR must be marketed, and its technology must be constructed, in such a way that the public will trust it as an efficient and effective way of managing their disputes. This is no simple challenge. All forms of ADR have, historically, encountered public distrust at one point or another. In our experience, the notion of conducting these processes online often kindles strong distrust even from practitioners of ADR. Viewing dispute resolution as a process requiring warmth and human interaction, professionals may find it hard to imagine that Internet communication – seen as cold and distance-creating – could support the process. There is no reason to expect higher levels of trust amongst the general public. As a field, ODR must convince users that they can trust that the technology used will be benevolently designed or at least neutral. Practitioners must convince user that the technology a). will not fail or freeze up; b). will be able to support their dispute; c). will be competent in performing as promised; d). will not involve time or costs beyond what the consumer envisions, and; e). will be, in general, user-friendly.

iii. Interpersonal trust

Parties utilizing the ODR experience not only levels of distrust inherent in most conflict situations; they are also hindered by challenges to trust between parties, and trust between parties and

---

[67] Rule, *supra* note 11.
[68] *Id.*
[69] *Id.* at 98.

their neutral, which are triggered by the nature of online communication and of the online environment.[70]

iv. *Trust in content offered by the system*

If an ODR system is going to provide parties with advice about dispute resolution norms (such as the outcomes of similar cases resolved in the past, information regarding the legal or marketplace norms affecting the dispute, or likely court outcomes) how can we enhance parties' trust in the advice? Untrusted advice will not have the effect the system was designed to encourage. If the system is going to give advice about trade-offs or optimizing agreements,[71] how can we ensure a sufficient degree of trust in the processes (the algorithms underlying and generating this advice) for doing so?If the system is going to provide an outcome (such as, the result of an automated blind bidding, or an automated decision on whether the type of claim raised is legitimate or actionable in the first place,)[72] how do we enhance users' trust in these outcomes? Obviously, a powerful connection between users' trust in the content, and the degree to which the system is perceived as "fair" exists, demonstrating the need for close examination of these concepts and the ways they interact in ODR systems.[73]

C. SECURITY IN ONLINE DISPUTE RESOLUTION

Similar to the term "trust," the term "security" has applications in the world of computer science as well as in the context of ADR. The world of computing has always been interested in protecting systems and data from malfeasant access. As the Internet

---

[70] For further elaboration on interpersonal trust in the online environment, see Ebner, *supra* note 66.

[71] *See, e.g*, John Nash, *Two Person Cooperative Games*, 21 ECONOMETRICA 128 (1953); Steven J. Brams & Alan D. Taylor, FAIR DIVISION, FROM CAKE CUTTING TO DISPUTE RESOLUTION (1996); Zeleznikow & Bellucci, *supra* note 36; Ernest M. Thiessen,& Joseph P. McMahon, *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643 (2000).

[72] LODDER, *supra* note 1. See, in particular, Chapter Two of this text for a discussion of norms for the use of technology in dispute resolution.

[73] *Id.*

developed, new forms of threats to systems and data have emerged, and this has resulted in a never-ending cycle of security measures and breaches.

In traditional mediation, the term 'security' might be related to information security, discussed in terms of confidentiality (which the mediator promises parties, or which they promise each other)[74] or to privilege (which the law often grants to protect mediation conversations, documents, and testimony from making its way into the courtroom).[75] In addition, the term security might denote parties' sense of wellbeing and comfort. This might span "emotional security," where parties feel in a safe place, in competent hands, dealing with a neutral they can trust, and protected from their counterparty's abuse, or it might be be related to physical security – in the sense that the setting and the ground-rules are designed to prevent things from getting out of hand, or in the sense that screening or other measures might be necessary to avoid threats to physical wellbeing (e.g., in situations where violence is/has been an issue)[76]

As these worlds converge in the practice of ODR, it is important to separate between different connotations of the term; as a result of this importance, we have developed a framework for differentiation between four types of security.

i. Information Security

This context connotes the security of the ODR process in terms of protecting parties' information from being shared by outsiders to the process as a result of to human activity. Included are familiar dispute resolution issues such as a mediator's duty to keep what she learns to herself, parties' contracting with each other to keep a process confidential, and the legal notion of privilege, protecting

---

[74] Samara Zimmerman, *Judge Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in Bad Faith Should Be Reevaluated in Court-Ordered Mandatory Mediation*, 11 CARDOZO J. CONFLICT RESOL. 353 (2009).

[75] *Id.*

[76] Elisabeth Wilson-Evered et al., *Towards an On-Line Family Dispute Resolution Service in Australia*, *in* MOBILE TECHNOLOGIES FOR CONFLICT MANAGEMENT 125-40 (Marta Poblet ed., 2011).

information from being uncovered by parties or judges in the course of a legal process.

ii. Data security

This context focuses on the protections set in place around the communication channels, the software, the servers and any hardware used for ODR. Such protection aims to prevent external people from hacking the system and obtaining non-public information, whether this is directly related to a dispute (e.g., pictures uploaded as evidence in an online arbitration case) or not (e.g., addresses and phone numbers). Additionally, focusing on this aspect of security would suggest that internal limitations be set in place to ensure that parties to disputes or their neutrals cannot access areas or information they are not allowed to view (e.g., protecting a conversation held in a private caucus chat room between one party and a mediator from being viewable by the other party).

iii. Personal security

In this context, security connotes the provision of safe and clearly defined processes to protect users from actual harm, whether physical or emotional.[77] In ODR, the risk of physical harm is reduced, owing to the parties' physical separation; indeed, ODR can serve an important function in providing ADR services in cases where there is the potential for domestic violence (or in other cases where there is a need for shuttle mediation.)[78] Interestingly enough, in this domain we have noted that some disputants want to use ODR, yet prefer not to utilize available video conferencing for the purposes of convening; the reduced social presence of their counterparty, it seems, lends to an enhanced sense of personal security on an emotional level.

iv. System security

---

[77] *Id.*

[78] *Id.; see also* Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence,* 24 OHIO ST. J. DISP. RES. 349 (2009).

Used in this context, security connotes the degree to which users feel confident that the ODR service they are using – the technological platform or its human operators – is not utilizing their information, participation, behavior or data in any way. As a user, my sense of security might be enhanced so long as I feel the service is not using my data, selling my data, using me as an unknowing participant in an experiment, or anything else. Specific uses that I, as a user, might be concerned about, or might certainly like to be consulted about, might include the service, *inter alia* : 1) using my data, without my permission; 2). using data in ways I might not like; 3).data mining, for any purposes; 4). learning about conflict behavior (beyond what is needed to service my own dispute); 5). learning about bargaining behavior (beyond what is needed to service my own dispute); 6.) learning about typing speed, time spent on particular pages, or advertisement-clicking – preferences, and; 7). any other use of data else.

IV. CONCLUSION

To become a more mature domain, Online Dispute Resolution (like its older sibling Alternative Dispute Resolution) needs to develop theoretical models as well as implement practical solutions. Prevalent amongst these theoretical issues – with critical practical ramifications - are the concepts of fairness, trust and security in ODR.

In this brief article we have introduced and discussed critical issues in each of these domains, and demonstrated why they need further development. We have noted that for ODR systems to be considered *fair*, we must ensure that such systems are transparent, give advice about the shadow of the law and alternatives to negotiation as well as provide some degree of transparency.

When examining trust in ODR, we need to examine ODR's role in providing trust in online activities, consider the effect of users' trust in ODR on the field's development, recognize the unique dynamics of interpersonal trust development in the online environment, and enhance users' trust in advice or other content

offered by an ODR system. We have also suggested that there are four distinct connotations of the term "security" in ODR: Information Security, Data Security, Personal Security and System Security. Finally, we note that that these three concepts of fairness, trust and security all merit closer examining; the interactions between them are worthy of further research as well.

Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?

Julio César Betancourt

Elina Zlatanska

1. Introduction

Online Dispute Resolution (ODR) refers to the use of Alternative Dispute Resolution (ADR)[1] mechanisms over the internet.[2] ODR methods can be used to deal with both offline- and online-related disputes. The idea of using ADR mechanisms "online", as opposed to "offline", appears to have arisen in the 1990s.[3] During that decade, some of the most noticeable ODR services were provided by: (1) the Virtual Magistrate Project[4]; (2) the Online Ombuds Office (OOO)[5]; and (3) the Online Mediation Project.[6] These projects were originally developed under the auspices of various institutions, including the American Arbitration Association (AAA) and the National Center for Automated Information Research (NCAIR).

[1] The *initialism* ADR, commonly and mistakenly referred to as an *acronym* for "Alternative Dispute Resolution", was coined by Professor Frank E.A. Sander of Harvard Law School. See Frank Sander, "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decisions: Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* 111–134; Frank Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37(1) *University of Florida Law Review* 1; and Simon Roberts et al., *Dispute Resolution: ADR and the Primary Forms of Decision-Making* (Cambridge: Cambridge University Press, 2005), p.5. ADR, in plain English, refers to the idea of settling and resolving disputes through different means other than litigation. As to the notion of ADR, see Henry Brown et al., *ADR Principles and Practice* (London: Sweet & Maxwell, 1993), p.9; Karl Mackie et al., *The ADR Practice Guide* (London: Butterworths, 2000), pp.8–10; George Applebey, "Alternative Dispute Resolution and the Civil Justice System", in Karl J. Mackie (ed.), *A Handbook of Dispute Resolution: ADR in Action* (London: Routledge, 1991), p.26 and Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (New York: Routledge-Cavendish, 2004), p.2.

[2] ODR encompasses a series of online means of communication, including "e-mail, Internet Relay Chat (IRC), instant messaging, Web forum discussions, and similar text-based electronic communications": in Robert Gordon, "The Electronic Personality and Digital Self" (2001) Feb–April *Dispute Resolution Journal* 11. See also Jason Crook, "What is Alternative Dispute Resolution (ADR)?", in Julio César Betancourt (ed.), *What is Alternative Dispute Resolution (ADR)?* (London: Chartered Institute of Arbitrators, 2010), p.25; José Antonio García Alvaro, "Online Dispute Resolution—Unchartered Territory" (2003) 7(2) *Vindobona Journal* 187; Jerome T. Barret et al., *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (San Francisco: Jossey-Bass, 2004), p.261; Nadja Alexander, "Mobile Mediation: How Technology is Driving the Globalization of ADR" (2006) 27(2) *Hamline Journal of Public Law & Policy* 248. For a different view, see Rossa McMahon, "The Online Dispute Resolution Spectrum" (2005) 71(3) *Arbitration* 218.

[3] See, generally, Colin Rule, *Online Dispute Resolution for Business* (San Francisco: Jossey-Bass, 2002). See also Ethan Katsh, "Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes through Code" (2004) 49 *New York Law School Law Review* 275.

[4] See E. Casey Lide, "ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation" (1996) 12 *Ohio State Journal on Dispute Resolution* 219. See also Alejandro E. Almaguer et al., "Shaping New Legal Frontiers: Dispute Resolution for the Internet" (1998) 13 *Ohio State Journal on Dispute Resolution* 719.

[5] For a more complete explanation of the concept of ombudsman, see Talbot D'Alemberte, "The Ombudsman, a Grievance Man for Citizens" (1966) 28(4) *University of Florida Law Review* 545; George B. McClellan, "The Role of the Ombudsman" (1969) 23 *University of Miami Law Review* 463; Mary Seneviratne, "Ombudsmen 2000" (2000) 9 *Nottingham Law Journal* 13; Ian Harden, "When Europeans Complain: the Work of the European Ombudsman" (2000) 3 *Cambridge Yearbook of European Legal Studies*, pp.199–208.

[6] For an overview of these services, see Frank A. Cona, "Application of Online Systems in Alternative Dispute Resolution" (1997) 45 *Buffalo Law Review* 986.

Within a short period of time, dispute resolution professionals[7] realised that there were possibilities for considerable expansion of this burgeoning field.[8] In 1997, Professors Ethan Katsh and Janet Rifkin founded the National Center for Technology and Dispute Resolution, which "supports and sustains the development of information technology applications, institutional resources, and theoretical and applied knowledge for better understanding and managing conflict".[9] Four years later, the first book in the field of ODR was written.[10] Later on, the area of ODR started to be explored by institutions such as the US Federal Trade Commission, the US Department of Commerce, the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, the Global Business Dialogue, the World Intellectual Property Organization, and the European Union.[11] In the European Union, in particular, legislative measures have tended to favour the utilisation of ODR mechanisms.[12] Examples include the Directive on Electronic Commerce art.17 and the Directive on certain aspects of Mediation in Civil and Commercial Matters Recitals 8 and 9. Further, in the area of consumer law,[13] both a new Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes and a Proposal for a Directive on

[7] For the purposes of this paper, the expressions "dispute resolution" and "dispute settlement" will be used interchangeably, although the authors acknowledge that they have a different meaning. The distinction is important because, terminologically speaking, the notion of "resolution" is related to the idea of joint decision-making, whereas the concept of "settlement" is connected with the idea of third party decision-making. See Tony Marks et al., "Rethinking Public Policy and Alternative Dispute Resolution: Negotiability, Mediability and Arbitrability" (2012) 78(1) *Arbitration* 19, n.6. See also Barbara Hill, "An Analysis of Conflict Resolution Techniques: From Problem-Solving Workshops to Theory" (1982) 26(1) *Journal of Conflict Resolution* 115. John Burton, cited by Gregory Tillett, *Resolving Conflict: A Practical Approach* (South Melbourne: Sydney University Press, 1991), p.9. See also Andrew Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000), p.42; John Burton, *Conflict and Communication: The Use of Controlled Communication in International Relations* (New York: Free Press, 1969), p.171.

[8] See Ethan Katsh, "Dispute Resolution in Cyberspace" (1996) 28 *Connecticut Law Review* 953. See also M. Scott Donahey, "Current Developments in Online Dispute Resolution" (1999) 16(4) *Journal of International Arbitration* 129.

[9] See National Center for Technology and Dispute Resolution (NCTDR), at *http://odr.info/* [Accessed June 12, 2013].

[10] Ethan Katsh et al., *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001), pp.1–240.

[11] Ethan Katsh, "Online Dispute Resolution: Some Lessons from the E-Commerce Revolution" (2001) 28 *Northern Kentucky University Law Review* 813. Similarly, working groups were set up by several other organisations with a view to studying this area. See Mireze Philippe, "Where is Everyone Going with Online Dispute Resolution (ODR)?" (2002) *International Business Law Journal* 192. See also UNCITRAL (Commission Documents), *Report of the United Nations Commission on International Trade Law* (2010) a/65/17; *Possible Future Work on Online Dispute Resolution in Cross-border Electronic Commerce Transactions* (April 23, 2010) UNGA A/CN.9/706; *Possible Future Work on Online Dispute Resolution in Cross-border Electronic Commerce Transactions, Note Supporting the Possible Future Work on Online Dispute Resolution by UNCITRAL, submitted by the Institute of International Commercial Law* (May 26, 2010) UNGA A/CN.9/710; *Possible Future Work on Electronic Commerce—Proposal of the United States of America on Online Dispute Resolution* (June 18, 2009) UNGA A/CN.9/681/Add.2; and UNCITRAL (Working Group III) *Report of Working Group III (Online Dispute Resolution)*, Twenty-fourth Session (November 21, 2011) UNGA A/CN.9/739; *Annotated Provisional Agenda* (August 22, 2011) A/CN.9/WG.III/WP.108; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules* (September 27, 2011) UNGA A/CN.9/WG.III/WP.109; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Issues for Consideration in the Conception of a Global ODR Framework* (September 28, 2011) UNGA A/CN.9/WG.III/WP.110; *Report of Working Group III (Online Dispute Resolution)*, Twenty-third Session (June 3, 2011) A/CN.9/721; *Annotated Provisional Agenda* (February 24, 2011) A/CN.9/WG.III/WP.106; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules* (March 17, 2011) A/CN.9/WG.III/WP.107; *Report of Working Group III (Online Dispute Resolution)*, Twenty-second Session (January 17, 2010) A/CN.9/716; *Annotated Provisional Agenda* (August 26, 2010) A/CN.9/WG.III/WP.104; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions* (October 13, 2010) A/CN.9/WG.III/WP.105; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions* (November 18, 2010) A/CN.9/WG.III/WP.105/Corr.1.

[12] Faye Fangfei Wang, *Online Dispute Resolution: Technology, Management and Legal Practice from an International Perspective* (Oxford: Chandos Publishing, 2008), p.43ff.

[13] The area of consumer law has received considerable attention within the ODR literature. See, e.g. Karen Stewart et al., "Online Arbitration of Cross-Border, Business to Consumer Disputes" (2002) 56 *University of Miami Law Review* 1111; Mohamed Wahab, "Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement" (2004) 12 *International Journal of Law and Information Technology* 123.

Alternative Dispute Resolution are currently being discussed.[14] These proposals are intended to improve the functioning of the retail internal market and enhance redress for consumers.

In principle, ODR mechanisms are expected, among other things, to "facilitate access to justice",[15] and should therefore be able to tackle some of the problems concerning the use of offline dispute resolution mechanisms.[16] It is believed that ODR could "resolve disputes quickly and more efficiently" than the traditional methods[17] but, to our knowledge, no research has been reliably and skilfully conducted to back up this assumption. ADR scholars have put forward various proposals aiming at developing an ODR system,[18] and during the last 10 years an important number of ODR services have been developed.[19] Within the vast array of ODR mechanisms, negotiation, mediation and arbitration appear to be the most commonly practised.[20]

As the legal profession has begun to modernise its working practices with the aid of several technological advances in computing and telecommunications,[21] one may wonder whether the utilisation of offline mechanisms will eventually be replaced by the employment of the so-called ODR mechanisms. This article provides a concise explanation of the notion of dispute resolution in cyberspace. It reviews some of the recent studies on the use of ODR, especially the use of e-negotiation, e-mediation and e-arbitration, considers the issues concerning the intricacies of settling and resolving disputes in cyberspace and concludes that the idea of banishing offline dispute settlement and dispute resolution methods—in the near future—is extremely unlikely ever to come true.

[14] See *Alternative Dispute Resolution and Online Dispute Resolution for EU Consumers: Questions and Answers*, Press Release (November 29, 2010), Memo/11/840.

[15] Gabrielle Kaufmann-Köhler et al., *Online Dispute Resolution, Challenges of Contemporary Justice* (The Hague: Kluwer Law International, 2004), p.68. For this to happen, it is necessary to explore, from a multidisciplinary perspective, how the internet can be used to improve access to justice through the deployment of ODR mechanisms. See Catherine Kessedjian et al., "Dispute Resolution On-Line" (1998) 32 *International Lawyer* 990.

[16] As to the perceived advantages of ODR mechanisms, see Lan Q. Hang, "Online Dispute Resolution System: The Future of Cyberspace Law" (2001) 41 *Santa Clara Law Review* 854; George H. Friedman, "Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities" (1997) 19 *Hastings Communications and Entertainment Law Journal* 695, 711; Laura Klaming et al., "I Want the Opposite of What You Want: Reducing Fixed-pie Perceptions in Online Negotiations" (2009) 1 *Journal of Dispute Resolution* 139.

[17] Robert Bordone, "Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems and a Proposal" (1998) 3 *Harvard Negotiation Law Review* 191.

[18] See, e.g. R. Bordone, "Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems and a Proposal" (1998) 3 *Harvard Negotiation Law Review* 199; Joseph A. Zavaletta, "Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal" (2002) 7 *Journal of Technology Law and Policy* 24; Beatrice Baumann, "Electronic Dispute Resolution (EDR) and the Development of Internet Activities" (2002) 52 *Syracuse Law Review* 1232; Arno R. Lodder et al., "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model" (2005) 10 *Harvard Negotiation Law Review* 287; George H. Friedman, "Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities" (1997) 19 *Hastings Communications and Entertainment Law Journal* 695; Michael E. Schneider et al., "Dispute Resolution in International Electronic Commerce" (1997) 14(3) *Journal of International Arbitration* 5.

[19] Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge: Cambridge University Press, 2009), p.76.

[20] Haitham A. Haloush et al., "Internet Characteristics and Online Dispute Resolution" (2008) 13 *Harvard Negotiation Law Journal* 328; Mary Shannon Martin, "Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce" (2002) 20 *Boston University International Law Journal* 151. See also Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge: Cambridge University Press, 2010), p.156ff.

[21] George H. Friedman et al., "An Information Superhighway 'on Ramp' for Alternative Dispute Resolution" (1996) 38 *New York State Bar Journal* 38.

2. E-Negotiation

Negotiation is one of the most commonly practised forms of dispute resolution[22] and, probably, "one of the most basic forms of interaction".[23] It is believed that "people negotiate even when they don't think of themselves as doing so".[24] Negotiation, in essence, can be defined as any type of communication between two or more people with the aim of reaching an agreement. For this, negotiation can be seen as an amicable, and perhaps as a highly desirable, way of resolving disputes. With the advent of the internet, this form of interaction, particularly within the dispute resolution arena and the legal profession, has somewhat moved off the court corridors and polished offices of a law firm on to the Web,[25] which resulted in the advancement of the idea of electronically based negotiations (e-negotiation).

The first research project in the area of negotiation via the World Wide Web (INSPIRE) came into operation in 1996. This project was "[d]eveloped in the context of a cross-cultural study of decision making and negotiation".[26] Extensive experimentation with INSPIRE prompted the design of several other e-negotiation systems (ENSs).[27] These systems together with decision support systems (DSSs) have been classified into several categories, including planning systems, assessment systems, intervention systems and process systems.[28] Public awareness of both ENSs and DSSs, however, continues to be very low and, therefore, it remains to be seen whether electronically based negotiations that rely on these systems will gain widespread acceptance.

The notion of e-negotiation is inextricably linked with the concept of computer-mediated communication (CMC).[29] It is argued that CMC facilitates the interaction process through the use of computers. The internet, without a doubt, has become one of the main means of communication and information exchange. CMC through email, for example, is increasingly commonplace. In 2011, corporate users sent and received approximately 105 email messages per day, that is, 38,325 emails per year.[30] New research would be needed to determine how many of those email messages, if any, involved negotiations of some kind, but in terms of

[22] As to the notion of negotiation, see P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (New York: Academic Press, 1979), pp.1–293; Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Belknap Press, 1982), pp.1–373; Roger Fisher et al., *Getting Together: Building Relationships as We Negotiate* (New York: Penguin Books, 1989), pp.1–216; Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving" (1984) 31 UCLA Law Rev.754; Linda Putman et al., *Communication and Negotiation* (Newbury Park, CA: Sage Publications, 1992), pp.1–294; Dean G. Pruitt et al., *Negotiation in Social Conflict* (Buckingham: Open University Press, 1993), pp.1–251; Max H. Bazerman, *Negotiating Rationally* (New York: Free Press, 1993), pp.1–196; Carrie Menkel-Meadow "Lawyer Negotiations: Theories and Realities—What Do We Learn From Mediation?" (1993) 56(3) *Modern Law Review* 361; Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, MA: Belknap Press, 2000), pp.1–354; Carrie Menkel-Meadow, "Teaching About Gender and Negotiation: Sex, Truths and Videotape" (2000) 16(4) *Negotiation Journal* 357; Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving in* (London: Penguin Books, 2011), pp.1–194.

[23] Bruce Patton, "Negotiation", in Michael Moffit et al. (eds), *The Handbook of Dispute Resolution* (San Francisco: Jossey-Bass, 2005), p.279.

[24] Fisher et al., *Getting Together: Building Relationships as We Negotiate* (1989), p.xxvii.

[25] Cf. Kathleen Valley, "Conversation: The Electronic Negotiator" (2000) Jan–Feb. *Harvard Business Review* 16.

[26] See Gregory Kersten et al., "WWW-based Negotiation Support: Design, Implementation, and Use" (1999) 25 *Decision Support Systems* 135. It is important to mention that research on e-negotiation has been carried out based upon three different approaches, namely normative, prescriptive and descriptive. See Mareike Schoop, "The Worlds of Negotiation" *Proceedings of the 9th International Working Conference on the Language-Action Perspective on Communication Modeling* (2004), pp.179–196.

[27] See, e.g. Jin Baek Kim et al., "E-negotiation System Development: Using Negotiation Protocols to Manage Software Components" (2007) 16(4) *Group Decision and Negotiation* 321. See also Ernest M. Thiessen, "Beyond Win-Win in Cyberspace" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 643, and Christopher A. Hobson, "E-Negotiations Creating a Framework for Online Commercial Negotiations" (1999) July *Negotiation Journal* 201.

[28] Gregory Kersten, "E-negotiation Systems: Interaction of People and Technologies to Resolve Conflicts" *UNESCAP Third Annual Forum on Online Dispute Resolution* (2004), pp.2–3.

[29] See Russell Spears et al., "Panacea or Panopticon?: The Hidden Power in Computer-Mediated Communication" (1994) 21(4) *Communication Research* 427. See also Rachel Croson, "Look at me When You Say That: An Electronic Negotiation Simulation" (1999) 30(1) *Simulation & Gaming* 24.

[30] See Sara Radicati, "Email Statistics Report, 2011–2015" (2011), available at *http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf* [Accessed June 12, 2013].

the effectiveness of e-negotiation—via email—it is believed that it can "lead to misunderstandings, sinister attributions, and ultimately, negotiation impasse".[31]

Research shows that email negotiations "1) increased contentiousness, 2) diminished information sharing, 3) diminished process cooperation, 4) diminished trust, [and] 5) increased effects of negative attribution".[32] Likewise, it has been proved that "resolving conflict, or reaching consensus … is better done face-to-face than electronically".[33] Similarly, it has been demonstrated that "[m]ore face-to-face contact produces more rapport, which in turn leads to more favorable outcomes for both parties".[34] In a similar vein, it has been pointed out that "[c]onventions of personal interaction that would apply in a telephone call or a face-to-face [mediation] do not apply in cyberspace".[35] Further studies have shown that "information exchanged over electronic media such as e-mail is less likely to be true".[36]

The great majority of the research in the area of e-negotiation through email[37] cast doubt upon the perceived advantages[38] of electronically based negotiations over face-to-face negotiations. In email communications, there is a likelihood that the parties will end up misreading each other's messages, and although one can say that further clarifications can be given, and that this means of communication continues to expand and so on,[39] no research has been done to support the hypothesis that e-negotiations via email are—or can be—more effective than face-to-face negotiations.

3. E-Mediation

E-mediation can be defined as a system-based—as opposed to a face-to-face-based—mechanism in which an impartial third party called "the mediator" facilitates the negotiation process between two or more people.[40] Because e-mediation is basically "[e-]negotiation carried out with the assistance of a third party",[41] it can be said that the arguments against the deployment of a system-based negotiation can be applied,

[31] Janice Nadler, "Rapport in Legal Negotiation: How Small Talk can Facilitate E-mail Dealmaking" (2004) 9 *Harvard Negotiation Law Review* 223. See also Don A. More et al., "Long and Short Routes to Success in Electronically Mediated Negotiations: Group Affiliations and Good Vibrations" (1999) 77(1) *Organizational Behavior and Human Decision Processes* 23; Elaine Landry, "Scrolling Around the New Organization: the Potential for Conflict in the On-line Environment" (2000) April *Negotiation Journal* 133; and Jacqueline Nolan-Haley, *Alternative Dispute Resolution* (St Paul, MN: Thomson-West, 2008), p.10.

[32] Noam Ebner et al, "You've Got Agreement: Negoti@ting via Email" (2009–2012) 31(2) *Journal of Public Law & Policy* 434.

[33] Gerardine DeSanctis et al., "Introduction to the Special Issue: Communication Processes for Virtual Organizations" (1999) 10(6) *Organization Science* 697.

[34] Leigh Thompson, "Negotiating via Information Technology: Theory and Application" (2002) 58(1) *Journal of Social Issues* 111; Aimee L. Drolet et al., "Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts" (2000) 36 *Journal of Experimental Social Psychology* 26. See also Michael Morris, "Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations" 6(1) *Groups Dynamics: Theory, Research, and Practice* 93.

[35] Joel Eisen, "Are We Ready for Mediation in Cyberspace?" (1998) *Brigham Young University Law Review* 1311.

[36] Kathleen L. McGinn et al., "How to Negotiate Successfully Online" (2004) 3 *Negotiation* 8.

[37] Jill M. Purdy et al., "The Impact of Communication Media on Negotiation Outcomes" (2000) 11(2) *The Journal of Conflict Management* 162; Janice Nadler et al., "Negotiation, Information Technology, and the Problem of the Faceless Other" in Leigh Thompson (ed.), *Negotiation Theory and Research* (London: Psychology Press, 2006), pp.154–155; Charles Craver, "Conducting Electronic Negotiations" (2007) June *The Negotiator Magazine*, available at *http://www.negotiatormagazine.com/* [Accessed June 12, 2013].

[38] See, e.g. Amira Galin et al., "E-negotiation versus Face-to-Face Negotiation: What has Changed—if Anything?" (2007) 23 *Computers in Human Behavior* 789; Lynn A. Epstein, "Cyber E-mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?" (2001) 36 *Tulsa Law Journal* 840.

[39] David R. Johnson, "Screening the Future for Virtual ADR" (1996) April *Dispute Resolution Journal* 118.

[40] Cf. Gabrielle Kaufmann-Köhler et al., *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague: Kluwer Law International, 2004), p.22. See also Sarah Rudolph Cole et al., "Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be" (2006) 38 *University of Toledo Law Review* 193. For an overview of the concepts of negotiation and mediation in the online environment, see Joseph Goodman, "The Advantages and Disadvantages of Online Dispute Resolution: An Assessment of Cyber-Mediation Web Sites" (2006) 9(11) *Journal of Internet Law* 10.

[41] Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation and Other Processes* (New York: Wolters Kluwer, 2007), p.107.

mutatis mutandis, to the area of e-mediation.[42] This is true for both text-based and video-based systems.[43] Despite this, a small minority believes that in those cases in which it would not be appropriate to mediate face to face—e.g. when both parties are emotionally charged, when it would not be cost-effective to bring both parties together, when there is a huge power imbalance between the parties, etc—e-mediation becomes an option.[44]

The first research project aimed at determining the "effectiveness" of e-mediation to resolve online-related disputes, particularly the ones that arose out of eBay transactions,[45] was conducted towards the end of the 1990s. This project was developed "based on the premise that mediators could adapt at least some skills and tactics used in face-to-face practices to the online mediation process".[46] Both the mediator and the parties used email as a means of communication. Of 144 cases brought to mediation, only 50 of them, that is, less than 40 per cent were mediated successfully.[47] Not surprisingly, the project's reliance on text was considered to be one of the drawbacks of email as a primary form of interaction.[48]

The average internet user is possibly well equipped for being involved in online mediation sessions via email, chat room, instant messaging, etc.[49] These systems have something in common—they allow people to exchange written messages with one another over the internet. Nevertheless, written language does not "always convey the complete meaning of what an individual is trying to communicate".[50] A detailed examination of the relevant literature reveals that

> "the most influential linguistics of the first half of the [twentieth] century … went out of their way to emphasize the primacy of spoken as opposed to written language, relegating the latter to a derived secondary status".[51]

Such a distinction between written and spoken language may impinge upon both the effectiveness of the levels of communication[52] and, more importantly, the outcome of a virtual mediation.

[42] Janice Nadler, "Electronically-Mediated Dispute Resolution and E-Commerce" (2001) October *Negotiation Journal* 333.

[43] Llewellyn J. Gibbons et al., "Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message" (2002) 32 *New Mexico Law Review* 33.

[44] Susan Summers Raines, "Can Online Mediation be Transformative?: Tales from the Front" (2005) 22(4) *Conflict Resolution Quarterly* 437. See also Richard S. Granat, "Creating an Environment for Mediating Disputes on the Internet" (1996) *A Working Paper for the NCAIR Conference on On-line Dispute Resolution*.

[45] See Jason Krause, "On the Web" (2007) October *ABA Journal* 44. It is important to mention that the vast majority of the initiatives concerning the promotion and facilitation of e-mediation are related to consumer transactions. See Louise E. Teitz, "Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution" (2001) 70 *Fordham Law Review* 1002.

[46] Ethan Katsh et al., "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'eBay Law'" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 713. See also Richard Birke et al., "U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace" (2002) 50 *Mediation in Cyberspace* 208.

[47] Ethan Katsh et al., "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'eBay Law'" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 711.

[48] For a different view, see James C. Melamed, "Mediating on the Internet: Today and Tomorrow" (2000) 1(11) *Pepperdine Dispute Resolution Law Journal* 11.

[49] Cf. Bruce Leonard Beal, "Online Mediation: Has Its Time Come?" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 738.

[50] Joseph B. Stulberg, "Mediation, Democracy, and Cyberspace" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 641. See also Richard Victorio, "Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century" (2001) 1 *Pepperdine Dispute Resolution Law Journal* 293.

[51] Wallace Chafe et al., "The Relation Between Written and Spoken Language" (1987) 16 *Annual Review of Anthropology* 383.

[52] Cf. Susan Nauss Exon, "The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution" (2010) 12 *Cardozo Journal of Conflict Resolution* 23.

4. E-Arbitration

E-arbitration may be defined as "an electronic version of offline arbitration".[53] It encompasses everything from the "online arbitration agreement" to the "online arbitral award".[54] Generally speaking, in light of the principle of party autonomy, the validity of online arbitration is not an issue.[55] In the international context, however, a number of concerns have been raised regarding the validity of not only online arbitration agreements[56] but also online arbitral awards,[57] especially, within the meaning of the New York Convention (NYC).[58] It has been posited that the NYC was adopted "at a time when the drafters could not foresee that [both arbitration agreements and arbitral awards] could take other than a physical form".[59] Therefore, one can only speculate that the courts will—in due course—agree that online arbitration agreements and online arbitral awards satisfy the formal requirements of the NYC.

At the time of writing, there are no "universally accepted rules … governing [online arbitration proceedings]".[60] Such proceedings are certainly taking place, although no comprehensive statistics on e-arbitration appear to have been published.[61] In online arbitration, the parties, the arbitral tribunal, experts and witnesses are expected to make use of electronic devices to take part in the arbitral proceedings. This involves the use of sophisticated software and hardware devices.[62] The existing systems, however, have been criticised on the basis that they can only deal with "very restricted classes of disputes, a simplified or basic arbitration process, the start of the process before variations become necessary [and] the process used by a single arbitration provider".[63]

Some argue that e-arbitration "*significantly* reduces the transaction costs of dispute resolution" [italics added],[64] and this might be true in some cases, but no research has been

[53] See Chinthaka Liyanage, "Online Arbitration Compares to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature" (2010) 22 *Sri Lanka Journal of International Law* 175. For a different view, see Farzaneh Badiei, "Online Arbitration Definition and Its Distinctive Features" (2010) *Proceedings of the 6th International Workshop on Online Dispute Resolution*, pp.87–93.

[54] See, generally, Hong-lin Yu et al., "Can Online Arbitration Exist within the Traditional Arbitration Framework?" (2003) 20(5) *Journal of International Arbitration* 455.

[55] Cf. Richard Hill, "On-Line Dispute Arbitration: Issues and Solutions" (1999) 15(2) *Arbitration International* 199. See also Thomas Schultz, "Online Arbitration: Binding or Non-Binding?" (2002) *ADR Online Monthly* 5; and Julia Hörnle, "Online Dispute Resolution", in John Tackaberry et al. (eds), *Bernstein's Handbook of Arbitration Law & Practice* (London: Sweet & Maxwell, 2003), pp.787–805. Legal scholars have raised several other concerns about: distrust of the operability and privacy of internet systems, fear about the "unseen" nature and neutrality of online arbitration providers, technological and presentation imbalances, elimination of face-to-face communications and the lack of voice; see Amy J. Schmitz, "'Drive-thru' Arbitration in the Digital Age: Empowering Consumers through Binding ODR" (2010) 62 *Baylor Law Review* 214.

[56] Alejandro López Ortiz, "Arbitration and IT" (2005) 21(3) *Arbitration International* 353.

[57] Paul D. Carrington, "Virtual Arbitration" (2000) 15 *Ohio State Journal on Dispute Resolution* 673.

[58] M.H.M. Schellekens, "Online Arbitration and E-Commerce" (2002) 9 *Electronic Communication Law Review* 113.

[59] United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration, Electronic Arbitration* (2003) UNCTAD/EDM/Misc.232/Add.20, pp.3–55.

[60] Julian Lew et al., *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), p.48. As to the regulatory framework for ODR, in general, see Rafal Morek, "The Regulatory Framework for Online Dispute Resolution: A Critical View" (2006) 38 *University of Toledo Law Review* 163–192. See also Tiffany J. Lanier, "Where on Earth Does Cyber-Arbitration Occur? International Review of Arbitral Awards Rendered Online" (2000) 7 *ILSA Journal of International and Comparative Law* 3. However, because of the widespread acceptance of arbitration, particularly within the commercial arena, it is believed that a useful first step would be the establishment of an international regulatory framework for resolving disputes through e-arbitration. Cf. Henry H. Perritt, "Dispute Resolution in Cyberspace: Demand for New Forms of ADR" (2000) 15 *Ohio State Journal on Dispute Resolution* 677.

[61] Thomas Schultz, "Online Arbitration: Binding or Non-Binding?" (2002) *ADR Online Monthly* 2.

[62] See, e.g. Dusty Bates Farned, "A New Automated Class of Online Dispute Resolution: Changing the Meaning of Computer-Mediated Communication" (2011) 2 *Faulkner Law Review* 335.

[63] Tony Elliman et al., "Online Support for Arbitration: Designing Software for a Flexible Business Process" (2005) 4(4) *International Journal of Information Technology and Management* 447.

[64] Roger P. Alford, "The Virtual World and the Arbitration World" (2001) 18(4) *Journal of International Arbitration* 456. See also Julia Hörnle, "Online Dispute Resolution—The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration" (2003) *International Review of Law, Computers and Technology* 28.

done on the costs of e-arbitration as opposed to offline arbitration. In general, it can be said that third-party decision-making is potentially more expensive than joint decision-making.[65] Research shows that, in the area of international arbitration, for instance, most of the costs are associated with both arbitral and legal fees,[66] and it remains to be seen whether arbitrators and legal representatives would be prepared to make a substantial reduction to their fees when conducting arbitrations online.

In terms of the appropriateness of online arbitration, it has been said that it is "particularly appropriate with respect to simple fact patterns and small claims".[67] Hence, online arbitration may appeal to the users of small claims and documents-only arbitration schemes, but definitely not to the users of "international arbitration", where complex issues and large amounts of money are at stake.[68] This is probably one of the reasons behind the perceived "virtual arbitration's low attractiveness" within this area.[69] It might be that e-arbitration needs to develop further before a full assessment of its efficiency can be undertaken,[70] but it is unlikely that "international arbitration", in particular, would ever take place entirely online.[71]

5. Conclusion

Despite some optimistic predictions about ODR's potential to coalesce—on a level playing field—with the traditional methods,[72] it is still too early to predict what the future of ODR might be.[73] The virtues of technological advances in the area of dispute resolution have perhaps been overestimated. ODR is just "another" option,[74] and in some cases it might even be the best option, but it is definitely not a panacea. States' dispute resolution machinery is a complex system[75] that cannot be replaced with "faster microprocessors and larger memory boards".[76] Dispute resolution mechanisms, in general, are a means of maintaining social order.[77] These mechanisms are intended to deal with conflicts and disputes—on the

[65] Cf. Sara Kiesler, *Culture of the Internet* (Mahwah: Lawrence Erlbaum Associates, 1997), p.235.

[66] Chartered Institute of Arbitrators, *Costs of International Arbitration Survey* (London: Chartered Institute of Arbitrators, 2011), p.2. See also Michael O'Reilly, "Conference Review: Costs in International Arbitration, London September 27–28, 2011" (2012) 78(1) *Arbitration* 59.

[67] Daniel Girsberger et al., "Cyber-Arbitration" (2002) 3 *European Business Organisation Law Review* 626.

[68] See Roger P. Alford, "The Virtual World and the Arbitration World" (2001) 18(4) *Journal of International Arbitration* 449. See also Justin Michaelson "The A-Z of ADR—Pt I" (2003) Jan. *New Law Journal* 182.

[69] Sami Kallel, "Online Arbitration" (2008) 25(3) *Journal of International Arbitration* 350.

[70] Nicolas de Witt, "Online International Arbitration: Nine Issues Crucial to its Success" (2001) 12 *American Review of International Arbitration* 441.

[71] Gabrielle Kaufmann-Köhler, "Online Dispute Resolution and Its Significance for International Commercial Arbitration", in Gerald Aksen et al. (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (South Africa: ICC Publishing, Publication 693, 2005), p.455.

[72] Andrea M. Braeutigam, "What I hear You Writing is … Issues in ODR: Building Trust and Rapport in the Text-based Environment" (2006) 38 *University of Toledo Law Review* 101. See also Benjamin Davis, "Building the Seamless Dispute Resolution Web: a Status Report on the American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution" (2002) 8(3) *Texas Wesleyan Law Review* 538; Anne-Marie Hammond, "How Do You Write 'Yes'?: A Study on the Effectiveness of Online Dispute Resolution" (2003) 20(3) *Conflict Resolution Quarterly* 261–286, and Nicole Gabrielle Kravec, "Dogmas of Online Dispute Resolution" (2006) 38 *University of Toledo Law Review* 125.

[73] Francis Gurry, "Dispute Resolution on the Internet", in *Papers of the International Federation of Commercial Arbitration Institutions: 5th Biennial Dispute Resolution Conference* (New York: AAA, 1999), p.60.

[74] Andrea M. Braeutigam, "Fusses That Fit Online: Online Mediation in Non-Commercial Contexts" (2006) 5 *Appalachian Journal of Law* 301.

[75] This system facilitates, among other things, access to justice, and it can certainly be "improved" by means of technology. See, e.g., Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (London: Routledge, 2011), p.95f.

[76] See Michael Wheeler, "Computers and Negotiation: Backing into the Future" (1995) April *Negotiation Journal* 169 and Ethan Katsh, "Ten Years of Online Dispute Resolution (ODR)" (2006) 38 *University of Toledo Law Review* 19.

[77] Cf. Jean Sternlight, "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2003) 3 *Nevada Law Journal* 289.

basis of the rule of law[78]—and it is doubtful that such a function can be fully and effectively performed in cyberspace.

[78] Thomas Schultz, "The Roles of Dispute Settlement and ODR", in Arnold Ingen-Housz (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, Vol.2 (The Hague: Kluwer Law International, 2011), p.140.

WHAT WE KNOW AND NEED TO KNOW ABOUT ONLINE DISPUTE RESOLUTION

Ethan Katsh[*] & Colin Rule[**]

Online Dispute Resolution (ODR) is the application of information and communications technology to the prevention, management, and resolution of disputes.[1] ODR originally emerged in the mid-1990s as a response to disputes arising from the expansion of eCommerce.[2] During that time the web was extending into commercial uses, becoming an active, creative, growing, and, at times, lucrative space. Such an environment, with significant numbers of transactions and interactions (where relationships are easily formed and easily broken) seemed likely to generate disputes. At the same time, it was also clear that disagreements emerging from online activities could not be resolved through traditional offline channels. With parties likely to be at a distance from each other and incapable of meeting face-to-face, these new disputes could only be resolved online. This meant that new tools and resources that exploited the capabilities of digital communication and information processing by computers had to be developed. Now, some twenty years later, ODR is the fastest growing area of dispute resolution, and it is increasingly being applied to other areas, including offline and higher value disputes. This rapid expansion merits a discussion of what we have learned about ODR so far, and what questions we still need to answer.

I. WHAT WE KNOW ABOUT ONLINE DISPUTE RESOLUTION

One thing we know about Online Dispute Resolution (ODR) is that it has evolved greatly in its fairly short life. Initial ODR processes generally mimicked offline alternative dispute resolution (ADR) processes.[3] Early experiments in resolving disputes online were often labeled "Online ADR" or "E-ADR." In the first significant ODR pilot project, with eBay in the late 1990s, an experienced human mediator used email to interact with the disputants using the same strategies with which he engaged disputants offline (e.g., assisted storytelling

---

[*] Director of the National Center for Technology and Dispute Resolution, Professor Emeritus of Legal Studies, University of Massachusetts-Amherst. Email: Katsh@legal.umass.edu
The authors greatly appreciate the suggestions of Leah Wing and Orna Rabinovich-Einy.
[**] Co-Founder and Chief Operating Officer of Modria.com, Inc. (an online dispute resolution software company in Silicon Valley, California) and the former Director of Online Dispute Resolution at eBay and PayPal. Email: crule@modria.com.

1. *See* Arthur M. Monty Ahalt, *What You Should Know About Online Dispute Resolution*, PRAC. LITIGATOR 22 (Mar. 2009), https://www.virtualcourthouse.com/index.cfm/feature/1_7/what-you-should-know-about-online-dispute-resolution.cfm (stating that ODR allows multiple disparate policies to settle disputes using the Internet).

2. *See id.*

3. *See* Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 21 INT'L REV. L. COMPUTERS & TECH. 97, 99 (2007).

and joint problem solving).[4] This was a reasonable mindset at the time and consistent with a theme that was often found in other contexts, namely that "[w]hen a new online technology is created for any process, the initial impulse is to create online mirror images of the 'live' or offline process."[5]

Approximately twenty years of experience has taught us that ODR is no more "Online ADR" than the online versions of banking, education, or gaming are simply the offline versions of those systems moved online. Once a process moves online, its very nature begins to change. Or, as Marshall McLuhan once wrote, "when a new technology comes into a social milieu it cannot cease to permeate that milieu until every institution is saturated."[6] That is what has been occurring with ODR and ADR over the last two decades. Some ODR approaches may resemble face-to-face ADR processes and ADR practitioners may employ ODR tools to supplement face-to-face meetings, but the goal of ODR is not simply to digitize inefficient offline processes. Technology changes the nature of the interaction between the parties and introduces new possibilities for helping them achieve resolution. We may learn from offline approaches in designing ODR systems, but the larger challenge is to take advantage of what we can do with technology that we could not do before. As a result, as the full potential of ODR is realized over time, future applications are likely to diverge more and more from how disputes were handled in the past.

Why is this? Because technology is moving us further and further away from the models and values of ADR that emerged in the 1970s and that are still prevalent today. ADR placed great value on resolving disputes face-to-face, emphasized the values of neutrality and confidentiality, and focused more on the resolution of individual disputes than on their prevention. ODR processes, on the other hand, are delivered online and, increasingly, rely on the intelligence and capabilities of machines. Most communications exchanged online are automatically recorded, thus leaving a "digital trail," which presents opportunities to collect and use data in novel ways. This has made it possible for extraordinarily large numbers of disputes to be handled at very low cost, removing the problem of capacity and price associated with a human third party decision-maker or facilitator. This has also meant that a large amount of data on disputing patterns is now available, and algorithms can now analyze that data quickly and efficiently, gleaning patterns and lessons that a human would not be able to discern. These characteristics allow for better quality control over the functioning of dispute resolution processes, as well as insights into the sources of various disputes. They allow for efforts to provide online dispute prevention (ODP) as well as resolution (ODR). At the same time, this ever growing digital

---

4. Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. DISP. RESOL. 705, 707 (2000).

5. ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 260 (Ethan Katsh et al. eds., 2012).

6. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 161 (1964).

data archive can mean less privacy in ODR processes, a dramatic development for an activity in which confidentiality has long occupied a central role.

As ODR has grown in use, the ADR model in which a human mediator alone manages the flow of information between the parties has gradually been supplanted by a model in which technology is looked at as a "Fourth Party,"[7] something that can be of value in both online and offline disputes. The Fourth Party may, in less complex disputes (such as many eCommerce disputes), replace the human third party by helping the parties identify common interests and mutually acceptable outcomes. Templates and structured forms can be employed that allow users to choose from various options and, by comparing the choices made by the parties, can highlight potential areas of agreement. More commonly, the Fourth Party assists, enhances, or complements the mediator or arbitrator.[8] For example, consider the specific informational tasks performed by third party neutrals. These might include brainstorming, evaluating, explaining, discussing, identifying, defining, organizing, clarifying, listing, caucusing, collecting, aggregating, assigning meaning, simulating, measuring, calculating, linking, proposing, arranging, creating, publishing, circulating and exchanging, charting, reminding, scheduling, monitoring, etc. Some of these are simple or clerical but some involve making decisions at appropriate times and in appropriate ways. Technology can assist with all of these efforts.

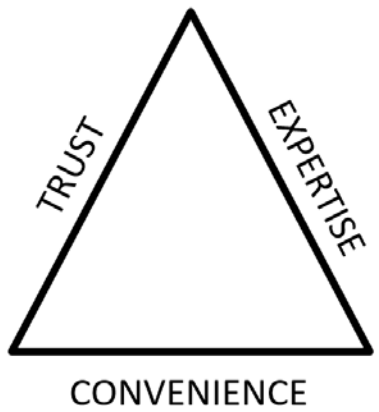


Figure 1: Empirical Research Opporunities in ODR

One way of understanding the opportunities ODR opens up for empirical research is to envision a triangle in which the sides represent convenience, expertise and trust (Figure 1). Any technological system, if it is to be used, must include all three elements but not necessarily to the same degree. All three are

7. ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 93 (John Wiley ed., 2001).

8. *See* Janet Rifkin, *Online Dispute Resolution: Theory and Practice of the Fourth Party*, 19 CONFLICT RESOL. Q. 117, 119 (2001).

needed if the system is to attract users and survive over time, but the shape of the triangle can change and, by doing so, emphasize visually that more of one element is present than another. ODR began with a triangle that had a much longer convenience side. The earliest ODR systems were convenient because they enabled communication at a distance, often asynchronously, so that participation was possible at any time. In so doing, the technology removed many long established physical constraints imposed by time and space. ODR was not only extrajudicial but in a realm where physical constraints could be overcome. However, in the early days the expertise side of the triangle was quite limited in that there was no software that was assisting any of the parties in making decisions.

Over time, there has been a lengthening of the expertise side of the triangle, thus moving ODR even further away from the face-to-face ADR model. Expertise is now embedded in advanced software that takes advantage of the computer's processing capabilities, which are improving all the time. It is this accelerating processor speed that makes machines appear to be getting "smarter." It has been understood from the beginning that ODR was dependent upon software, but the software that tended to be employed in the earliest experiments was software that optimized convenient communication. Focusing on convenience and online-only activities also was not threatening to human mediators and arbitrators. However, as ODR software has become more advanced, and ODR has expanded its application to offline disputes, it has raised concerns that it may take on cases that previously required human attention.

Another set of lessons have grown out of the challenges of resolving disputes at scale. In the first few years of ODR, high volume platforms, such as eBay and PayPal, learned to utilize forms or structured templates to collect cases from users, and then developed software to process the data and manage the conversation as the dispute progressed.[9] A company called Cybersettle created a simple algorithm for handling monetary claims, and another company called Smartsettle developed a fairly complex software platform that could mathematically optimize resolutions across many negotiating points.[10] The dispute resolution triangle still was longest on the convenience side, but the expertise side was steadily lengthening.

Empirical research requires the availability of data. For a process like ODR, which collects data with every click of the mouse, we have, ironically, relatively limited empirical data about ODR processes. Until recently, ODR was employed mostly in the private sector. With a few exceptions,[11] large scale and private

---

9. *See* DARIN THOMPSON, THE GROWTH OF ONLINE DISPUTE RESOLUTION AND ITS USE IN BRITISH COLUMBIA 1.1.3 (2014).

10. *See* ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY 75–76 (2010).

11. *See generally* J. N. MATIAS ET AL., REPORTING, REVIEWING, AND RESPONDING TO HARASSMENT ON TWITTER 5 (detailing the process a user must undergo to attain "authorized reporter" status).

eCommerce and social networking sites have not allowed empirical studies of their dispute resolution efforts. When they did conduct research and revealed the results, users objected to how data was being employed.[12] As ODR expands into the public sector, such as in courts and administrative agencies, we should be able to learn more about what works and does not work in ODR. These early observations from public implementations will be discussed in more detail below.

This Paper provides an overview of the present and insight into the future by focusing on three large-scale, data-producing and quite different ODR ventures. The first and most well-known involves the online auction site eBay, a web site that handles approximately sixty million disputes a year.[13] The second is the Internet Corporation for Assigned Names and Numbers (ICANN) domain name arbitration process[14] that, in the last sixteen years, has handled over 50,000 disputes between owners of a domain name and holders of a trademark that is identical or similar to the domain name.[15] The third is a more recent experiment involving online property tax appeals, a local process in North America that affects every homeowner. These three examples provide data both on what we know or are learning as well as on what questions await answers.

A. eBay and the Value of Disputes

It has been estimated that from 3–5% of eCommerce transactions end in a dispute.[16] For sites without a feedback or reputation system that users can consult before making a purchase, the percentage would be even greater. Reputation systems allow users to make judgments as to which sellers provide the greatest chance of a successful transaction, and therefore lowest risk of a dispute. Based on global eCommerce transaction volume, that means there are

---

12. *See, e.g.*, Inder M. Verma, *Editorial Expression of Concern and Correction*, 111 PROC. OF THE NAT'L ACAD. OF SCI. OF THE UNITED STATES OF AM. 10779 (2014) (clarifying that authors of an empirical study gathered user data in accordance with the U.S. Department of Health and Human Services Policy for the Protection of Human Research Service, even though this did not fully conform with the principles of obtaining informed consent and allowing participants the opportunity to opt out).

13. *See* THOMPSON, *supra* note 9.

14. *Uniform Domain-Name Dispute Resolution Policy*, ICANN, https://www.icann.org/resources/pages/help/dndr/udrp-en (last visited Mar. 24, 2016).

15. *List of Proceedings Under Uniform Domain Name Dispute Resolution Policy*, ICANN, https://archive.icann.org/en/udrp/proceedings-list.htm (last visited Mar. 24, 2016).

16. COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, ECOMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 79 (2002) [hereinafter ONLINE DISPUTE RESOLUTION FOR BUSINESS]; Colin Rule, *Here Are the Keys to Crack the Code of the Collaborative Economy*, VENTURE BEAT (June 11, 2014, 11:00 PM), http://venturebeat.com/2014/06/11/collaborative-economy/ [hereinafter Rule, *Keys to Crack the Code*].

likely more than 700 million eCommerce disputes each year, growing to more than a billion disputes per year in 2017.[17]

The goal for a large eCommerce marketplace like eBay, however, is not to resolve an exceptionally large number of disputes. The goal is to maximize the number of successful transactions, and resolving disputes is essential to increasing that volume. By monitoring the buying and selling behaviors of users and extending the expertise side of the triangle, eBay can provide fast and fair resolutions that encourage buyers to engage in more transactions. This collection and analysis of the data generated by very large numbers of disputes can enable techniques and approaches that are not possible in face-to-face offline dispute resolution.

In the ADR world, various studies have measured satisfaction rates of users of different ADR systems. In actuality, these are measurements that derive from what the parties say about how they feel after participating in a mediation or arbitration. Companies like eBay, by having access to every click made by a user, can examine satisfaction in a different and more granular manner. In 2010, eBay and PayPal conducted a study[18] that was not intended to measure satisfaction in the traditional manner, by surveying disputants before and after participating in a dispute resolution process. Rather, it would compare the actual behavior of participants before and after the process, something it could easily measure with data they routinely collected.[19] In other words, eBay would not look at what users said but at their actions as buyers or sellers after participating in an online dispute resolution process.[20]

eBay randomly assigned several hundred thousand users to two groups and compared their buying and seller behavior for three months before and after the ODR experience.[21] This activity ratio indicated not only how more or less active the party became on the site after winning or losing a dispute, but could also calculate how much the company gained or lost financially as a result of someone participating in the ODR experience.[22] It did this by knowing the value of each transaction the person engaged in before and after the dispute resolution process.[23]

The study designers had hypothesized that parties who "won" their dispute (e.g., received a reimbursement) would have increased activity and that parties

---

17. *Worldwide Ecommerce Sales to Increase Nearly 20% in 2014*, EMARKETER (July 23, 2014), http://www.emarketer.com/Article/Worldwide-Ecommerce-Sales-Increase-Nearly-20-2014/1011039 [hereinafter *Ecommerce Sales 2014*].

18. ONLINE DISPUTE RESOLUTION FOR BUSINESS, *supra* note 16; Rule, *Keys to Crack the Code*, *supra* note 16.

19. *Ecommerce Sales 2014*, *supra* note 17.

20. Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. 767 (2012).

21. *See id.* at 771.

22. *See id.*

23. *See id.*

that "lost" their dispute would have decreased activity.[24] It assumed, in other words, that parties that won would be more satisfied than parties that lost and would adjust their transaction volume accordingly. This did occur; but the most meaningful lesson of the study, and the most counter-intuitive, was that participation in the ODR process led to increased activity even from the losers.[25] What it found was that:

> [t]he only buyers who decreased their activity after filing their first dispute were buyers for whom the process took a long time, more than six weeks. This lesson affirmed feedback we had heard previously indicating that buyers preferred to lose their case quickly rather than have the resolution process go on for an extended period of time.[26]

eBay's ODR system is one that attends to all three sides of the triangle. The few clicks necessary to file a complaint enhances convenience, the capability to analyze data, extract information not previously accessible, and use that data to improve the user experience provides a kind of expertise not possible with systems relying on human labor. Trust is, in a sense, the overarching and primary goal and the data on usage patterns can bring to light new information as to what is needed to build trust and attract and maintain users. It is also, in a way, technological support for the maxim "justice delayed is justice denied."

B. Domain Name Disputes

At the heart of the opportunity to improve empirical research in ODR is the presence of data in a form that can be processed. In theory, since everything done online is recorded, the landscape for research in ODR should be much broader than empirical research in ADR. In our second example, data is being collected but research is still limited. This is not because the data is proprietary but because the system is not collecting data in an easily accessible, useable, and structured manner.

This second large-scale ODR experience concerns disputes about domain names. Domain names, such as modria.com or odr.info, are essentially online addresses and each domain name must be unique if the system is to work. Just as there cannot be two "Main Streets" in a town, there cannot be two domains with the same name. If there were, clicking on a URL or IP address would not lead us where we wanted to go.

The domain name system was invented in 1984 but only grew rapidly starting in the mid-1990s.[27] In 1990, there were just eight thousand domain

---

24. *See id.*
25. *See id.*
26. *Id.* at 776.
27. Ian Peter, *History of the Internet Protocols*, NETHISTORY, http://www.nethistory.info/History%20of%20the%20Internet/protocols.html (last visited Mar. 24, 2016).

names, but by 2000 there were over a million.[28] Today, there are over two hundred and ninety million top level domains, such as .com, .net, and .org.[29] Gradually, during the 1990s, companies realized that domain names were valuable and became worried that their trademarks would be damaged if someone registered a domain name that was the same as the trademark.

In 1998, an entity named the Internet Corporation for Assigned Names and Numbers (ICANN) was established to manage the domain name system.[30] One of the first efforts ICANN undertook was to develop a dispute resolution system to resolve disputes between domain name holders and trademark owners. This system, called the Uniform Dispute Resolution Policy (UDRP), is referred to as non-binding arbitration since anyone dissatisfied with the decision can start over again by filing a complaint in court.[31] In practice, this happens infrequently.

Arbitrators under the UDRP can order a domain name to be transferred to a trademark owner if the arbitrator finds that the domain name was registered in "bad faith."[32] The policy provides a few standards for finding "bad faith." On the other hand, there would not be "bad faith" if the domain name holder could show "proof of a legitimate, non-commercial or fair use of the domain name."[33] In such an instance, the domain name holder could keep it even if it appeared to be similar to the trademark.

ICANN requires that organizations that provide arbitrators publish the decisions.[34] The provider organization is also selected by the complainant and, while there are several providers, almost all of the cases are heard by an arbitrator from either the World Intellectual Property Organization (WIPO) or the National Arbitration Forum (NAF).[35] Statistics show that both organizations rule in favor of trademark holders approximately 85% of the time.[36]

Particularly recently, WIPO has been much more transparent in how it selects arbitrators[37] and has also established a system for querying its database in

---

28. HISTORY OF GTLD DOMAIN NAME GROWTH, ZOOKNIC INTERNET INTELLIGENCE, http://www.zooknic.com/Domains/counts.html (last visited Mar. 24, 2016).

29. Sean Michael Kerner, *Domain Names Top 294 Million in 2015*, ENTER. NETWORKING PLANET (July 2, 2015), http://www.enterprisenetworkingplanet.com/netsp/domain-names-top-294-million.html.

30. *Register Accreditation: History of the Shared Registry System*, ICANN, https://www.icann.org/resources/pages/history-2012-02-25-en (last visited Mar. 24, 2016).

31. *UDRP Is Not Federal Arbitration*, BALOUGH LAW OFFICES, LLC: BLOG, http://www.balough.com/udrp-not-federal-arbitration/#.VmUFMYQ4mCQ (last visited Apr. 5, 2016).

32. UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, ICANN, https://www.icann.org/resources/pages/policy-2012-02-25-en (last visited Mar. 24, 2016).

33. *Id.*

34. *Id.*

35. *See* discussion *infra* Part I.C.

36. *Case Outcome (Consolidated): All Years*, WORLD INTELLECTUAL PROP. ORG. (WIPO) (last visited Mar. 24, 2016), http://www.wipo.int/amc/en/domains/statistics/decision_rate.jsp?year=.

37. Letter from David Roache-Turner, Head, Domain Name Dispute Resolution Section, WIPO Arbitration and Mediation Center, to Andrew, http://domainnamewire.com/wp-content/WIPO-statement.pdf (last visited Mar. 24, 2016).

a manner that can generate lists of decisions involving a particular issue or category of cases.[38] For example, one can search for domain name decisions involving celebrities and domain names with a negative term attached to the trademark owner's name, e.g. walmartsucks.com. Data, at least for WIPO, now exists in a form that could easily be researched in novel ways. Unfortunately, the National Arbitration Forum provides no similar capabilities. It merely enables one to conduct a full-text search of the decisions decided by NAF.[39] A separate organization provides a means for a full-text search of the decisions of both providers.[40] There are, in other words, obstacles to research aimed at all UDRP decisions.

In the limited studies conducted on the domain name dispute resolution process, NAF has been widely criticized for assigning arbitrators non-randomly and, in some instances, to arbitrators who rule in favor of trademark owners more than 95% of the time.[41] There have been increasing numbers of domain name disputes handled by the two organizations but the percentage of disputes relative to the large number of domain name disputes is decreasing. In other words, a smaller and smaller percentage of domain names are being challenged.

The domain name process has been a success in terms of convenience. It is much less expensive than going to court and decisions are usually made in fewer than forty days. Questions of fairness, however, are still present. Approximately half of all respondents fail to respond. This may be because the respondent feels that its case is weak or, alternatively, feels that it is unlikely to receive a fair hearing. Arbitrators in such cases are still allowed to find for the domain name holder but such an outcome is unusual. The rules authorize the trademark owner to select the provider so it is not a surprise that NAF is often selected. ICANN accredits the providers but imposes almost no standards that would persuade domain name holders that the process is fair. The technology employed by both providers is largely focused on communicating and sharing documents, leaving the expertise side of the triangle almost non-existent.

C. Online Property Tax Assessment Appeals

Most citizens in North America are familiar with the process of receiving a property tax bill in the mail every year, with a valuation based on their local assessor's estimated value of their property. Taxes are levied against almost all

---

38. *Index of WIPO UDRP Panel Decisions*, WIPO, http://www.wipo.int/amc/en/domains/search/legalindex/ (last visited Mar. 24, 2016).

39. *See Domain Name Dispute Proceedings and Decisions*, ARBITRATION MEDIATION INT'L, http://www.adrforum.com/SearchDecisions (last visited Mar. 24, 2016).

40. *See, e.g.*, *UDRP Search Engine*, DOMAINFIGHT.NET, http://domainfight.net (last visited Mar. 24, 2016).

41. *Important Statistics About UDRP Panelists from WIPO and NAF*, DEFENDMYDOMAIN.COM (Apr. 26, 2010, 11:37 am), http://defendmydomain.com/important-statistics-about-udrp-panelists-from-wipo-and-naf.

properties across the United States and Canada, including commercial, industrial, and residential holdings. Property taxes fund government with citizen payments set according to each citizen's ability to pay, as measured by property wealth. As the International Association of Assessing Officers (IAAO) explains, ". . . property tax is the only tax used in every state of the United States, the District of Columbia, and every Canadian province. In fact, the property tax remains the most important source of own-source and total revenue for local governments in the United States."[42]

Property Tax Assessors utilize software called Computer Assisted Mass Appraisal (CAMA) to calculate and track the values of every property within their jurisdiction and to send out all the tax bills to citizens.[43] These CAMA systems are advanced, but traditionally they have not focused on processing appeals. By law, every taxpayer has the right to appeal their property tax bill if they feel the amount is inaccurate.[44] There is usually a window of time after the bills are sent out when the taxpayers can request an informal review of their assessed valuation. Many assessment jurisdictions within North America are now using ODR systems for their property tax assessment appeals, and because these assessments are being conducted by public bodies, information about the number of cases filed, the time to decision, and outcomes are being shared with the public. One such assessment jurisdiction is the Property Appeals Assessment Board, or PAAB, in the Canadian province of British Columbia.

PAAB launched its ODR system for property tax appeals in its 2012 assessment season. After four years of managing appeals through the system and refining its flows, PAAB reported that it achieved a 75% amicable resolution rate for cases filed in the ODR system, meaning the assessed amount was adjusted by mutual agreement and the case was closed. This rate was approximately 10% higher than the amicable resolution rate achieved via teleconference the year before. Of the 25% of ODR cases that didn't resolve, 13% required adjudication and 12% were dismissed (for not complying with PAAB response deadlines). An earlier survey of users of the process indicated that 52% were satisfied with the time it took to resolve the appeal, 84% felt the ODR software was easy to use, and 78% were satisfied with the overall ODR experience. Preference surveys conducted by the B.C. provincial government also indicated that a majority of citizens preferred to access government processes online as opposed to face-to-face or over the phone.[45]

---

42. INT'L ASS'N OF ASSESSING OFFICERS, STANDARD ON PROPERTY TAX POLICY 6 (2010).

43. *See, e.g.*, *The Job of the Assessor*, N.Y.S. DEP'T OF TAXATION & FIN. (May 2012), https://www.tax.ny.gov/pubs_and_bulls/orpts/assessjo.htm (stating that assessors use CAMA techniques to analyze sales and estimate values for multiple properties).

44. *See, e.g.*, S.C. CODE ANN. § 12-60-2520(a) (2014) (granting taxpayers the right to object to a property tax assessment).

45. *See* SAM B. EDWARDS III & DIOGO SANTOS, REVOLUTIONIZING THE INTERACTION BETWEEN STATE AND CITIZENS THROUGH DIGITAL COMMUNICATIONS 203–04 (2014).

These results are broadly in line with other assessment districts in North America that have implemented ODR for their informal review requests and formal appeals. Moving property tax assessment appeals online has empowered citizens by giving them more convenient access to redress and by shortening the path to resolution. As such, it is in line with other early stage ODR experiments, which had a longer convenience side of the ODR triangle. The outcomes of the process are still determined by human powered reviews, meaning the software-powered expertise is not yet driving the bulk of the resolutions. However, as more data is gathered over the life of the process, patterns in decisions may enable more algorithmic resolutions in the near future. The strong preference numbers also indicate that the system is trusted by citizens, especially as it is provided at no cost to individual filers and is maintained by the PAAB itself.

II. WHAT DO WE NEED TO KNOW ABOUT ODR?

ODR, like ADR, is a range of processes. ODR is a how, not a what. In time, most dispute resolution processes will likely migrate online, and ODR will be relevant to almost every kind of dispute. Professor Frank Sander's oft-cited concept of the multi-door courthouse[46] is an apt model for ODR systems designers, because online processes can offer a nearly infinite range of "doors" customized for nearly every kind of dispute. In addition, Professor Sander's suggestion that ADR providers "fit the forum to the fuss"[47] is also particularly relevant to ODR since there are both more "fusses" and more "forums" in the online environment, necessitating a wider range of redress processes to handle the broader spectrum of potential issues.

A. More Disputes

The demand for ODR derives largely from the growth in online disputes, such as disputes arising from eCommerce transactions or "on demand economy," disputes that cannot be managed face-to-face. There is also likely an increasingly inadequate supply of human mediators and arbitrators as numbers of disputes increase, as well where face-to-face options might be available but the disputes involve low values. The following assertions contain a number of hypotheses about the growth in the number and range of disputes, many of which can be tested empirically.[48] The first assertion is verified largely by what we know about eCommerce disputes but at least some of the other assertions in the list represent untested hypotheses and provide a framework for future research.

---

46. Address by Frank E.A. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *reprinted in* Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

47. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure* 10 NEGOT. J. 49 (1994).

48. *See* ETHAN KATSH & ORNA RABINOVICH, DIGITAL INJUSTICE (forthcoming 2016).

1. The number of disputes increases whenever transactions and relationships increase.
2. The more novel the activity, the greater the likelihood of disputes. The first iteration of an innovative product or activity rarely anticipates all the disputes that it will generate.[49]
3. The more valuable the item or issue in question, the more likely it is that a problem or grievance will turn into a dispute.
4. The more data that is not only collected but is processed and communicated, the more opportunities for disputes will occur. The more data that is collected, the more bad data there is.
5. Speed and time pressures lead to disputes. If value is likely to erode quickly, as is often the case with technology, pressure to protect and aggressively extend its value increases.
6. Increased complexity in relationships and systems create more opportunities for disputes. In the words of computer scientist Peter Neumann, "Complex systems break in complex ways."[50] When informing shareholders about a federal investigation of problems in correcting errors, Experian stated that "We might fail to comply with international, federal, regional, provincial, state or other jurisdictional regulations, due to their complexity, frequent changes or inconsistent application and interpretation."[51]
7. The easier it is to complain (by filling out an online form or sending an email), the more disputes there will be.
8. The lack of transparency in algorithms leads to disputes.
9. The less attention given to preventing disputes, the more disputes there will be.

B. More Forums

Alongside the challenge of more disputes is the opportunity for developing more and novel avenues for resolving disputes. "More" does not simply mean a

---

49. "Models are useful in estimating project costs and timing. For example, if a model predicts that the bug discovery rate drops rapidly after an initial flurry of discoveries, this fact can be used to determine when software is ready for release: once the rate has reached an acceptable level, the software can be shipped. Such estimation can have significant economic effects upon an enterprise: ship too early and pay a price in service calls; ship too late and potentially lose customers who might look elsewhere." Sandy Clark et al., *Familiarity Breeds Contempt: The Honeymoon Effect and the Role of Legacy Code in Zero-Day Vulnerabilities*, 2010 ANNUAL COMPUT. SEC. APPLICATIONS CONFERENCE 251 (2010), http://www.acsac.org/2010/openconf/modules/request.php?module=oc_program&action=view.php&a&id=69&type=2.

50. John Markoff, *Killing the Computer to Save It*, N.Y. TIMES, Oct. 30, 2012, at D1, www.nytimes.com/2012/10/30/science/rethinking-the-computer-at-80.html?_r=0.

51. Jeff Horwitz, *Alleged Abuses Put Credit Agencies on the Hot Seat*, BOSTON GLOBE, June 17, 2014, http://www.bostonglobe.com/business/2014/06/16/miss-consumers-harmed-credit-reporting-giant/itY78fc4FbKAoz6KNO7qHO/story.html.

larger selection of what is already in existence. "More" in this context translates into the adoption of digital tools and systems that provide solutions to problems (small and large), as well as the use of information technologies in new ways that anticipate and prevent disputes. By generating more disputes, technology has made access to injustice easy. Technology also presents opportunities to develop new forms and formats that facilitate access to justice.

While some private companies may resist providing data about numbers or types of disputes handled, all have some incentive to provide information about the processes they employ to handle disputes. Facebook, for example, provides a series of screen shots of the process one can use to file a complaint.[52] The increasing number of ODR companies and governmental entities are also likely to post descriptions of their systems. There has recently been a growth spurt of ventures that are either already in operation or in various stages of development and which are all likely to serve as data sources. These include the following:

1. Private firms: Modria, Youstice, SmartSettle, Picture it Settled, Mediateitonline.com, NetNeutrals, Virtual Mediation Lab
2. The Hague Institute for Innovations in Law (HiiL)[53]
3. British Columbia Civil Resolution Tribunal[54]
4. UNCITRAL
5. EU Directive on ODR[55]
6. UK Online Small Claims Court[56]
7. Stop Errors in Credit Use and Reporting (SECURE) Act—Proposed legislation in United States to facilitate error correction in credit reports.

C. Opportunities for Research Distinguishing ODR from ADR

ODR presents so many novel capabilities and opportunities for dispute resolution that it requires a new research agenda to better define its optimal application. Simply applying prior face-to-face models for processes and ethical

---

52. Mary Novak, *Facebook's User Conflict Resolution System: An Illustrated Walkthrough*, JUST COURT ADR (Aug. 27, 2014), http://blog.aboutrsi.org/2014/uncategorized/facebooks-user-conflict-resolution-system-an-illustrated-walkthrough/.

53. The Dutch Legal Aid Board has recently launched the Rechtwijzer, which is an end-to-end online divorce platform available to any Dutch couple. *Rechtwijzer 2.0: Technology that Puts Justice in Your Hands*, HIIL, http://www.hiil.org/project/rechtwijzer (last visited Mar. 24, 2016).

54. *What Is CRT?*, CIVIL RESOLUTION TRIBUNAL, https://www.civilresolutionbc.ca/what-is-the-crt/ (last visited Mar. 16, 2016).

55. Beginning in January 2016, all merchants in the EU will be required to post a link on their websites to the EU ODR complaint system. Certified ODR providers will also be able to resolve cross-border ecommerce disputes.

56. ONLINE DISPUTE RESOLUTION ADVISORY GRP., CIVIL JUSTICE COUNCIL, ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS (Feb. 2015), https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

rules is inadequate. There are many unanswered questions around ODR, and it will take time to both define the necessary questions, as well as analyze data collected from ODR to determine best practices. While many new research needs will likely become apparent over time, here is an initial list of the issues researchers will need to tackle in the near future to distinguish ODR from traditional ADR practice:

1. What will be the dispute systems design in the online environment?
2. Models for building trust, convenience, and expertise via technology
3. Skills needed for effective ODR service delivery
4. Use of data for prevention of disputes, when ODR provides much earlier access to disputants in the overall dispute lifecycle
5. Similarities and differences between technology-assisted negotiation and mediation
6. Areas of overlap between ODR and ADR, including the optimal use of technology inside of a face-to-face dispute resolution process
7. Use and role of apology in online processes
8. Sense of participation and voice in asynchronous, text-based interactions
9. Statistics on the percentage of agreements reached and upheld, especially in comparison to ADR and particular forms of ADR. There is a long standing statistic that face-to-face mediation leads to agreements in approximately 85–90% of time. Is online mediation similar? What variables can be isolated in online mediation that can affect the success rate?
10. Demographics: What are the demographics of those who are providing ODR? Is ODR replicating the same demographic patterns that ADR has been consistently critiqued for over the past 30 years: mostly white middle class people providing services, especially when they are volunteers, for lower income populations, disproportionately urban people of color? Is technology making headway in broadening who is giving and receiving services?
11. Breadth of data collection: it should be easier to gather data from a broad range of sectors (family, commercial, criminal, civil, education, environmental, public policy, etc.) and from across the globe. This will provide very useful comparative data and also in an increasing globalized world and the reality of the use of the Internet within and across borders. It can also provide a valuable overview of the landscape by types of technology, type of demographic, type of dispute resolution process, etc.
12. What types of technologies are being used most (i.e., video conferencing, texting, emailing, mobile phones, chat rooms, etc.)?
13. What barriers have people experienced in adopting technology? To employing ODR? For neutrals? For disputants? Breaking down these categories by demographics such as gender, age, race, ethnicity,

language, and—for disputants—being a respondent or complainant, being an individual or a business, etc.

14. What types of processes that involve dispute resolution but are not typically seen as ADR are increasing in use with the help of technology? One critique of the ADR field from those external to it is that there are other professions that handle disputes that have not usually been included in "the ADR profession" and yet are routinely turned to for handling disputes. This has narrowed the field and the professionalization process. Since ODR provides even more opportunity for inclusion, access, and creativity, it is an opportunity to gather data that would help us learn about who and how people are using technology to resolve or prevent disputes. Here are a few examples: preachers, rabbis, imams, and other religious leaders; facilitators; peacemakers; peace negotiators; youth program leaders; school vice principals; discipline system staff; customer service representatives; human resource personnel; probation officers; lawyers who are not serving in the capacity of neutrals; dispute system managers inside organizations; dispute system designers; etc.
15. Links between the collection of data in ODR and access to justice
16. Transparency in face-to-face processes versus ODR use of algorithms
17. How to conduct effective training in ODR; how it differs from ADR training; and whether ADR training should be a pre-requisite for ODR practitioners

III. CONCLUSION

Looking into the future, it is clear that the lines between ODR and ADR will continue to blur until it will be very hard to tell one from the other. Technology is insinuating itself into every area of our lives, changing our notions of the way global society should operate, and the way we resolve disputes will be no different. Eventually ODR may be the way we resolve most of the problems in our lives, with algorithmic approaches even more trusted than human powered resolutions. The only question is how long this transformation will take to play out.

The pace of that change will largely be determined by how quickly we can consolidate the lessons learned from ODR projects to date, and conduct new research to answer the remaining questions about how ODR can be made most effective. A decade ago the notion of ODR as the default means of redress for both online and offline disputes sounded like science fiction, but with the pace of technological change, such an assertion now seems almost likely. At some point soon, it may seem obvious that such an outcome was inevitable.

Human ingenuity has found solutions to previously insoluble problems for many decades. Now, as we wrestle with the ramifications of a fully and digitally connected world, we face new challenges that were unimaginable a generation ago. Advancing the practice and understanding of ODR may provide expanded

access to justice for citizens around the world, which will help achieve the objectives that purely face-to-face ADR services have been unable to deliver.

Plenary 3

Access to Justice:
Opening the Door to Additional Protections in Arbitration

Moderator: Rekha Rangachari, Esq.

Panelists: James P. (J.P) Duffy IV, Esq.

Erica B. Garay, Esq

Hon. Faith Hochberg (ret.)

Taking Advantage of the Arbitration Process: How to Customize it to Your Case

By Erica B. Garay

As arbitration becomes a much more common process used to decide commercial disputes, it is important for litigators to take advantage of the opportunities that arbitration provides to customize the process to the needs of a specific case and the litigants. All too often, even experienced litigators fail to recognize their ability to tailor an arbitration hearing and process to the case and the clients they represent. This article will explore what litigators need to consider and what opportunities there are for addressing these important concerns. The First Opportunity: The "Who, What, When" to Consider in Drafting the Clause Arbitration is a creature of contract. The parties have the opportunity in drafting their clause to provide the rules that will govern the arbitration. The "usual" arbitration clause will state what provider (such as the NCBA panels or the American Arbitration Association) will supply the arbitrator or panel, and which rules will govern (such as Commercial Rules or the Employment Rules). The clause might state what qualifications the arbitrator should have, such as "a former judge" or "a lawyer experienced with trade secrets law." The arbitration clause can select one provider's rules to govern the conduct of the arbitration and even use a different provider to administer the arbitration and supply the neutral; a clause can also dictate that the Federal Rules of Evidence will apply or that a particular state's law will apply to the conduct of the arbitration (and not just to the interpretation of a contract). Draftsmen should consider whether the parties want discovery to be conducted as though the case were in court. Remember, as discussed below, generally speaking, arbitration provides for document exchanges, but not for interrogatories, or notices to admit or depositions. If parties wish to include discovery in addition to document exchanges, then the clause should so provide. In making these choices, however, the draftsman should recognize that the party needs to anticipate whether it will be a plaintiff or a defendant. In other words, is it in the party's

interest to limit discovery? Merely making a knee-jerk choice to favor broad discovery might not be in your client's best interest in the subsequent dispute. It is important to recognize that the parties can contract as to their procedural and substantive rights. Another consideration is whether the parties want to include appellate arbitration in the clause. This relatively recent development allows for a three-arbitrator panel to sit as an appellate court to review an arbitration award. If you choose such an option, which could permit broader review of an award than is permissible under state or federal law, draftsman should consider what the appellate review will be, whether it is de novo or something else. Again, the contract will dictate. Counsel should also consider the number of arbitrators (one or three—three being much more expensive, since you are now requiring deliberation among the arbitrators) as well as the qualifications of the arbitrator(s). Do you want a former judge? An architect? A lawyer experienced with a particular type of claim or industry can help make the entire arbitration process much more efficient and effective. How to Tailor the Arbitration if the Clause Is Silent If the clause does not provide for the arbitrator's specific qualifications, counsel representing the claimant can state the qualifications that they are seeking when the arbitration is commenced. This can be raised in the demand, during the first administrative call held with the case manager, and in the selection process itself. Counsel should also consider conferring with the other side. For example, if the parties know that the case will involve a buy-out of an interest, having an appraiser or an attorney familiar with valuations would allow for an effective, efficient arbitration, since the neutral would be familiar with the issues and evidentiary matters. The Demand and Initial Administrative Call In the demand, the Claimant has the initial opportunity to advise the provider as to the qualifications of the arbitrator(s) for the particular case. The next opportunity is during the administrative call(s) with the provider. Counsel will be asked about what background (accountant, former judge, appraiser, or an attorney with a particular experience) the arbitrator(s) should have. This is an important opportunity to ensure that you are selecting the right person to decide the case. Preliminary Conference Call During the first

call with the selected arbitrator, the litigators have another important platform for customizing the arbitration process—both the prehearing discovery phase, as well as the hearing itself. If there are any legal issues that should be addressed at the outset, counsel should be prepared not only to frame the issue (and possible motions) but also the scheduling and tasks involved in such, and raise them with the arbitrator in the initial call. Examples of such motions are choice of law, scope of damages, and the scope of the arbitration clause. Planning to include time to address these at the outset will ensure that the arbitration will not run off course later. Similarly, one should consider at the start whether the case would benefit from a dispositive motion or bifurcation of issues, and plan for it accordingly. For example, the scheduling order could provide a deadline by which a party will either file a motion or submit a letter that seeks leave to move. Building in time for the briefing of such a motion before a hearing is an important way for the legal issues to be addressed in a time-sensitive manner and to permit the hearing to stay on schedule. Among the ways that the arbitration can be tailored to the needs of the case is to consider at the very earliest stages where evidence is, who has the evidence, where the witnesses are located, and whether there will be issues about obtaining such. Remember that there may be limitations on the ability of a party to obtain documents pre-hearing from non-parties, especially if the documents are out-of-state, or if a non-party is not cooperative. Counsel should give thought to whether non-party witnesses who are out-of-state will appear voluntarily or are willing to testify remotely. One should take time before this call to consider what one's needs are, how long the process will take, and to be prepared to make a proposal for handling such matters. For example, if the case is governed by the Federal Arbitration Act, then only arbitrators may issue subpoenas. In such a context, it would be advisable to make sure that there is time in the schedule for presenting the subpoenas, serving them and addressing any dispute regarding their scope. Counsel should also consider how remote witnesses will testify at the hearing. Will their testimony by telephonic, skype or video-conferenced? The arbitrator may prefer to see a witness testify. Also, given

thought to how exhibits will be presented to these witnesses and make sure that all counsel will have the ability and opportunity to have exhibits at the witness's locale. (It is also important to bear in mind that if you are using video or skype as the method to present the witness, to make sure you have tested the method in advance, for example, testing the link.) Counsel should not assume that the equipment will be available. The scheduling order will be set during the preliminary call. Counsel must be prepared to set hearing dates and the rest of the schedule. There are a myriad of ways that litigators can use this opportunity to customize the arbitration (and do not assume that just because you have always made an opening statement or provided a pre-hearing brief, that such is mandated or needed in every arbitration). To ensure efficiency and avoidance of unnecessary delays, it is advisable to ensure that the schedule you agree to takes into account the specific needs of your case, including: • Are there issues concerning arbitrability or the scope of the arbitration or whether a party named in the arbitration is a party to the arbitration clause? Is this an issue to be addressed by the arbitrator or a court? • Include time to address confidentiality stipulations and submission to the arbitrator to be so-ordered; if using a "court" form, have you edited it to be appropriate for an arbitration? • Include time to negotiate any ESI protocol (for search terms, for example) • Set a schedule to present (and argue) discovery disputes, including concerning privilege issues • Whether the case or hearing should be bifurcated, or whether the parties would benefit from certain issues being decided at an early stage (such as choice of law or scope of damages) • A schedule to present dispositive motions • Whether you need deadlines to add parties or claims • Do you need both opening statements and pre-hearing briefs? • Can the parties stipulate to any facts? Set a deadline. Stipulating to facts will shorten hearing time and reduce costs. • Counsel should carefully review the pleadings served and the arbitration clause. Has claimant followed the clause's requirements? For example, has the correct locale for the hearing been demanded? The preliminary conference call is also an opportunity to ask the arbitrator to require that the claimant amplify its demand so that there is more specificity as to the claims,

factual allegations, and damages sought. Counsel can ask the arbitrator to set a deadline for the amplification or to direct claimant explain its calculation of damages; or, if there are allegations of fraud without specificity, a respondent could ask to have a deadline set for providing such information. In an arbitration, the demand is deemed denied, even if there is no answer filed. If that is how respondent is proceeding, a claimant could ask to have included in the schedule a deadline for the respondent to serve an answer that specifies what defenses are being raised. This should not be overlooked, so that there are no surprises at the hearing and the discovery demands can address the defenses. This is an important opportunity to request an amplification of the claims, defenses and calculation of damages. Counsel should take the time to analyze what their needs are so as to ensure that there is notice of what claims or defenses are being heard and so that discovery is aimed at them. Similarly, if there are multiple parties and multiple claims, counsel should consider asking for a pleading to be filed that informs the adversary as to what claims are plead by which party and against whom, as well as what damages are sought from which party. Consideration as to the arbitrabililty is important, too. However, counsel should consider whether it is better to address all the issues in a single hearing rather than having piecemeal litigation/arbitration. Conclusion Advocates are advised that proper thought should be given at the outset (and in the drafting of the contractual provision) as to how to create the optimum process to arbitrate the claims and defenses that will be presented. Just doing what was done on a prior occasion is a sure way to miss out on an important opportunity to tailor the process to the particulars of the dispute at hand.

Erica B. Garay is an arbitrator and mediator at Garay ADR Services and can be reached at ebgaray@gmail.com

http://www.nassaubar.org/UserFiles/Nassau_Lawyer_December_2017.pdf

This article was originally published in **The Nassau Lawyer,** Dec. 2017

OBTAINING PROVISIONAL RELIEF IN AID OF ARBITRATION

by Erica B. Garay, Esq.

Mr. Jones, head of sales to a manufacturing company, Fortune Corp, suddenly departs for the competition. In weeks before his resignation, Mr. Jones was emailing himself (to his home/personal email account) reports of historic sales and information about current discussions with customers and prospective customers. Customers have begun calling Fortune's president, advising that Mr. Jones has begun soliciting their business on behalf of his new employer, a competitor of Fortune. Mr. Jones was a party to an employment agreement containing an arbitration clause. Fortune would like to seek an injunction and obtain a temporary restraining order (TRO) against Mr. Jones.

First, because there is an arbitration clause, counsel for Fortune must prepare a Demand for Arbitration (which can be quite brief, or can look like a complaint, containing multiple causes of action and a statement of the claim) and commence an arbitration in accordance with the rules of the arbitration provider designated in the arbitration clause. The Demand must be served in accordance with the rules or contractual provisions. Filing fees are explained on the tribunal's website.

Counsel may seek a preliminary injunction and TRO from the arbitrator pursuant to the applicable rules, if the rules provide for such. An arbitrator has the power to issue such relief, upon a showing of entitlement. For example, the Rule 37 (Interim Measures) and Rule 38 (Emergency Measures of Protection) of the American Arbitration Association (AAA) (Commercial Rules), provide a mechanism to obtain interim or preliminary relief on an expedited basis. Similarly, National Arbitration and Mediation (NAM) Rule 10 (Interim Order), imbues the arbitrator with broad powers to issue interim relief that the arbitrator, in his discretion, deems appropriate.[1]

Alternatively, counsel may seek provisional relief from the court "in aid of arbitration." Seeking such interim or preliminary relief will not act as a waiver of the parties' arbitration clause if sought under CPLR 7502(c). Indeed this section provides extraordinary relief to ensure the effectiveness of a future arbitration award.

Pursuant to CPLR 7502(a), a special proceeding must be commenced to apply for provisional relief, if there is no action pending.[2] If there is an action pending, then the application can be made by motion.[3] CPLR 7502(a)(i)-(ii) is the governing venue provision for special proceedings in aid of arbitration. The signed Order to Show Cause will dictate how and by when the Order to Show Cause, Petition and supporting papers are to be served. "E-filing rules," including bringing a copy of the proof of e-filing and purchase of the index number, must be observed when counsel presents the order to show cause, supporting papers, and Request for Judicial Intervention (RJI) in court. If the case is a commercial case, it should be so designated on the RJI, and any applicable rules of the division must be followed.

CPLR 7502(c) requires the petitioning party to show that:

- the claim is arbitrable and there is a binding arbitration clause

- without the injunction or order of attachment the award rendered in the arbitration would be ineffectual

- and that the provisions of article 62 (attachment) and/or article 63 (injunctions) have been satisfied.

Courts have held that the petitioner must satisfy the three-prong test and show that the arbitral award would be rendered ineffectual without the injunction. In addition to the Order to Show Cause (and affidavit of emergency) and petition, the petitioner should present affidavits with exhibits and a memorandum of law in support of the extraordinary relief of injunction or attachment demonstrating entitlement to the extraordinary relief sought.

In *Ottimo v. Weatherly Securities Corp.*, the Second Department stated that in addition to showing that the "award to which the applicant may be entitled may be rendered ineffectual without such provisional relief," the applicant must demonstrate "traditional equitable criteria for the granting of temporary relief under CPLR article 63".[4] "Article 63 is a formulation of the traditional equitable criteria necessary for provisional relief: (1) irreparable harm; (2) a likelihood of success in arbitration; and (3) a balance of the equities in favor of the moving party."[5]

The failure of Petitioner to establish that the award would be rendered "ineffectual" is often a ground for denial of the requested relief. For example, in *Kadish v. First Midwest Securities, Inc.*, the First Department, affirmed the denial of an order of attachment finding that petitioner failed to provide record evidence establishing that the respondent would be unable to pay an award (as the certified financials established the qualifications of the company) and that petitioner had failed to rebut the evidence presented that it was likely that insurance would be available to fund the award.[6]

The denial of an injunction was also affirmed in *Advanced Digital Security Solutions, Inc. v. Samsung Techwin Co., Ltd.*, where the Second Department held that it was proper to deny an injunction because issues of fact existed that precluded petitioner from establishing the likelihood of success on the merits.[7] In *Richard Manno & Co., Inc. v. Manno,*, the trial court denied a preliminary injunction in aid of arbitration, since it is the same relief sought from the arbitrator as the ultimate award.[8] The Court held that the balancing of the equities favored the respondent, especially where an award of damages would make the petitioner whole.

There are more hurdles to obtaining an injunction in aid of arbitration than in any other application for an injunction.[9] However that does not mean that an injunction will not be awarded. This is especially the case where there are trade secrets to protect or the return of corporate property is sought,[10] to prevent the transfer of real property during the pendency of an arbitration, [11]or where the termination of an agreement to sell goods would cause irreparable harm during the pendency of the arbitration.[12] In *Rockwood Pigments NA, Inc. v. Elementis Chromium, LP*, for example, the First Department noted that, but for the award of injunction in aid of arbitration to require the continued performance of the contract (which allegedly had been terminated wrongfully), the ultimate remedy of specific performance would be unavailable, at the conclusion of the arbitration, where petitioner was in need of the subject goods for the company to function.[13]

The petitioning party must post an undertaking to support the injunction that you have obtained. CPLR 7502(c). Extensions on good cause shown can be given, if a deadline to file the bond cannot be met.

With respect to seeking a TRO in the Order to Show Cause, counsel should also consider what advance notice is required to be given to the respondent that such relief is being sought. Notice is unnecessary under 22 N.Y.C.R.R. § 202.7(f) where it would cause "significant prejudice to the party seeking the restraining order by giving of notice." This would apply to destroying evidence that trade secrets were taken or used, for example. The reasons for not providing the usually required notice should be set forth in the RJI and can be further explained in the affidavit of emergency.

Lastly, the petitioner must commence the arbitration within 30 days of the grant of the provisional relief (if not filed previously).[14] Otherwise, the order granting such provisional remedy is null and void, and the respondent can recover reasonable attorney's fees and costs.[15]

As noted above, the claimant may also seek preliminary relief from the arbitrator, if available under the provider's rules. Given the proviso that an arbitrator is not bound by the strictures of CPLR 7502(c) and its procedural requirements, a practitioner should consider seeking provisional or interim relief directly from the arbitrator, who is entitled to do justice, and where court review of such determinations is extremely limited.

If the high threshold to obtain an order of attachment cannot be met, counsel should consider entering a stipulation that restrains the respondent in certain ways. For example, the stipulation could limit the financial activities of the respondent or embody a "status quo" order. Or, instead of an injunction to protect petitioner, a stipulation could limit solicitation of certain customers, or agree to the return of corporate property (such as cell phones, laptops, documents and electronic data) and/or limit the use of confidential information or specific documents during the pendency of the arbitration.

As ADR becomes more prevalent, litigators need to be conversant in the provisional remedies available from the arbitration tribunals and from the courts in aid of arbitration. CPLR 7502(c) and the ADR tribunal's rules provide invaluable tools to protect the claimant.

Erica B. Garay is a Member of Meyer, Suozzi, English & Klein, P.C., Chair of the Meyer Suozzi ADR Practice Group, and Co-Chair of the NCBA ADR Committee. Ms. Garay can be contacted at egaray@msek.com.

---

[1] See also JAMS Rule 24(e) (interim and provisional relief).

[2] *See also* CPLR Article 4 (special proceedings).

[3] *See* CPLR 7502(a).

[4] 306 A.D.2d 287, 760 N.Y.S.2d 364, 364 (2d Dep't 2003).

[5] *Tapimmune Inc. v. Island Capital Mgmt., LLC*, 2013 WL 1494681 (N.Y. S.Ct. N.Y. Cty, April 8, 2013), *citing Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005). *See also Winter v. Brown*, 40 A.D.3d 526, 527, 853 N.Y.S.2d 361, 362 (2d Dep't 2008).

[6] 115 A.D.3d 445, 446, 981 N.Y.S.2d 525, 526 (1st Dep't 2014), *citing Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 82 A.D.3d 89, 96, 921 N.Y.S.2d 14 (1st Dep't 2011); *Sullivan & Worcester LLP v. Takieddine*, 73 A.D.3d 442, 442, 899 N.Y.S.2d 609 (1st Dep't 2010).

[7] 53 A.D.3d 612, 613, 862 N.Y.S.2d 551, 552 (2d Dep't 2008).

[8] 34 Misc.3d 1225(A), 946 N.Y.S.2d 69 (N.Y.S. Ct. Suffolk Cty., Feb. 2012)(Whelan, J.).

[9] *See, e.g.*, CPLR Article 63 (injunction) CPLR Article 62 (attachment).

[10] S*ee, e.g., Earnick Enterps., Inc. v. Sterling Vision, Inc.* 1998 WL 35243182 (N.Y.S. Ct. Kings Cty, Feb. 3, 1998).

[11] S*ee, e.g., Astoria Equities 200 LLC v. Halletts A Devel. Co., LLC*, 47 Misc.3d 171, 183, 996 N.Y.S.2d 516, 524 (S.Ct. Queens Cty. 2014).

[12] S*ee, e.g., Rockwood Pigments NA, Inc. v. Elementis Chromium, LP*, 124 A.D.3d 509, 2 N.Y.S.3d 94 (1st Dep't 2015).

[13] *Id.*

[14] CPLR 7502(c).

[15] If you find yourself in federal court, the Federal Arbitration Act does not provide a specific section governing application for an injunction in aid of arbitration. However, the Second Circuit has found that the district court has the inherent power to issue such an injunction. *See, e.g., Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990); *Roso-Lino Bev. Distribs, Inc. v. Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124 (2d Cir. 1984). The circuit courts are split on this issue, however.

This article was previously published in *The Nassau Lawyer*.

Erica Garay is the owner of Garay ADR Services, serving as a neutral arbitrator and mediator of commercial and employment claims.

Alternatives
TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

VOL. 35 NO. 1 JANUARY 2017

Arbitration

Assessing the Options: Go for an Interim Emergency Award? Or a Temporary Restraining Order Issued by a Court?

BY FAITH S. HOCHBERG

"Go to court? Or not to court?" Those are the questions, with apologies to the late great bard.

This is an unusual inquiry coming from a former U.S. District Court judge who retired from the bench just last year. But this author would be the first to say that courts can learn a lot from processes developed by arbitrators.

As just one example, litigation discovery in the U.S. is too cumbersome, burdensome and expensive. But when you need interim emergency measures to protect your client's interests in a matter before an arbitration panel can be convened, your first decision may be the most critical to protecting your client's interests.

In a rapidly evolving matter where, for example, speed is critical to prevent dissipation or removal of assets, are you better off going to court or seeking an emergency arbitral ruling?

A decade ago, the answer would have been clear: seek an emergency court order. Now, however, many arbitral institutions and rules can be quite nimble in emergent situations.

So which forum do you choose? There are many nuanced considerations; it is vital to consider them before an emergency arises.

This article sets forth the practical issues that counsel may face, in the order that this author believes they should be considered. The universal assumption is that the matters that should go before an emergency arbitration tribunal are those where the ultimate relief on the merits will be determined in arbitration.

Hon. Faith Hochberg, U.S.D.J. (ret.), is a mediator and arbitrator in private practice, based in New York City. She is a mediator and an arbitrator on the Panels of Distinguished Neutrals maintained by the CPR Institute, which publishes this newsletter. She was U.S. Attorney for the District of New Jersey from 1994 to 1999, and a U.S. District Court judge sitting in New Jersey from 1999 to 2015. The author's full bio can be found at www.JudgeHochberg.com, and she can be reached at judgehochberg@JudgeHochberg.com.

1. What Type of Relief Will You Be Seeking?

The first question is likely to be what kind of interim relief you anticipate. An asset freeze? An order preserving the status quo in a corporate dispute? An order to enjoin obstructive behavior? An order to prevent funds from leaving the jurisdiction?

The primary goal, of course, is to ensure that your client will have a collectible judgment at the end of the merits arbitration.

Once this is decided, there are many decisions that follow.

2. Is the Relief Measure Likely To Be Adverse to a Party or a Non-Party to the Arbitration?

If the relief will likely be sought from a party to the arbitration, it is essential to stay current with the sources of arbitral authority to grant interim relief. The applicable arbitral rules that govern the dispute may well have new or updated rules that permit an emergency arbitrator to grant interim relief. Even if you had

(continued on page 6)

Alternatives DOI: 10.1002/alt

Commentary

(continued from previous page)

- … That had a generally accepted method of enforcing its determinations …
- … And that had a sound basis for the traditional practice of binding private dispute resolution.

These attributes are essential to the very concept of arbitration as a method of non-judicial, consensual, final, and binding resolution of disputes. Yet many of them seem no longer to pertain to either mercantile or religious communities.

Just as the absence of the practice of Quaker arbitration—or some other clear, defined, final, authoritative and Spirit-led procedure for addressing disputes within Quaker congregations—may reflect a disinclination of contemporary Friends to join a truly covenanted faith community, so current trends of commercial arbitration might also reflect a similar departure from its mercantile origins of seeking accountability, authority and self-regulation for the advancement of the trade.

Modern theories of arbitration contemplate that the process—which originally relied on informed consent and participation in a defined body of users—may now bind employees, consumers, credit card users, software purchasers, and others who share few attributes of a community, and indeed may be unaware that they have agreed to participate in the arbitration process.

Quakers appear to have abandoned—even forgotten—a historic practice of arbitration. The eventual disuse of arbitration in the religious community may hold disquieting lessons for those questioning the integrity of commercial arbitration.

Generally applicable legal principles, rather than standards of behavior unique to a shared and intentional community, are now applied to the determination of these conflicts. No distinct practice or tradition of private adjudication has survived this evolution, and no distinct social, economic, or spiritual objectives are served by modern arbitration that the general law does not equally address.

Rather, the arbitration process is perceived merely as an alternative forum to vindicate the same rights deriving from the same standards and the same inter-relational behaviors as would be addressed by a public court in the application of broadly applicable legal principles.

COMMERCIAL DEVOLUTION

The study of the disuse of Quaker arbitration, then, leads us to reassess the devolution of modern arbitration itself. In any community—whether one sharing a common faith or one sharing a common mercantile practice—private arbitration among members of a close and dependent society is, ultimately, an exercise in mutual accountability.

In the absence of that accountability, and in light of the broadly accepted modern practice of disputants' engaging advocates to argue law, rather than directly and frankly engaging each other in a search for an outcome reflecting their shared values, an essential attribute of arbitration is missing and its practice is skewed.

At its core, arbitration over the centuries has relied upon a closed community with common goals, accepting that mutual accountability is essential to its welfare. The acknowledgement within the community of specific expectations for behavior—unique to that specific community—is an essential element of private dispute resolution and the key to the practice of arbitration as a means of the community's achieving its objectives.

The Quaker community changed, and as it lost those principles of mutual reliance, the practice of arbitration ceased to address its wounds or affirm its basic strengths. Might commercial arbitration have lost its essential character, as well?

Arbitration

(continued from front page)

those rules committed to memory as recently as a year ago, check for updates, because this area of many arbitral institutions' rules is changing rapidly.

In addition to the arbitral rules that apply to your case under the arbitration clause, consider whether an international convention will apply. The convention will govern whether an emergency arbitrator's ruling will be enforced in a particular country where assets are located. Also, have at your fingertips the relevant national law of the country where you expect to either enforce an emergency arbitrator's ruling, or seek emergent relief directly from a court.

The trend of the conventions, laws and rules is generally not to prohibit interim measures, unless the arbitration clause itself prohibits them. Note that some arbitration clauses now specifically authorize such measures, but specific authorization may not be necessary to obtain that type of relief. (If interim measures are expressly prohibited in the arbitration clause or incorporated rules, the task will be monumentally more difficult.)

Nevertheless, be sure to take that extra step of researching the national laws of the country where you will need to enforce the interim measure. Some countries' laws prohibit arbitrators from granting provisional relief, even if the applicable arbitral rules permit it, so be aware of those laws from the start of the analysis.

United States law generally upholds the authority of arbitrators to order interim relief, if the arbitration agreement is silent and does not ban it. While there are a very few historical cases holding that express consent is required, this is a distinctly minority view.

By contrast, if the relief to be sought is from a third party who is not bound by the arbitration clause, you will almost always need to seek that relief in a court with jurisdiction over the person and/or the asset. If there is jurisdiction over the asset, but not the person, consider whether the national law of that country permits in rem proceedings.

For a discussion on the current caselaw, see Bruce E. Meyerson, "Interim Relief in Arbitration: What Does the Case Law Teach Us?" 34 *Alternatives* 131 (October 2016)(available at http://bit.ly/2eHITCI).

3. How Fast Will You Need a Ruling on the Interim Measure?

Historically, the general view was that courts can act faster than arbitrators, because courts have judges and rules in place to hear an emergency motion for a temporary restraining order, preliminary injunction, attachment request, and/or an emergency asset freeze.

Now that many arbitral institutions have procedures to appoint an emergency arbitrator before the merits panel is constituted, this view is changing, and the inquiry involves multiple factors.

It is important to stay current as the rules emerge. While I was a federal judge, I was always amazed that civil rules changes seemed to take forever to be fully known by the bar.

As a result, I often had to point out to counsel that rules had been adopted on issues such as claw-back of inadvertently produced privileged documents, or authentication of business records.

The need for interim relief moves too quickly to learn about rules from the judge or arbitrator. Counsel must not only keep abreast of new rules, but also have a plan in advance to move quickly if interim measures are required.

If your arbitration agreement is ad hoc, with no rules specified, seeking court relief is probably the better choice, unless there is a provision for interim measures in the agreement itself. And, of course, where your client has the ability to be involved in the drafting process, make sure that you consider whether to incorporate either a set of arbitration rules that have a procedure for interim relief, or incorporate that provision directly into the arbitration clause.

If speed is a core concern, to avoid dissipation or transfer of assets, or destruction of evidence, seeking relief directly from a court will usually be faster, because is it a one-step process rather than two steps. Even if there is clear authority for an arbitral award of interim relief, only a court can both award and enforce that relief.

Weighing Your Options

The arbitration dilemma: Where should you go for emergency relief?

Don't always follow your instincts: By definition, judges and courts are set up for timely intervention/preservation. But today's arbitration rules accept pre-hearing arbitration action as part of the full dispute resolution scheme. They are a solid option.

Have a game plan: Despite the ubiquity of interim procedures, the rules have been changing fast. This article provides you with the evaluation steps for getting help before your case is arbitrated.

The arbitral rules that govern the dispute may have new or updated provisions that permit an emergency arbitrator to grant interim relief. Even if you had those rules committed to memory as recently as a year ago, check for updates. This area is changing rapidly at many arbitral institutions.

4. What Will Be the Applicable Legal Standard To Win Interim Relief?

Although courts have the personnel and administrative ability to act with speed to assign a judge to hear emergent applications for relief, the legal standard necessary to convince a judge to grant the relief sought may be considerably more difficult than in an arbitral process.

The traditional legal standard to surmount in court is to demonstrate both a likelihood of success on the merits, and irreparable harm that is not compensable in damages. In addition, courts also consider factors such as a balancing of the harm to the party seeking the relief compared to the prejudice to the party whose assets may be frozen before it has a chance to be heard.

Historically, arbitrators have applied a more flexible standard, phrased in terms such as "necessary relief in the interest of justice," or "preserving the arbitral process." Standards using this language are set forth in many conventions and rules.

But there is a fairly recent trend of arbitral standards vectoring somewhat toward court legal standards. While arbitrators generally have shied away from using the standard of "likelihood of success on the merits" to avoid appearing to prejudge the case before the merits panel hears the evidence, the standard applied in some proceedings is whether there is a "reasonable possibility" of success on the merits.

This is a lesser burden than establishing "likelihood" of success. But it also is more demanding than the historically elastic standard of "necessary relief in the interest of justice" or "relief necessary to preserve the arbitral process."

5. If You Get an Interim Award, Can You Enforce It?

If the relief obtained is injunctive in nature, it will be necessary to obtain court enforcement of it, absent voluntary compliance by the adverse party. As stated above, be sure that you are familiar with the law and rules of the court with jurisdiction over the party and the asset.

Voluntary Compliance vs. Court-Enforced Compliance: Do not rule out the possibility of voluntary compliance, because the

(continued on next page)

Arbitration

(continued from previous page)
adverse party may not want to get on the wrong side of an arbitration panel before the case even begins.

And if you are defending an interim ruling, remember that arbitrators are human and the credibility of a party can be affected if it does not comply with the interim ruling. Counsel often advise compliance. A negative impression of credibility is hard to erase, especially with the tribunal that will be deciding whether to award damages for noncompliance. Additionally, consider whether the merits panel can make an adverse inference from the fact of noncompliance.

Enforcement via Court Action: The reality is that most interim awards will have to be enforced in a court of competent jurisdiction. If you are able to persuade an emergency arbitrator to grant interim relief, a court will almost always enforce the interim award. Courts apply a very different standard to review of arbitration awards than is applied to cases brought to it in the first instance. Therefore, the court will likely enforce the arbitrator's interim award even if that court might not itself have granted relief under the legal standard to be applied if the application had been made directly to the court.

Nomenclature Can Matter: Because enforcement of the interim award will require court action where a party does not voluntarily comply, make sure that the interim award is styled as a "Partial Final Award" and not a "Procedural Order."

This gives counsel the best chance to quickly convince a court that it is a final award of interim relief. Of course, the court will independently decide if the award is in fact really one that is final and enforceable, but the wording can create a strong first impression.

6. Will Advance Notice to the Other Party Trigger the Harm before Counsel Can Even Be Heard?

When dealing with a true scoundrel, it may be necessary to seek relief ex parte.

Regardless of the forum, an ex parte motion is always a challenge, but your chances are better in court than in arbitration. Arbitrators are hesitant to act without the consent of both sides in the process. Arbitration is premised on consent, and that core principal is deeply engrained in the process and the arbitrators themselves.

Counsel often advise compliance with interim rulings. A negative impression of credibility is hard to erase, especially with the tribunal that will be deciding whether to award damages for noncompliance.

7. As if this Wasn't Already Complicated Enough, What Else Must Be Considered?

Rules on Posting of Bonds by the Prevailing Party: The general rule in courts is to require the prevailing party to post a bond, to secure against any harm to the party who is enjoined or restrained. Courts require this, with rare exceptions, because a decision is being made to the detriment of one party without full knowledge of all the facts and evidence. If the injunction is improvidently ordered, there must be a secure way to redress the wrong to the adverse party.

Where an interim award is made by an emergency arbitrator, a bond also likely will be sought and often granted.

The Country Where the Interim Measure Would be Enforced: If enforcement will be sought in a foreign country, an arbitration award is a superior choice because of worldwide recognition and enforcement, even in countries that would not enforce a court order of the United States.

Choice of Law; Venue; Jurisdiction: These issues demand careful legal analysis in advance of the emergency to chart a smart path toward enforceable relief.

Jurisdiction is critical, and advance research should be conducted about whether the jurisdiction must be proper over the person or in rem over the asset. It is important to note that United States law has narrowed considerably about both general and specific jurisdiction over entities, especially foreign entities.

Choice of Law often is specified in the arbitration agreement. If it is not, be sure to know in advance what law will be applied. It could be the national law of the country where the entity or asset is located, or it may be the arbitral seat. If the measure is directed to a non-party, the law that applies will likely be the law of the forum where the party or asset is located.

* * *

The ability to obtain interim relief in advance of convening an arbitration merits panel is rapidly becoming the norm rather than the exception.

Whether and how to anticipate the fast-moving choices that need to be made about whether to proceed with an emergency arbitrator or a court is a true challenge. But that challenge is less daunting if advance research is done to develop a decision tree about the pros and cons of each, whether your client is the claimant or the potential respondent.

You will not have the luxury of time to chart your course through these decisions, so anticipation and advance research is key.

REVIEWING THE LAW

Once you are comfortable with the decision-making practice pointers for getting interim relief in arbitration, you need to align it with familiarity with the law. *Alternatives* covered the case law and statutes on interim measures in arbitration during the fall in an article by former Arizona state court judge and veteran practitioner Bruce E. Meyerson. See his article, "Interim Relief in Arbitration: What Does the Case Law Teach Us?" in the October 2016 issue, at 34 *Alternatives* 131 (available at http://bit.ly/2eHITCI). A sidebar features a guide to the state law adoptions of the latest version of the Revised Uniform Arbitration Act.

Interim, Provisional and Conservatory Measures in US Arbitration

PRACTICAL LAW LITIGATION AND PRACTICAL LAW ARBITRATION

Search the Resource ID numbers in blue on Westlaw for more.

This Practice Note outlines interim measures available in arbitration and provides guidance on where, when and how to apply for these measures.

SCOPE OF THIS NOTE

Interim, provisional and conservatory measures are remedies that can be granted before the arbitrators hear the merits and render their final award. They are designed to protect a litigant during the course of an arbitration to insure a meaningful final adjudication on the merits. These are extraordinary remedies that are usually granted only on the ground that the award to which the applicant may be entitled may be rendered ineffectual without interim relief. If the remedy is granted, the applicant may be required to post security to make the other party whole for any injury it sustains as a result of the remedy if it is determined that the applicant was not entitled to the remedy. Before advising a client to seek an interim remedy, counsel should consider the likelihood of obtaining relief and the value of that relief if obtained.

This Note addresses remedies that parties may seek before arbitrators and US courts to preserve the status quo so that the final award rendered by the arbitrators will be meaningful. Depending on the applicable law or institutional rules, the remedy may be referred to as "provisional," "preliminary," "interim," "conservatory" or "temporary." Regardless of the term, the effect is the same. Under the rules of most of the arbitral institutions, the arbitral tribunal can grant interim remedies, which include the ability to grant preliminary injunctive relief and orders of attachment in an appropriate case. A party may, for example, need to restrain an employee in possession of sensitive trade secrets from working for a competitor or may need to attach assets that would otherwise leave the jurisdiction.

This Note explains the:

- Relevant sources of law.
- Power of arbitrators.
- Role of the courts.
- Factors to consider when deciding to seek interim relief before arbitrators or a US state or federal court.
- Best ways to resist interim relief.

For an analysis of anti-suit injunctions in aid of arbitration, see Practice Note, Anti-Suit Injunctions and Anti-Arbitration Injunctions in the US Enjoining Foreign Proceedings (3-560-2848). For more information on interim, provisional and conservatory measures in international arbitration generally, see Practice Note Interim, Provisional and Conservatory Measures in International Arbitration (1-342-7952).

US LEGAL FRAMEWORK FOR ARBITRATION

Federal courts, state courts and arbitrators can grant interim relief such as preliminary injunctions and pre-judgment attachments in aid of arbitration. Most interim measures are granted at an early stage in the proceedings to preserve the status quo or prevent the dissipation of assets or evidence that could render an award ineffectual.

Arbitration in the US is governed by both federal and state law. The main source of US arbitration law is the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16, 201-208, 301-307), which applies in the state and federal courts of all US jurisdictions. The FAA applies to all arbitrations arising from maritime transactions or to any other contract "involving commerce," which is defined broadly (see *Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037, 2040 (2003)). This effectively means that the FAA applies to all international arbitrations and most domestic arbitrations seated in the US.

The FAA does not cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. § 1). Therefore, employees "actually engaged in the movement of goods in interstate commerce" are not covered by the FAA (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001), quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)). The FAA's exemption for seaman's employment contracts, however, does not apply to international voyages, which are covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in 1958 (New York Convention) (see *Dumitru v. Princess Cruise Lines, Ltd.*, 732 F. Supp. 2d 328, 338 (S.D.N.Y. 2010)). In the areas the FAA covers,

the courts have stated that it generally pre-empts any state law that conflicts either with its express provisions or its intent of promoting arbitration.

The FAA permits parties to specify in their agreement state arbitration rules to govern their arbitration (see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008)). All 50 US states and the District of Columbia have enacted arbitration laws of their own to address issues on which the FAA is inapplicable or silent.

Federal courts are courts of limited jurisdiction and can hear only certain types of cases. In controversies touching on arbitration, however, the FAA is "something of an anomaly" in the realm of federal legislation, in that it does not independently bestow federal jurisdiction (*Hall St.*, 552 U.S. at 581-582 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983)). Where the claims in the underlying arbitration are based on federal law, as long as the federal cause of action is not facially insubstantial, the district court may properly exercise subject matter jurisdiction over the application for provisional remedies (see *Fairfield Cty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53, 55 (2d Cir. 2014)).

An action or proceeding falling under the New York Convention is deemed to arise under US laws and treaties (9 U.S.C. § 203). The FAA, which implements the New York Convention provides federal courts jurisdiction over actions to "compel, confirm, or vacate" an arbitral award (see *Holzer v. Mondadori*, 2013 WL 1104269, at *6 (S.D.N.Y. Mar. 14, 2013). Although the FAA does not explicitly grant federal courts jurisdiction, courts generally hold that they possess subject matter jurisdiction over requests for preliminary relief in aid of international arbitration (*Stemcor USA Inc. v. Cia Siderurgica do Para Cosipar*, 870 F.3d 370, 375 (5th Cir. 2017); see also *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) (entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to section 206 of the FAA), cert. denied, 500 U.S. 953 (1991); see also *Goel v. Ramachandran*, 823 F. Supp. 2d 206, 215–16 (S.D.N.Y. 2011)). Federal courts, therefore, have jurisdiction to grant preliminary relief even when the petition is not accompanied by a request to compel arbitration (see *Venconsul N.V. v. Tim Int'l N.V.*, 2003 WL 21804833, at *3 (S.D.N.Y. Aug. 6, 2003)).

Where the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the New York Convention, the defendants may, at any time before the trial, remove the action or proceeding to the federal district court embracing the place where the action or proceeding is pending (9 U.S.C. § 205). (See Practice Note, Removal: How to Remove a Case to Federal Court (1-506-8452)).

For more information on the scope of the FAA, see Practice Note, Understanding the Federal Arbitration Act (0-500-9284).

SEEKING INTERIM RELIEF BEFORE COURTS AND ARBITRATORS

Arbitration governed by institutional rules such as the American Arbitration Association (AAA) Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence on or after October 1, 2013) (AAA Rules) and the International Centre for Dispute Resolution (ICDR) International Arbitration Rules as amended and effective June 1, 2014 (ICDR Rules) specify that the arbitrators have the power to grant interim, provisional and conservatory measures and specify procedures for obtaining relief even before the tribunal is constituted (see AAA Rules 37 and 38 and Articles 6 and 24, ICDR Rules).

Provisional relief is often necessary before arbitration when:

- A party has evidence that is relevant to the dispute but this evidence is likely to be destroyed, damaged or lost absent an interim order protecting it.
- A dispute is concerned with the ownership of perishable goods that may deteriorate before the dispute can be determined. An interim order requiring the sale of the goods (with the sale proceeds to be held pending the final award), or requiring the goods to be sampled, tested or photographed before the sale is often granted in this case.

WHO MAY PROVIDE RELIEF

Interim, provisional and conservatory relief in aid of arbitration may be provided by:

- The arbitral tribunal.
- An "emergency arbitrator" appointed by an administering body.
- A federal or state court.

The precise scope of the powers of each of these to act depends on:

- The arbitration agreement.
- Applicable arbitration rules.
- Applicable federal and state law.

COURT-IMPOSED LIMITS

Some US courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement governed by the New York Convention (see, for example, *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974) and *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981)). In *Merrill Lynch, Pierce, Fenner & Smith v. Hovey,* the Eighth Circuit held that a preliminary injunction was inappropriate in an arbitrable controversy where the parties did not specifically provide for it in their agreement (726 F.2d 1286, 1292 (8th Cir. 1984); see also see *Manion v. Nagin*, 255 F.3d 535, 538-39 (8th Cir. 2001); *RFD-TV, LLC v. MCC Magazines, LLC*, 2010 WL 749732, at *3-4 (D. Neb. March 1, 2010)). Other courts have declined to grant provisional relief where it is clear that the arbitrators have the power to grant the same provisional relief (see *TK Services, Inc. v. RWD Consulting, LLC*, 263 F.Supp.3d 64, 71 (D.D.C. 2017); *Burton Way Hotels, Ltd. v. Four Seasons Hotels Ltd.*, 2017 WL 2491595, at *1 (C.D. Cal. May 18, 2017)).

The prevailing view, however, is that under the FAA, a court may grant interim relief pending arbitration (see *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012), *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214-15 (7th Cir. 1993); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1051-54 (2d Cir. 1990); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d at 826; *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F.2d 50, 54-55 (3d Cir. 1983); and

Sojitz Corp. v. Prithvi Info. Solutions Ltd., 921 N.Y.S.2d 14, 17 (1st Dep't 2011)). In *Sojitz*, for example, the court held that a creditor can attach assets, for security purposes, in anticipation of an award that will be rendered in an arbitration seated in a foreign country, even where there is no connection between the arbitral dispute and the state, as long as there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

The question of whether a federal court should grant a preliminary injunction is generally one of federal law even in diversity actions, but state law issues are sometimes considered (see *AIM Int'l Trading LLC v. Valcucine SpA*, 188 F. Supp. 2d 384, 387 (S.D.N.Y. 2002)). For more information on seeking preliminary injunctive relief in federal court, see Practice Note, Preliminary Injunctive Relief: Procedure for Obtaining Preliminary Injunctive Relief (Federal) (3-520-9724).

The standard for an injunction pending arbitration is the same as for preliminary injunctions generally (see *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015)). The standard for granting preliminary injunctions, however, vary slightly by circuit. Some circuits apply a balancing test, allowing a weaker showing in one factor to be offset by a stronger showing in another. Other circuits apply the traditional factors sequentially, requiring sufficient demonstration of all four before granting preliminary injunctive relief. For more information on the standards used in each circuit, see Standard for Preliminary Injunctive Relief by Circuit Chart (8-524-0128).

The likelihood of success on the merits that a court considers when considering whether to grant a preliminary injunction is measured in terms of the likelihood of success in arbitration. Because arbitration is frequently marked by great flexibility in procedure, choice of law, legal and equitable analysis, evidence, and remedy, success on the merits in arbitration cannot be predicted with the confidence a court would have in predicting the merits of a dispute that it will determine on the merits. The court's assessment of the merits therefore has reduced influence. (*SG Cowen Sec. Corp. v. Messih*, 224 F.3d 79, 84 (2d Cir. 2000).)

Court-issued interim orders generally last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief (see *Fairfield Cnty. Med. Ass'n*, 557 F. App'x at 56; *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010); and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d at 215). In effect, restraints issued by courts often serve the same function as a temporary restraining order (TRO). In a recent decision, *Rodenstock GmbH v. New York Optical International, Inc.*, the court noted that the institution before which the dispute was pending made no provision for interim relief before constitution of the tribunal and therefore specified that the court-ordered injunction lasts only until thirty days after the institution notifies the parties of the tribunal's appointment (2018 WL 4445108 (S.D. Fla. Sept. 14, 2018)). Other courts allow provisional remedies to remain in place until the arbitral panel renders an award (see *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, 2013 WL 5312540, at *18 (S.D.N.Y. Sept. 23, 2013) and *Amegy Bank Nat'l Ass'n v. Monarch Flight II, LLC*, 870 F. Supp. 2d 441, 452-53 (S.D. Tex. 2012) (collecting cases and noting the split of authority regarding how long the court-imposed relief should last)).

Where the arbitrators make permanent the provisional relief ordered by the court, the court will enter permanent relief when confirming the award (see *Benihana, Inc. v. Benihana of Tokyo, LLC*, 2016 WL 3913599, at *1, *5 (S.D.N.Y. July 15, 2016)). The confirming court retains jurisdiction to vacate the injunction if applying it prospectively is no longer equitable (see *Arkwright Advanced Coating, Inc. v. MJ Sols. GmbH,* 2017 WL 945086 (D. Minn. Mar. 10, 2017)). The arbitrator also has authority to dissolve a court-ordered injunction but the dissolution only becomes effective when confirmed by the court (*In re Sw. Ranching Inc.*, 2017 WL 4274309 (Bankr. S.D. Tex. Sept. 22, 2017)).

Where admiralty jurisdiction is invoked, federal law governs attachments of ships and other assets (see *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399 (2d Cir. 1995)). In proceedings begun by libel and seizure of vessels or other properties in admiralty proceedings, Section 8 of the FAA provides the federal courts with jurisdiction to direct the parties to proceed with arbitration and to enter a decree on the award. For more information on provisional relief in maritime cases, see Practice Note, Maritime Attachment and Vessel Arrest in the US (W-001-8160).

Counsel should clearly point out that the relief the petitioner seeks is pending arbitration and petitioner is not seeking ultimate relief from the court. In *Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P.*, for example, a party filed an action for a jury trial on the merits and an award of damages and permanent injunctive relief. The court held that having made this choice, the plaintiff had no right to abandon litigation and start afresh with an arbitration. (*Satcom Int'l Grp. PLC v. Orbcomm Int'l Partners, L.P.*, 49 F. Supp. 2d 331, 338 (S.D.N.Y.), aff'd, 205 F.3d 1324 (2d Cir. 1999).)

The court will likely require the successful movant to post security, typically by bond. Judges set the bond in the amount they believe sufficient to pay any costs and damages sustained by the wrongly restrained respondent (FRCP 65(c)). The court may entertain an application for attorneys' fees and costs in connection with the judicial provisional remedy proceedings, notwithstanding the parties' agreement to have all disputes resolved by arbitration (see *Benihana Inc. v. Benihana of Tokyo, LLC*, 2016 WL 3647638, at *3 (S.D.N.Y. June 29, 2016)). More typically, the court will send the application for fees to arbitration (see *Doctor's Assocs., Inc. v. Repins*, 2017 WL 1745024, at *7 (D. Conn. May 4, 2017)).

For a sample application to a federal court for preliminary injunctive relief, with integrated drafting notes, see Standard Document, Petition for Preliminary Injunction in Aid of Arbitration (Federal) (W-003-3155).

PROCEDURE UNDER STATE LAW

Outside of admiralty, Federal Rules of Civil Procedure (FRCP) 64 dictates that state law governs the availability of attachment in federal court ("At the commencement of and throughout an action [for attachment in federal district court], every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment"). For more information on applying for attachments under state law, see, for example, Practice Note, Provisional Remedies in New York: Attachment (6-545-4846).

In state courts, most state laws authorize provisional remedies in aid of arbitration. Section 7502(c) of the New York Civil Practice Law and Rules (CPLR), for example, provides that to obtain provisional relief, the movant must demonstrate that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." CPLR 7502(c) provides that a showing of an ineffectual award is the "sole ground for the granting of the remedy" (compare *JetBlue Airways v. Stephenson*, 932 N.Y.S.2d 761 (Sup. Ct. N.Y. Co. 2010), aff'd, 931 N.Y.S.2d 284 (1st Dep't 2011) (denying motion for injunctive relief under CPLR 7502(c) because, although the movant presented arguments regarding the CPLR Article 63 criteria, it ignored the "ineffectual award" requirement) with *Winter v. Brown*, 853 N.Y.S.2d 361 (2d Dep't 2008) (lower court erred when it granted preliminary injunction in favor of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief)). CPLR 7502(c) also provides that if an arbitration is not commenced within 30 days of the granting of provisional relief, the order granting relief expires and costs, including reasonable attorneys' fees, are awardable to the respondent.

State court decisions have also recognized that interim orders should last only until the arbitrators are appointed where the applicable arbitral rules permit the arbitrators to entertain applications for provisional remedies (see *TIBCO Software, Inc. v. Zephyr Health, Inc.*, 32 Mass.L.Rptr. 637 (Super. 2015)).

Some state have adopted the UNCITRAL Model Law that expressly allows for applications for interim measures of protection in aid of an arbitration (see, for example, *Bahr Telecomms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 184 (D. Conn. 2007) (federal court applying state law of attachment) and *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 105 (N.C. App. 2007) (granting preliminary injunction under the Revised Uniform Arbitration Act (RUAA)). To date, 17 states and the District of Columbia have adopted the RUAA. For information on the RUAA and a list of the states that have adopted it, see Practice Note, Revised Uniform Arbitration Act: Overview (W-004-5167).

For a sample application to a state court for preliminary injunctive relief, with integrated drafting notes, see, for example, Standard Documents, Petition for Preliminary Injunction in Aid of Arbitration (NY) (W-003-6424) and Petition for an Attachment in Aid of Arbitration (NY) (W-003-8401).

WHETHER TO APPLY TO THE ARBITRAL TRIBUNAL OR THE COURT

Parties generally can apply either to a court or to arbitrators for interim relief. Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted, and therefore cannot yet act. In these cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.
- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties. An attachment, for example, concerns property often in the hands of non-parties and therefore applications to arbitrators for attachment are rare. For more information on the effect of preliminary injunctions on non-parties, see Practice Note, Preliminary Injunctive Relief: Initial Considerations (Federal): Circumstances When Courts Have Found Non-parties Bound by an Injunction or Restraining Order (9-521-5760).
- The moving party does not yet possess the evidence it needs to present an application for interim relief. Courts may be more likely to grant discovery in connection with an application for interim relief.
- The party needs ex parte relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties (see AAA Rule 38(b) and Article 6, ICDR Rules). Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (for example, California and New York) permit an applicant to proceed without notice in urgent cases. This usually happens where an attachment of assets is sought.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy (see section 8 of the RUAA). Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized and able to act.
- The arbitrator may not have the power to grant the relief sought. For example, arbitrators may not have the authority to appoint a receiver (compare *Stone v. Theatrical Inv. Corp.*, 64 F. Supp. 3d 527, 540 (S.D.N.Y. 2014), reconsideration denied, 80 F. Supp. 3d 505 (S.D.N.Y. 2015) (arbitrator has the power to appoint receiver as part of a final award) with *Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) and *Pursuit Capital Mgmt., LLC v. Claridge Assocs., LLC*, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (arbitrators may not appoint a temporary receiver as a provisional remedy)).

Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice.
- The applicant is satisfied that the other party will respect orders issued by the tribunal.
- The application involves technical or industry expertise that a judge is not likely to have.
- The federal or state courts are reluctant to grant provisional remedies in aid of arbitration (see, for example, *SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC*, 875 F.3d 609, 615-16 (11th Cir. 2017) (Fed. R. Civ. P. Supp. B security for costs cannot be obtained except as an adjunct to obtaining jurisdiction); *Smart Techs. ULC v. Rapt Touch Ireland Ltd*, 197 F. Supp. 3d 1204. 1205 (N.D. Cal. July 15, 2016) (declining to entertain motion for preliminary injunction in aid of arbitration in view of availability of emergency arbitrator); and *A & C Disc. Pharmacy, L.L.C. v. Caremark, L.L.C.*, 2016 WL 3476970, at *6 (N.D. Tex. June 27, 2016) (declining motion on the ground that the arbitrator, not the court, should rule on who has the primary power to decide whether the request for preliminary relief is arbitrable)).
- The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be

available in court (see, for example, *CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. Pship*, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012) (asset freeze) and *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 263 (2d Cir. 2003) (pre-award security)).

- The respondent is a foreign state (or an agency, instrumentality, or political subdivision of a foreign state). Parties seeking judicial relief against foreign states must follow the procedures of the Foreign Sovereign Immunities Act (FSIA), which is the sole source of subject matter and personal jurisdiction over an action against a foreign sovereign (*Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017)). The FSIA service of process provisions (set forth in Section 1608(a) (28 U.S.C. § 1608(a))) are tiered in a four-step hierarchical manner than can take months to complete.

INTERIM RELIEF FROM THE ARBITRAL TRIBUNAL

INSTITUTIONAL RULES

This section summarizes the interim relief available under the:

- AAA Rules.
- ICDR Rules.
- JAMS Arbitration Rules (effective July 1, 2014).
- The International Institute for Conflict Prevention & Resolution (CPR) Administered Arbitration Rules (effective July 1, 2013).

AAA Rules

Under the AAA Rules:

- The tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.

(AAA Rule 37.)

AAA Rule 38 provides that where a party requires emergency relief before the tribunal has been formed, the AAA appoints an "emergency arbitrator." The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case (AAA Rule 38(e)). The authority of the emergency arbitrator ceases once the tribunal has been constituted (AAA Rule 38(f)).

The rules also provide for parties to seek temporary relief in court, stating that:

> "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate."

(AAA Rule 38(h).)

ICDR Rules

Under the ICDR Rules:

- At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.

(Article 24, ICDR Rules.)

Furthermore, the rules expressly permit the tribunal to apportion the costs of the application in any interim award or in the final award (Article 24.4, ICDR Rules). In many cases it is preferable for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

The rules further provide that where a party requires emergency relief before the tribunal has been formed, the ICDR appoints an "emergency arbitrator" (Article 6(2), ICDR Rules). The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case (Article 6(4), ICDR Rules). The authority of the emergency arbitrator ceases once the tribunal has been constituted (Article 6(5), ICDR Rules).

The rules also provide for parties to seek temporary relief in court, stating that:

> "A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

(Article 24(3), ICDR Rules.)

JAMS Rules

Under the JAMS Rules:

- The tribunal may take whatever interim measures it deems necessary including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim partial final award and the tribunal may require security for the costs of the interim measures.

(JAMS Rule 24(e).)

JAMS Rule 2(c)(iv) provides that where a party requires emergency relief before the tribunal has been formed, JAMS appoints an "emergency arbitrator." The emergency arbitrator can order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case. The authority of the emergency arbitrator ceases once the tribunal has been constituted (JAMS Rule 2(c)(v)).

The rules also provide for parties to seek temporary relief in court, stating that:

> "Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

(JAMS Rule 24(e).)

CPR Rules

Under the CPR Rules, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property

(CPR Rule 13.1). CPR Rule 14 provides that where a party requires emergency relief before the tribunal has been formed, CPR appoints a "special arbitrator." The special arbitrator can order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order. Once the tribunal has been constituted, the tribunal may modify or vacate the award or order rendered by the special arbitrator (CPR Rule 14.14).

The rules also provide for parties to seek temporary relief in court, stating that:

> "A request for interim measures by a party to a court shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement."

(CPR Rule 13.2.)

AD HOC ARBITRATION

In an ad hoc arbitration, there are three common scenarios:

- The parties have agreed to arbitrate under the 2013 UNCITRAL Arbitration Rules. Under those rules, the tribunal may:
  - maintain or restore the status quo pending determination of the dispute;
  - take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
  - provide a means of preserving assets out of which a subsequent award may be satisfied; or
  - preserve evidence that may be relevant and material to the resolution of the dispute.
- Apart from any arbitral rules, the arbitration agreement itself may confer power on the tribunal to grant interim relief. If so, the orders available depend on the scope of the arbitration agreement.
- The law that applies at the seat of the arbitration may itself confer powers on the arbitral tribunal to grant interim relief. For example, in states that have adopted the RUAA the arbitrator may issue 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 (RUAA § 8).

For more information on ad hoc arbitration in the US, see Standard Clause, US: ad hoc Arbitration Clause (5-519-2015).

WHEN TO APPLY

As a general principle, applications for interim and conservatory relief should be made as early as possible. This is because:

- Failure to apply early may prejudice the application for practical reasons. Evidence or assets may be disposed of or property may deteriorate.
- Delay in applying may be taken into account by the tribunal. If the matter is not urgent enough to cause a party to seek relief promptly, a tribunal may decide that the relief is not necessary.

HOW TO APPLY

The procedure for applying to the tribunal depends in the first instance on the arbitration agreement or any applicable rules. For example, an application under the AAA Rules for emergency relief must be made in writing to the AAA (preferably by electronic means), with a copy of the request or response delivered to all the other parties (AAA Rule 38(b)). However, the following points are generally applicable to arbitration under any institution's rules:

- **Apply in writing.** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing.
- **Submit evidence.** The applicant should provide evidence in support of its position. For example, if a party is seeking conservatory orders in relation to property, it should identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If the applicant is seeking to enforce an employee non-compete agreement, provide affidavits establishing the employer's business interest in enforcing the non-compete and the potential harm to the employer if the tribunal does not issue an order preserving the status quo. The applicant should also brief the applicable law regarding its entitlement to the relief sought.
- **Specify relief sought.** State the precise order sought clearly in the application. Do not apply for an order that is too broad in scope. Provide a carefully formulated draft order so that the tribunal can easily see what is being requested and why.

EX PARTE APPLICATIONS TO ARBITRATORS

The rules of the major arbitral institutions prohibit applications for interim relief being made without notice. In any event, proceeding before an arbitrator on an ex parte basis would be ill-advised because:

- Most arbitral tribunals are extremely reticent about proceeding without giving both parties an opportunity to address them.
- Any steps taken without notice may affect the enforceability of the ultimate award. Ex parte evidence submitted to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties' rights and is grounds for vacatur of an arbitration award (see *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991)).

In a recent dispute between President Trump and an adult film actress, however, a California emergency arbitrator issued an ex parte order (using pseudonyms) granting injunctive relief. It is doubtful that the order is enforceable.

NO POWER OF EMERGENCY ARBITRATOR TO BIND FULLY CONSTITUTED ARBITRAL TRIBUNAL

Under the institutional rules considered here, the emergency arbitrator does not have the power to bind the full arbitral tribunal. The fully constituted tribunal has the power to vacate, amend or modify any order, award or decision by the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal unless the parties agree otherwise.

ENFORCING PRELIMINARY RELIEF AWARDED BY ARBITRATORS IN COURT

Courts have held that they do not have the power to review an interlocutory ruling by an arbitration panel (see *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980)). Courts have relaxed this rule, however, when parties seek confirmation of provisional remedies awarded by arbitrators (see *Sperry Int'l Trade v. Gov't of Isr.*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), aff'd, 689 F.2d 301 (2d Cir. 1982) (confirming an arbitrator's order to place a disputed $15 million letter of credit in escrow pending a decision on the merits, finding that the award would be rendered a meaningless exercise of the arbitrator's power if the order were not enforced); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1059 (6th Cir. 1984) (upholding the confirmation of the award that preserved the status quo, reasoning that the injunction issued by the arbitral tribunal would be meaningless absent judicial confirmation of it) and *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (holding that if "an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made")).

Relying on *Sperry* and *Petroleos Mexicanos*, the court in *Yahoo! Inc. v. Microsoft Corp.* confirmed an award issued by an emergency arbitrator appointed under the AAA rules to grant emergency relief "until the matter can be fully and fairly decided by a three arbitrator panel of industry experts following discovery" (983 F. Supp. 2d 310 (S.D.N.Y. 2013)). The *Yahoo!* case shows how quickly interim relief can be obtained in arbitration. The emergency arbitrator held two days of evidentiary hearings starting 11 days after Microsoft commenced arbitration and issued a decision six days after conclusion of those hearings. The next day, Yahoo! moved in court to vacate the award and Microsoft cross-moved to confirm. The court ruled for Microsoft less than a week later. In going from commencement to judicial confirmation in just 25 days, the *Yahoo!* case demonstrates that even where the tribunal is not constituted, the use of emergency procedures provided by arbitral institutions can provide expeditious and effective relief. Moreover, the court respected the parties' agreement to keep proceedings confidential. The motion papers were filed under seal and the only part of the proceeding that was made public was the decision. (See also *Air Ctr. Helicopters, Inc. v. Starlite Inv.s Ireland Ltd.*, 2018 WL 3970478 (N.D. Tex. Aug. 15, 2018) (finding jurisdiction to enforce award of specific performance made by emergency arbitrator); but see *Footprint Power Salem Harbor Dev., L.P. v. Iberdrola Energy Prod., Inc.*, 2018 WL 2558468 (Sup. Ct. N.Y. Co. May 30, 2018) (questioning whether court could confirm award of emergency arbitrator and noting that it is "better practice" for the applicant to seek a temporary restraining order in aid of arbitration from the court).)

In *Companion Property & Casualty Insurance Co. v. Allied Provident Insurance, Inc.*, the arbitrators issued an interim award requiring the respondent to post security (2014 WL 4804466, at *3 (S.D.N.Y. Sept. 26, 2014)). When the respondent ignored the interim award, the claimant made a motion in court to confirm it. The court reviewed the case law that supports the court's power to confirm interim awards of security and noted that "[w]ithout the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration." Having concluded that it had the power to confirm the interim award, the court noted that it should confirm as long as there is a "barely colorable justification." On that standard, the court confirmed the award because the agreement between the parties required that the respondent provide collateral for its obligations. See also *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694 (N.D. Ill. Aug. 24, 2016) (confirming interim award requiring insured to post security for insurance carrier's claims) and *Ecopetrol S.A. v. Offshore Exploration & Prod. LLC*, 46 F. Supp. 3d 327, 337 (S.D.N.Y. 2014) (enforcing interim awards requiring seller to tender certain amounts to purchaser with funds not derived from amounts in escrow).

Once the award is confirmed, it becomes a judgment of the district court and violation of the judgment may be punishable as a contempt of court under FRCP 70(e) (see *Cardell Fin. Corp. v. Suchodolksi Associates, Inc.*, 896 F. Supp. 2d 320, 328 (S.D.N.Y. 2012)). Where a party is found to be in contempt of court, the court has broad discretion in ordering a remedy to coerce future compliance and compensate the injured party for losses resulting from the contumacious conduct (see *Haru Holding Corp. v. Haru Hana Sushi, Inc.*, 2016 WL 1070849, at *2 (S.D.N.Y. Mar. 15, 2016)). Coercive measures include civil commitment and escalating financial sanctions (see *CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. P'ship*, 2013 WL 324061, at *3 (S.D.N.Y. Jan. 24, 2013)).

Where a court is asked to vacate an interim award issued by arbitrators, however, the court will not necessarily entertain the application. At least one US court has refused a request to vacate an emergency arbitrator's interim order for conservatory measures under the ICDR Rules (*Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, 2011 WL 2135350 (S.D. Cal. May 27, 2011)). In *Chinmax*, the court in addressing a challenge to the interim order found that it did not have jurisdiction to vacate the order because it was not final and binding for the purposes of the New York Convention. The order itself stated that it would be subject to the consideration of the full arbitration tribunal, and on this basis the court refused to grant the motion to vacate. (See also *Great E. Sec., Inc. v. Goldendale Investments, Ltd.*, 2006 WL 3851159 (S.D.N.Y. Dec. 20, 2006) (denying a petition to vacate and granting a cross-motion to confirm an interim order of the arbitral tribunal requiring petitioner to place funds in escrow pending conclusion of the arbitration).)

Courts will only enforce that part of the interim relief that requires judicial intervention at that stage of proceedings. To determine whether to grant relief, a court must consider:

- The likelihood that the harm alleged by the party will ever come to pass.
- The hardship to the parties if judicial relief is denied at this stage in the proceedings.
- Whether the factual record is sufficiently developed to produce a fair adjudication of the merits.

(See *Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.*, 2011 WL 653651, at *4 (E.D. Mich. Feb. 14, 2011).) In *Draeger*, the court confirmed the interim relief awarded by the emergency arbitrator regarding the turnover of the plaintiff's property but ruled that the emergency arbitrator's award of attorneys' fees should not be confirmed because it was subject to adjustment by the

merits arbitrator (see also *Bowers v. N. Two Cayes Co. Ltd.*, 2016 WL 3647339, at *3 (W.D.N.C. July 7, 2016) (confirming arbitrator's grant of injunctive relief ordering a percentage of the sale of certain real estate to be placed in an escrow account pending the outcome of the arbitration but denying confirmation of arbitrator's ruling that that the arbitration is binding on the parties)).

RESISTING INTERIM RELIEF

In response to a request for interim relief, a party should marshal its legal arguments and supporting evidence to convince the tribunal or a court not to grant the requested relief. The opposition should address whether the tribunal or court has the power to grant the request and should reasons why the application should be denied as a matter of discretion.

In addition to its main argument, the respondent should consider arguing in the alternative that if the relief sought by the applicant is granted, it should be conditioned on the applicant providing adequate security. The respondent should specify both the amount and the form of the security (see, for example, FRCP 65(c) and CPLR 6312(b)). Most institutional rules provide for security as a condition of interim relief granted by arbitrators.

BEFORE AN EMERGENCY ARBITRATOR

The respondent should check how long it has under the rules to object to the appointment of the arbitrator and make the relevant objections in the permitted time frame. There may be grounds to resist the granting of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to establish that the award to which the applicant may be entitled may be rendered ineffectual without interim relief.

In its response to the application, the respondent may consider whether it can object to the:

- Jurisdiction of the emergency arbitrator.
- Application on these grounds, among others:
  - the emergency arbitrator provision of the relevant rules do not apply;
  - the applicant is unlikely to succeed on the merits;
  - there is no urgent need for the interim relief to be granted;
  - irreparable harm would be suffered by the respondent if the emergency relief were granted; or
  - greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

BEFORE THE ARBITRAL TRIBUNAL

The respondent should check the applicable rules regarding the power of the tribunal and the procedures for interim relief. In its response to the application, the respondent may consider whether it can object to the application on these, among other grounds:

- The applicant is unlikely to succeed on the merits.
- There is no urgent need for the interim relief to be granted.
- Irreparable harm would be suffered by the respondent if the emergency relief were granted.
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

BEFORE A COURT

The respondent should consider whether:

- Federal or state courts in the state where the arbitration is seated have held that they lack power to grant the relief requested (see, for example, *McCreary Tire*, 501 F.2d at 1037-38).
- The application can be opposed on the ground that courts should intervene only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief (see, for example, *Next Step Med.*, 619 F.3d 67 at 70). Where the arbitral tribunal is authorized to grant the equivalent of preliminary injunctive relief, some courts hold that it is inappropriate for the district court to do so (see, for example, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999)).
- The applicant is unlikely to succeed on the merits (see, for example, *Discover Growth Fund v. 6D Glob. Techs. Inc.*, 2015 WL 6619971 (S.D.N.Y. Oct. 30, 2015)).
- There is no urgent need for the interim relief to be granted.
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

09-18

The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop

Kluwer Arbitration Blog
July 20, 2016

Michelle Grando (White & Case LLP)

Please refer to this post as: Michelle Grando, 'The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop', Kluwer Arbitration Blog, July 20 2016, http://arbitrationblog.kluwerarbitration.com/2016/07/20/the-coming-of-age-of-interim-relief-in-international-arbitration-a-report-from-the-28th-annual-ita-workshop/

"When Justice Delayed Would be Justice Denied: Emergency Arbitrators and Interim Measures in International Arbitration" was the subject of the 28th Annual Workshop of the Institute for Transnational Arbitration (ITA), which took place on 16 June 2016 in Dallas, Texas. Under the leadership of ITA's Chair, Abby Cohen Smutny (White & Case), and the conference co-chairs, Dr. Shahla Ali (University of Hong Kong), Jennifer Kirby (Kirby), and David Brynmor Thomas (39 Essex Chambers), the speakers addressed a variety of issues concerning applications for interim measures to arbitral tribunals and emergency arbitrators.

The stage for a mock interim measures hearing and five speaker panels was set by the keynote speeches of James Castello (King & Spalding) and Patricia Shaughnessy (University of Stockholm), who provided an overview of the evolution and current state of interim measures and emergency arbitrator rules. Several themes emerged from their speeches that recurred throughout the panel discussions, revealing the existence of a general consensus among the arbitral community about key aspects of interim relief in international arbitration. These are addressed in turn.

Increased use of arbitral interim measures

The possibility of arbitral tribunals granting interim measures has been recognized for many decades now. It was, for instance, expressly considered in the 1976 version of the UNCITRAL Arbitration Rules, which provided that "the arbitral tribunal may take any interim measures it deems necessary." For a long time, however, such power remained largely dormant as most parties preferred to seek interim measures from local courts instead of going to arbitral tribunals. This trend started to change in the late 1990s-early 2000s. The turning point became clear in the 2012 edition of the Queen Mary University and White & Case International Arbitration Survey, in which survey participants indicated that in their experience requests for interim measures to arbitral tribunals were more common than to courts.

The emergence of the emergency arbitrator, a special procedure to provide parties access to interim measures before the constitution of the arbitral tribunal, constitutes further evidence of the increased popularity and maturity of arbitral interim measures. The International Centre for Dispute Resolution (ICDR) was the first to adopt emergency arbitrator provisions in 2006, being followed by the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC) in 2010, the International Chamber of Commerce (ICC) in 2012, the Hong Kong International Arbitration

Centre (HKIAC) in 2013, and the London Court of International Arbitration (LCIA) in 2014. As Shaughnessy observed, despite the relative novelty of the procedure, there have already been a significant number of applications for emergency measures. Her research revealed that as of June 2016, ICDR registered 67 emergency arbitrator requests, SIAC 50, ICC 34, SCC 23, and HKIAC 6 requests.

To be clear, although requests to arbitral tribunals for interim relief have increased, the speakers agreed that such requests are still not common, appearing in about one-quarter or less of arbitrations. This number reflects, at least in part, the fact that interim relief is not relevant to all cases.

What factors contributed to the increased use of arbitral interim measures?

The speakers discussed a variety of factors that have led to the increased use of arbitral interim measures. Such factors include:

– The lifting of restrictions in domestic legislation reserving the power to order interim measures to state courts. Castello observed that at some point in time such restrictions were found in the laws of most countries in continental Europe, including Austria, Germany, Greece, Italy, Spain, and Switzerland; only Italy maintains the restriction at present.

– The adoption by major arbitral institutions of rules that favor applications for interim measures to arbitrators, instead of courts, such as Article 28 of ICC Arbitration Rules, and Article 25.3 of the LCIA Rules.

– Experience has demonstrated that it might be better to request interim measures from arbitral tribunals instead of courts because arbitrators might be already familiar with the facts of the dispute; have the specialized legal or technical knowledge required to decide the application; know the language of the dispute; provide a neutral alternative to potentially unfriendly courts; and be in a better position to ensure the privacy of the proceedings. Moreover, interim measures ordered by an arbitral tribunal may cover many jurisdictions, while the effectiveness of a court order is limited to the territory of the court. This would also obviate the need to hire local counsel in multiple jurisdictions.

– The work of UNCITRAL, incorporated in the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration (Article 17) and the 2010 version of the UNCITRAL Arbitration Rules (Article 26). These rules, as Castello observed, have provided helpful guidance to arbitral tribunals as to the scope of interim measures and the conditions for granting them; to courts in deciding whether to enforce arbitral interim measures; and to national legislatures in passing legislation commanding the courts to enforce arbitral interim measures.

– Discussion of the subject and guidance provided by members of the arbitral community.

How is compliance ensured?

In light of the arbitrators' lack of coercive power to enforce their orders, several speakers discussed the issue of the enforceability of arbitral interim measures. The general conclusion was that in the vast majority of cases, enforcement issues do not arise because the parties voluntarily comply with the orders. This is supported by the results of the 2012 International Arbitration Survey, which revealed that the majority (62%) of interim measures orders are complied with voluntarily. Voluntary compliance seems to be encouraged by the potential for sanctions, such as cost awards, and the reputational effect of non-compliance.

Castello observed that despite calls from certain members of the arbitral community for the adoption of a "New York Convention" for the enforcement of interim measures, UNCITRAL has preferred to

focus on developing the Model Law, which if implemented or used as inspiration by States will produce the same effect. In this regard, Article 17H of the 2006 version of the Model Law provides that "[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued."

Prerequisites for granting interim measures

Most institutional arbitration rules, including the ICSID Arbitration Rules, have opted not to set forth specific criteria, but rather provide arbitrators broad powers to decide when and what kind of interim relief to grant. An example of this is Article 28 of the ICC Arbitration Rules, which provides that "the arbitral tribunal may … order any interim or conservatory measure it deems appropriate." The most significant exception to this approach is Article 26 of the 2010 version of UNCITRAL Arbitration Rules. As Costello observed, UNCITRAL chose to provide more precise guidance because of the general perception that the broad authority to grant "any interim measures it deems necessary," contained in the 1976 version of the Rules, was leaving some tribunals uncertain about the scope of their interim measures power, and thus leading them to decline to exercise such power.

Despite the absence of specific criteria in most institutional rules, the speakers converged that in practice arbitral tribunals, including investor-state tribunals operating pursuant to the ICSID Convention, require that four criteria be met for interim measures to be ordered: (i) reasonable possibility of success, that is, a *prima facie* case on jurisdiction and merits; (ii) risk of irreparable harm; (iii) urgency; and (iv) proportionality, i.e., balance of hardships in favor of interim relief. These are essentially the criteria contained in Article 26(3) of the 2010 UNCITRAL Arbitration Rules, which, the speakers concluded, reflect the practice of international arbitral tribunals.

It was also noted that these same criteria have been applied by emergency arbitrators, in which context "urgency" has played a crucial role. As Shaughnessy explained, the question is "Can this wait until the arbitral tribunal is constituted and until it is operating and able to consider interim relief?" The lack of urgency is apparently one of the major reasons for denying emergency relief.

New frontiers

In light of the relative novelty of the emergency arbitrator rules, many questions were raised concerning their application.

One question concerned the compatibility of emergency arbitration with pre-arbitral procedures such as cooling-off periods and multi-tiered clauses requiring the parties to engage in mediation, expert determination, or dispute board procedures prior to filing a request for arbitration. This question was apparently considered by emergency arbitrators in three SCC cases. They concluded that the cooling-off period requirement contained in certain investment treaties did not prevent emergency proceedings because of the nature of emergency relief. It was noted that this interpretation might eventually give rise to enforcement problems, because SCC emergency orders cease to be binding if the "case is not referred to an Arbitral Tribunal within 90 days" of their issuance. In the case of other rules, the requirement that the request for arbitration be filed within a brief period of time after the request for emergency arbitrator relief might also pose difficulties.

Another question regarded the enforcement of emergency arbitrator orders or awards. In this regard, a representative from HKIAC noted that Hong Kong has amended its legislation to provide for the enforceability of emergency arbitrator orders in proceedings seated in Hong Kong or abroad. It was also noted that Ukrainian courts have recently enforced a SCC emergency arbitrator award issued in the context of an investment treaty dispute between JKX Oil & Gas and Ukraine. Notably, the

UNCITRAL Model Law does not specifically address the enforcement of emergency arbitrator decisions because the last version of the Model Law was adopted in 2006, when the first emergency arbitrator rules had just been adopted by the ICDR. It will be interesting to see whether domestic courts will interpret provisions modeled on Article 17H of the Model Law as providing them authority to enforce such decisions.

A maturing system

In sum, the presentations and discussions evidenced the significant progress made in the past 30 years in establishing a coherent set of rules for arbitral interim relief. Having arbitral tribunals routinely dealing with interim measures, instead of the parties having to resort to local courts, is a significant development that has undoubtedly strengthened the arbitral system and allowed it to evolve into a more sophisticated and self-standing system of dispute resolution. It is a welcomed development for the users of international arbitration that are getting closer to the ideal of being able to resolve disputes entirely at the international level and avoiding the complexities, biases, and costs associated with having to deal with (often multiple) foreign court systems.

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Applications for Interim Measures

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Charles Brown, ex officio
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Wolf Von Kumberg, ex officio

Applications for Interim Measures

Applications for Interim Measures

Introduction

This Guideline sets out the current best practice in international commercial arbitration in relation to the arbitrators' power to grant interim measures. It provides guidance on:

i. interim measures in general (Articles 1 to 6);

ii. *ex parte* applications (Article 7); and

iii. emergency arbitrators (Article 8).

Preamble

1. Historically, the power to grant interim measures in international arbitration was solely reserved to national courts. Today, many countries have modified their national arbitration laws to expressly recognise that courts and arbitrators possess concurrent jurisdiction to grant these types of measures.[1] Additionally, many arbitral institutions have also revised their rules to expressly give arbitrators power to grant interim measures. Both national laws and arbitration rules generally give broad powers to arbitrators to grant any measure that they consider necessary and/or appropriate.
2. One of the main challenges for arbitrators considering applications for interim measures is that the national laws and arbitration rules rarely provide any procedural rules or guidance on how an application for interim measures should be dealt with or what measures can be granted and in what circumstances. This is intended to give arbitrators a wide discretion as to the procedures they may adopt and the types of interim relief they may grant to suit the particular circumstances of each arbitration. When considering how to exercise this discretion, arbitrators should bear in mind that they are not bound to apply the procedures and principles developed in the national courts as these may not be relevant or suitable for arbitration. An alternative source of guidance may be found in arbitration practice sources developed by the international

arbitration community. These include scholarly commentaries, opinions, awards and orders.[2]

3. Applications for interim measures typically, but not exclusively, arise at the first procedural hearing attended by all the parties (and their representatives). Sometimes an application by one party in the absence of the other party (an *ex parte* application) may be required mainly because of the nature of the relief sought.
4. Additionally, the matter may be so urgent that a party needs to make an application for relief before an arbitral tribunal has been properly constituted. To cater for this situation some institutions have incorporated procedural provisions that enable a party to ask the institution to appoint an 'emergency arbitrator' to hear an emergency application for relief pending the formation of an arbitral tribunal.[3] Emergency arbitrators have substantially the same powers and responsibilities in relation to the grant of interim measures as the regular tribunal, even though they are appointed solely for the emergency application. Accordingly, all references to arbitrators' powers or responsibilities in this Guideline relating to interim measures are equally applicable to emergency arbitrators and arbitral tribunals.

Article 1 — General principles

1. **Arbitrators should deal with applications for interim measures promptly and expeditiously.**
2. **Arbitrators faced with an application for interim measures should establish whether they have both the jurisdiction to hear the dispute and the power to order the interim measure being applied for under the arbitration agreement, including any applicable rules and the law of the place of arbitration (*lex arbitri*).**
3. **Where the arbitration agreement, including any applicable rules and the *lex arbitri* contain provisions for granting interim measures,**

arbitrators should adhere to the stipulated requirements and limitations, if any.

4. **Although the circumstances may warrant a preliminary *ex parte* decision, before reaching a final decision on an application for an interim measure, arbitrators should ensure that both parties have been given a fair opportunity to present their case.**

Commentary on Article 1

Paragraph 1

Applications for interim measures

a) Interim measures usually arise out of an application by one of the parties.[4] An application may be made orally during a hearing or at any other time in writing supported by evidence. The application should provide sufficient detail to enable the other parties to respond to it and for the arbitrators to make their decision. More specifically, the application should identify (1) the right(s) to be protected; (2) the nature of the measure(s) that the party is seeking; and (3) the circumstances that require such a measure.[5] If the application does not specify all of these elements, arbitrators should consider requesting further information before deciding on the application.

Priority to be given to applications for interim measures

b) Arbitrators should give priority to applications for interim measures without disturbing the smooth progress of the arbitration. They should deal with the application as quickly as possible and in a manner that will, if possible, avoid adding costs and unnecessary delay to the proceedings. Sometimes applications for interim measures may be used as a delaying tactic or to harass the opposing party. In such cases, if the arbitrators consider that an application for interim measures is not made in good faith, they should reject it promptly.

Paragraph 2

Express powers

a) An important pre-condition for the granting of interim measures is the establishment of the arbitrators' power to grant the requested measure. Even though it is unusual for the arbitration agreement itself to include an express provision for granting interim measures, it is common for national laws and arbitration rules to include general powers to grant interim measures.

Implied powers

b) If there are no express provisions allowing the arbitrators to grant interim measures and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*, arbitrators may conclude that they have an implied power to do so.[6]

Paragraph 3

Applicable law(s)

a) Arbitrators should take care to establish whether any aspects of the interim measures being requested are subject to any requirements or limitations imposed by law. They need to consider (1) the criteria for granting interim measures, (2) the types of interim measures that can be granted and (3) the procedure for granting such measures pursuant to the applicable law(s).[7]

b) Where there are specific requirements concerning the arbitrators' powers to grant interim measures and/or the procedure to be followed, these provisions should be complied with.

c) In the absence of any provisions in the applicable law(s), arbitrators may consider it appropriate to apply standards developed in international arbitration practice (see Article 2 below).

d) Arbitrators may also consider whether the interim measure requested may contravene the law of the place where the measure is likely to be performed or enforced (*lex loci executionis*).[8] In those circumstances the local courts may refuse to enforce the measure.[9] Arbitrators should therefore consider if there is an alternative relief that can be granted that will not contravene that law.

Paragraph 4

Fair opportunity to present their case

a) Interim measures are usually granted on an *inter partes* basis, i.e. after both the applicant and the opposing party are heard.[10] A party against whom a measure is sought should be notified of the application for the interim measure at the earliest opportunity, provided with copies of all evidence and/or documents relied on by the applicant, and given a fair opportunity to respond before any final decision on the application is made.

b) In the case of *ex parte* applications, the granting of an interim measure should be followed by submissions so that the parties have a fair and equal opportunity to present their case (see Article 7 below).

Article 2 — Criteria for granting interim measures

1. When deciding whether to grant interim measures arbitrators should examine all of the following criteria:

i) *prima facie* establishment of jurisdiction;

ii) *prima facie* establishment of case on the merits;

iii) a risk of harm which is not adequately reparable by an award of damages if the measure is denied; and

iv) proportionality.

2. Depending on the nature of the interim measure requested and the particular circumstances of the case, some of the criteria may not

apply or may be relaxed.

3. **When assessing the criteria, arbitrators should take great care not to prejudge or predetermine the merits of the case itself.**
4. **Arbitrators may require a party applying for an interim measure to provide security for damages as a condition of granting an interim measure.**

Commentary on Article 2

Paragraph 1

Criteria for granting interim measures

Arbitrators should follow a structured analysis that examines the criteria set out in Article 2, paragraph 1. If the applicant fails under any one element, arbitrators should refuse to grant the interim measure save for the requirement in item 3 (see Article 2, paragraph 2 below).

i) Prima facie establishment of jurisdiction

a) Before considering whether to grant an interim measure, arbitrators should determine whether they have *prima facie* jurisdiction over the dispute. This includes an examination of the evidence as to whether there is a valid arbitration agreement. This is usually satisfied by clear evidence of the existence of a written agreement to arbitrate between the parties.[11]
b) Even if there is a pending jurisdictional challenge to the arbitrators' authority, which they have not ruled on, arbitrators may still consider an application for interim measures and issue such measures, so long as they are satisfied that there is *prima facie* basis to assert jurisdiction.[12] If arbitrators consider there is need for an interim measure, for example, to protect the *status quo* and/or to preserve evidence, then they do not have to delay their decision on the interim measures application pending consideration of the full jurisdictional challenge. The reason for this is

that the decision as to whether to order an interim measure is not a final determination on jurisdiction.[13]

c) If, however, arbitrators consider that there is little or no chance that they will have jurisdiction, they should first consider the jurisdictional challenge before dealing with the application for interim measures.

ii) Prima facie establishment of case on the merits

Arbitrators considering an application for interim measures should be satisfied on the information before them that the applicant has a reasonably arguable case.[14] This means that arbitrators should be satisfied on a very preliminary review of the applicant's case that it has a probability of succeeding on the merits of its claim; however arbitrators should not prejudge the merits of the case (see Article 2, paragraph 3 below).

iii) A risk of harm which is not adequately reparable by an award of damages

Arbitrators need to be satisfied that the party applying for an interim measure is likely to suffer harm if the measure is not granted. They do not need to be satisfied that the harm will definitely occur, rather they need to be satisfied that there is a risk that the harm is likely to occur. If the harm can be adequately compensated for by an award of monetary damages (that is likely to be honoured) it may not be appropriate to grant the interim measure.[15] Arbitrators should therefore determine whether a given harm can be sufficiently and adequately compensated through damages on a case-by-case basis. The test to be applied to determine the level of harm that justifies an interim measure varies depending on the type of measure sought and the circumstances of the case.[16]

iv) Proportionality

a) Arbitrators need also to consider any harm likely to be caused to the opposing party if they grant the interim measure. Any harm caused by granting the measure should be weighed against the likely harm to the applicant if the measure is not granted. They should consider whether the circumstances of the case and the grounds supporting the granting of the relief outweigh the grounds favouring denial of the relief or vice versa.

b) Arbitrators may need to consider the relative financial position of the parties to ensure that a party will not be substantially disadvantaged if the interim measure is granted such that the arbitration is abandoned. In this situation, the likely financial hardship to be caused to both parties should be carefully weighed and considered.

Paragraph 2

Specific requirements for certain types of interim measures

While the requirements detailed in Article 2, paragraph 1 should all be considered, their precise application will depend to a great extent on the facts of the case and the type of interim measure which is sought. For example, requests for measures to preserve evidence may not need to satisfy the requirements for irreparable or serious harm (unless the preservation of evidence is costly or requires unusual efforts). In addition, when considering applications for security for costs, arbitrators should take into account their specific requirements.[17]

Paragraph 3

No prejudgment of the case

a) When deciding applications for interim measures, arbitrators should be careful not to prejudge or predetermine the dispute itself. They should not finally decide any issue in the dispute based on the evidence and

argument in support of, or in opposition to, an application for interim measures. This also means that arbitrators should keep an open mind when hearing later submissions and evidence. Where arbitrators consider that the interim measure cannot be granted without making a decision on the merits of the case as a whole, they may either refrain from granting such a measure[18] or proceed to an accelerated hearing on the merits.

b) Arbitrators should emphasise to the parties that, in reaching their decision on an application for interim measures, they have not prejudged or fully decided any issue in the dispute. Failing to do so may result in later challenges to the arbitrators' appointment on the basis of lack of impartiality.

Paragraph 4

Security for damages

a) Arbitrators may consider it appropriate to make the granting of interim measures conditional upon the applicant providing security for any damages that may be suffered by the opposing party as a consequence of the measure being granted. Some national arbitration laws and some arbitration rules expressly provide for such a condition.[19] Even without an express stipulation, it is common practice in international arbitration to attach conditions to the grant of interim measures to protect the interests of the opposing party in case the measure or measures turn out to have been unnecessary or inappropriate.

b) In practice, the opposing party will usually ask the arbitrators to require the applicant to provide security for any damage that may be caused by an interim measure. However, arbitrators may order security for damages on their own motion, for example, where an inexperienced party is involved and where the requested measure has the potential to cause damage to the opposing party.

c) Arbitrators should consider factors such as (1) the actual expense to be incurred by the opposing party in complying with the measure; (2) the potential damage to the opposing party if the measure is subsequently found to have been unnecessary or inappropriate; and (3) the financial capacity of the applicant to provide the security. They should be wary of not stifling a meritorious application by an excessive order for security.

d) Arbitrators have the discretion to decide on the amount of any security and the manner in which it is to be provided (e.g., bank guarantee, cash, cheque deposit, parent company guarantee, bond, payments into escrow account, liens on property, deposit with an independent stakeholder). The amount should cover any actual expenses incurred and damages likely to be suffered by the opposing party. Arbitrators should be wary of requiring security to be provided by taking possession of the opposing party's stock-in-trade or tools of trade as this could prevent that party from carrying on its lawful business.

Article 3 — Limitations on the power to grant interim measures

1. **Arbitrators cannot grant interim measures requiring actions by third parties.**
2. **Arbitrators do not have the power to directly enforce interim measures they may grant.**
3. **Arbitrators cannot impose penalties for non-compliance unless granted a specific power to do so by the arbitration agreement, including the applicable arbitration rules and/or the *lex arbitri*.**

Commentary on Article 3

Paragraph 1

Interim measures and third parties

Arbitrators' authority derives from the arbitration agreement and, as a result, their powers do not extend beyond the parties to the arbitration.

Arbitrators therefore cannot grant interim measures that are binding on third parties.[20] However, arbitrators can require a party to the arbitration to take steps in relation to a third party.[21] For example, a parent company can be required to direct its subsidiary to act in a particular manner. Nonetheless, arbitrators do not have power to order the attachment of assets which belong to, or are under control of, a third party.

Paragraph 2

Interim measures and national courts

Arbitrators lack coercive powers to enforce their decisions on interim measures. In most cases where enforcement is necessary, this has to be done through national courts. There is no general consensus as to whether arbitrators' decision granting interim measures should be issued in the form of a procedural order or an award capable of being enforced under the New York Convention. Some national courts consider that while an interim measure is only temporary in nature, it is, however, final for the purposes of enforcement.[22] Arbitrators should bear in mind that any state which has adopted Articles 17H and 17I of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) will have a regime for recognition and enforcement of interim measures issued in the form of an interim award.[23]

Paragraph 3

Penalties for non-compliance with measures ordered

a) Arbitrators cannot impose penal sanctions or punitive damages for non-compliance with a decision ordering an interim measure unless the parties' agreement, including the arbitration rules and/or the *lex arbitri* confer such a power on them.[24]

b) However, depending on the type of measure, arbitrators may impose different sanctions to promote compliance, including, among other things, the drawing of adverse inferences and taking into account the conduct of the recalcitrant party when allocating the costs of the arbitration.[25]

Article 4 — Denying an application for interim measures

1. **In addition to the limitations on the arbitrators' powers detailed in Article 3, arbitrators may decline an application for an interim measure in any of the following situations:**
   - **i) the measure sought is incapable of being carried out;**
   - **ii) the measure sought is incapable of preventing the alleged harm;**
   - **iii) the measure sought is tantamount to final relief; and/or**
   - **iv) the measure sought is applied for late and without good reason for the delay.**
2. **Arbitrators may deny a request for an interim measure where the opposing party declares, or undertakes, in good faith that it will take steps to render the interim measure unnecessary.**

Commentary on Article 4

Paragraph 1

When considering an application for interim measures, arbitrators should take into account the factors listed in Article 4, paragraph 1 and, if any of them apply, the request for the interim measure(s) may be denied.

i) Interim measures incapable of being carried out

Arbitrators should consider whether the interim measure is capable of being carried out.[26] Otherwise, it may be a waste of time and money to grant such a measure.

ii) Interim measures incapable of preventing the alleged harm

Arbitrators should only grant measures that are capable of preventing the alleged harm. If the specific measures applied for are not capable of preventing the alleged harm, arbitrators may, on their own motion, grant a different and effective type of interim measure that is more appropriate. In doing so arbitrators should be very careful not to go beyond what has been requested.

iii) Interim measures tantamount to final relief

Arbitrators should consider denying an application that is, in fact, a disguised application for a final award on the merits. For example, where the subject matter of the dispute between the parties relates to the storage charges of a warehouse where goods are kept and the main claim requests a transfer of such goods to a different place, an interim measure having the same effect (i.e. transfer of the goods), will be tantamount to a final relief because it will involve a decision on one of the main claims.[27]

iv) Timing of applications for interim measures

Arbitrators should consider denying applications for interim measures which are made late and without good reason being provided for the delay. Arbitrators need to be satisfied that the applicant has made the application promptly, i.e. within a reasonable time of becoming aware of the necessary facts.[28]

Paragraph 2

Undertaking in good faith

Instead of granting interim measures, arbitrators may decide it is more appropriate to accept an undertaking made in good faith by the party against whom the measures are sought. In such circumstances,

arbitrators may decide on the application solely based on the undertaking offered by the opposing party without considering whether or not the requirements for an interim measure have in fact been satisfied.

Article 5 — Types of interim measures

1. **As a general rule, arbitrators may grant any measure that they deem necessary and appropriate in the circumstances of the case.**
2. **Unless otherwise provided in the applicable national law and the applicable arbitration rules,[29] arbitrators may grant any or all measures which fall within, but are not limited to, one of the following categories:**
   - **i) measures for the preservation of evidence that may be relevant and material to the resolution of the dispute;**
   - **ii) measures for maintaining or restoring the *status quo*;**
   - **iii) measures to provide security for costs;[30] and**
   - **iv) measures for interim payments.**

Commentary on Article 5

Paragraph 1

Arbitrators can construe the term 'interim measures' as broadly as possible in the particular circumstances. It is important to note that the measures arbitrators can grant are not necessarily limited to measures available to state courts at the place of arbitration. However, arbitrators should look at the likely place of performance and align the relief granted with the relevant laws in that jurisdiction to ensure that the interim measure can be successfully enforced (see Article 1, paragraph 3 above).

Paragraph 2

In practice, the measures granted by arbitrators should aim to prevent damage to, or loss of, the subject matter of the dispute. Such measures should also facilitate the conduct of the arbitral proceedings and/or the enforcement of any final award.

i) Measures to preserve evidence and/or to detain property

a) Provided that the parties have not agreed to the contrary, arbitrators' powers are usually extensive, covering all forms of property, including shares and identifiable funds of money. Arbitrators have the powers to grant measures (1) for the inspection, preservation, custody or detention of evidence including property which is the subject matter of the dispute and (2) for samples and photographs to be taken from, or any observation be made of property, and/or to make the property available for expert testing.
b) Applications for the preservation or detention of property have the potential to cause the opposing party a greater degree of harm than an application for inspection of the property. This is because preservation or detention of property may have serious and adverse consequences for a party that needs to use or sell the property. Consequently, arbitrators should take particular care to avoid any injustice being caused in such cases.

ii) Measures to maintain or restore the status quo

Arbitrators may grant interim measures which require a party to take, or refrain from taking, specified actions. For example, arbitrators may order a party to continue the performance of contractual obligations, such as carrying out construction works, to continue shipping products or providing intellectual property. If perishable goods are the subject of a dispute, arbitrators may order that a party sells them and keeps the

proceeds of sale in an escrow account until a further decision or a final award is issued.

iii) Measures to provide security for costs

In international arbitration, where the costs may be considerable,[31] a party may be entitled to a level of costs protection from frivolous claims or claims brought by insolvent parties. Security for costs is a specific type of interim measure which requires the claiming party to provide security for the whole or part of the party's anticipated costs[32] where there is a risk that they will be unable to pay those costs if their claim fails. This particular interim measure raises complex issues which are dealt with in the *Guideline on Applications for Security for Costs*.[33]

iv) Measures for interim payments

Arbitrators may grant measures for interim payments where it is considered necessary to enable the applicant to remain in business or to facilitate the execution of a particular project.[34] Before granting such a measure, they should be satisfied that the receiving party is entitled to the amount of the payment. In addition, when making their final award, arbitrators need to take account of any interim payments that have been made.

Article 6 — Form of interim measures

1. **Unless otherwise specified in the *lex arbitri* and the applicable arbitration rules, arbitrators should grant interim measures in the form of a reasoned procedural order.**
2. **Depending on the circumstances of the case, however, arbitrators may consider it appropriate to grant interim measures in the form of an interim award.**
3. **Given the temporary nature of interim measures, if presented with**

new evidence justifying a change to interim measures previously granted, arbitrators may modify, suspend or terminate them.

Commentary on Article 6

Arbitrators should take into account specific provisions as to the form of interim measures in any relevant arbitration rules as well as any mandatory provisions of the *lex arbitri*. However, the majority of arbitration laws and arbitration rules do not specify the form in which an interim measure should be granted in which case it is for the arbitrators to decide the appropriate course.[35]

Paragraph 1

Procedural order

a) It is generally accepted that where an interim measure is needed as a matter of urgency, the quickest and simplest way of providing the relief is to issue a procedural order.[36] Procedural orders generally do not need to comply with any formalities.[37] However, it is advisable to expressly state that they may be varied upon further consideration of the application or if there is a change of circumstances that justifies the previous order being modified, suspended or terminated.
b) Time permitting, it is good practice to include in any order reasons for granting or rejecting an application for interim measures to avoid the decision being perceived as arbitrary and to provide guidance to any enforcing authority, unless the parties agree that they do not need a reasoned decision.

Paragraph 2

Matters to consider when deciding the form of the decision

a) Arbitrators should evaluate the advantages and disadvantages of the different forms of order including a procedural order and an interim

award. Matters arbitrators should take into account when deciding on the form for interim measures include (1) any potential savings of time and costs, (2) how best to achieve the objective for which the interim measure is applied, (3) the parties' specific requests and comments, (4) the likelihood of compliance with the measure, (5) any requirements imposed in the applicable arbitration rules and/or the *lex arbitri* and (6) whether the courts in the place where the interim measures will be implemented recognise and enforce, or do not recognise and enforce, a particular form of arbitral decisions.

b) Where a request for an interim measure has been refused, arbitrators should issue their decision in the form of an order.[38]

c) Finally, some institutional rules require that all draft awards be reviewed by the institution before they are issued and this may cause considerable delay.[39] Procedural orders do not require such scrutiny and can be issued more promptly.

d) Arbitrators should consider granting interim measures in the form of an interim award if there are concerns regarding compliance because it is generally accepted that this has a strong positive effect on persuading the party to comply.[40] Describing their decision as an 'interim award' reflects the fact that the award is provisional in nature and does not finally decide any issues between the parties.[41]

e) While the term 'award' generally has no clear definition, the national laws of certain jurisdictions provide that an award is final as to its decisions and interim measures can be granted only by way of procedural orders.[42] Therefore arbitrators should always check the applicable *lex arbitri* and/or arbitration rules and make sure that they have powers to grant interim measures in the form of an award (see Article 3, paragraph 2 above).

Paragraph 3

Modification, suspension or termination of interim measures

a) Where an interim measure is granted, arbitrators may subsequently modify, suspend or terminate the measure if presented with new evidence or argument that justifies the change. Ordinarily, arbitrators will do so upon request of one of the parties. In exceptional cases, for example, where the measure has been granted on an erroneous or fraudulent basis, arbitrators may do so on their own motion. When modifying an order on their own motion arbitrators need to consider carefully what change needs to be made and notify the parties of any changes.[43]

b) It is common practice, when granting interim measures, for arbitrators to expressly require any party to give prompt disclosure of any material change in the circumstances which formed the basis for granting the interim measures. Arbitrators should consider emphasising the temporal character of any interim measures by including wording in their decision such as 'during the course of the proceedings' or 'until a further decision or Final Award on the merits'.[44]

Article 7 — *Ex parte* applications

1. **Interim measures can be granted either *ex parte* or after receiving submissions from both parties.**
2. **Interim measures granted *ex parte* are subject to further review pending an *inter partes* hearing.**

Commentary on Article 7

Paragraph 1

Ex parte applications for interim measures

a) The majority of national laws and arbitration rules are silent as to whether an application for interim measures needs to be notified to all

the parties involved in the arbitration and whether arbitrators can grant such measures *ex parte*. What the laws and rules usually provide is that both parties should be given a fair and equal opportunity to present their case (see Article 1, paragraph 4 above), which has been interpreted as precluding *ex parte* applications.

b) However, in cases of extreme urgency or where an element of surprise or confidentiality is required to make the order effective, it may be appropriate for arbitrators to grant an interim measure on an *ex parte* basis, i.e. without notice to the party against whom the measure is sought and hearing initially submissions only from the party making the application,[45] so long as it is not prohibited under the arbitration agreement, including any arbitration rules and the *lex arbitri*.[46] In addition, the appropriate safeguards should be put in place to protect the interests of the party that is not heard, including making the necessary arrangements for that party (1) to be notified of any order made, (2) to be given copies of any evidence and documents submitted in connection with the application and (3) to be given a fair opportunity to be heard as soon thereafter as is reasonably practicable.[47] Finally, when faced with an *ex parte* application, arbitrators should also bear in mind that they are hearing one side only, and even though they will make a provisional order pending an *inter partes* hearing, it is appropriate to test the applicant's case and submissions more rigorously than might be normal, and to seek full and frank disclosure of points adverse to the applicant.[48]

c) Arbitrators should be satisfied (1) that all the criteria applicable to interim measures generally are present (see Article 2 above) and additionally (2) that the disclosure of the application to the other party may well frustrate the purpose for which the relief is sought and render it, if granted, ineffective. For example, if an application for an interim measure were made to restrain assets being moved, the arbitrators would need to be satisfied that there was a genuine risk that the opposing party,

upon notice of the application, would move the assets in order to defeat the purpose of any decision.

Paragraph 2

When granting interim measures on an *ex parte* basis, arbitrators should emphasise that any such measure is provisional in that it is effective only for a limited time and pending the hearing of all parties. This stresses the temporary nature of any *ex parte* measure granted and serves to remind the parties that arbitrators may decide that it is appropriate to modify, suspend or terminate any provisional measure once they have heard from the opposing party at an *inter partes* hearing (see Article 6, paragraph 3 above).

Article 8 — Emergency arbitrators

1. **If the parties' arbitration agreement, including any arbitration rules, so permits, applications for interim measures can be granted by an emergency arbitrator before a regular tribunal has been formed.**
2. **Once a regular tribunal has been formed, all requests for additional interim measures should be heard by that tribunal.**

Commentary on Article 8

Paragraph 1

Emergency arbitrator

a) The need for emergency interim measures often arises simultaneously with the dispute but before any arbitrators have been appointed. In practice, it can take weeks or months to appoint a regular arbitral tribunal. If a party needs emergency relief during this period, it can only apply to the local courts for relief, unless the arbitration agreement between the parties incorporates provisions for the appointment of an

emergency arbitrator.[49]

b) An emergency arbitrator is typically a neutral appointed by an arbitral institution specifically to deal with an application for urgent interim relief which cannot wait for the constitution of the arbitral tribunal. The power of an emergency arbitrator is limited to decisions on interim measures and does not extend to any decisions on the merits of the case. Moreover, the decision of an emergency arbitrator does not bind the regular arbitrators and they may modify, suspend or terminate any order or interim award granted by the emergency arbitrator.

Urgency

c) An emergency arbitrator should be satisfied (1) that all the criteria applicable to interim measures generally are present (see Article 2 above) and (2) that immediate or urgent measures are required which cannot wait for the constitution of the arbitral tribunal; otherwise, the emergency arbitrator may reject the application solely on the basis that it can wait.[50]

Ex parte applications for emergency relief generally not allowed

d) Most arbitration rules containing provisions for emergency arbitrators explicitly provide that both parties are to be notified of any application for emergency relief and given an opportunity to be heard and make submissions in relation to such an application.[51]

Paragraph 2

a) Arbitration rules typically provide that emergency arbitrators become *functus officio* once a regular tribunal has been composed and that once they have issued a decision on the applications for emergency relief, they cannot act as arbitrators in the subsequent arbitral proceedings, unless the parties agree otherwise.[52]

b) If the arbitral tribunal is constituted while the emergency arbitration proceedings are pending, the emergency arbitrator needs to consider whether they can still make a decision. In certain rules the emergency arbitrators may make their decision even if an arbitral tribunal has been constituted in the meantime,[53] whereas in other rules, the matter should be transferred to the arbitral tribunal because once constituted all requests for interim measure should be addressed to it.[54]

Conclusion

1. There is little controversy about the authority of arbitrators to grant interim measures. They are generally given very broad powers to grant any interim measure they consider necessary and/or appropriate in the circumstances of the case before them. Nevertheless, numerous issues arise concerning the nature of the relief arbitrators may grant as well as its form and effectiveness. Also, different laws may govern different aspects of the process for granting interim measures and therefore great care should be taken to consider the appropriate laws.
2. With this in mind, the present Guideline attempts to highlight best practice so as to assist arbitrators in dealing with applications for interim measures in an effective and efficient manner.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 29 November 2016

Endnotes

1. For a recent detailed overview of the availability of interim measures in support of arbitration in 43 different jurisdictions worldwide, see Lawrence W. Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris 2014). See also, IBA Arbitration Committee, Arbitration—Country Guides, which give further information on the law and practice of arbitration in more than 50 countries, available at <http://www.ibanet.org>.
2. Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005), p. 172; José Maria Abascal Zamora, 'The Art of Interim Measures' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13 (Kluwer Law International 2007), pp. 753-755; and John Beechey and Gareth Kenny, 'How to Control the Impact of Time Running Between the Occurrence of the Damage and its Full Compensation' in Filip de Ly and Laurent Lévy (eds), *Interests, Auxiliary and Alternative Remedies in International Arbitration* (ICC 2008), pp. 109-110.
3. Such institutions include, *inter alia*, the Charted Institute of Arbitrators (CIArb), the International Centre for Dispute Resolution (ICDR/AAA), the Australian Centre for International Commercial Arbitration (ACICA), the International Chamber of Commerce (ICC), the Stockholm Centre of Commerce (SCC), the Singapore International Arbitration Centre (SIAC), the Swiss Chambers' Arbitration Institution (Swiss), the Hong Kong International Arbitration Centre (HKIAC), the London Court of International Arbitration (LCIA). Certain arbitral institutions use procedures other than emergency arbitrator, which are analogous in their nature, see, for example, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC at the UCCI),

emergency arbitrator functions are performed by the President of the Court.

4. See e.g., Article 26(1) UNCITRAL Rules (2010/2013), Article 17 UNCITRAL Model Law 1985 (with amendments as adopted in 2006), Article 25(1) LCIA Rules (2014) and Article 23 ICC Rules (2012). Arbitrators should be wary of granting interim measures, on their own motion, even though exceptional circumstances may apply. They should only grant provisional relief without the previous request of one of the parties if any rules governing the arbitration expressly permit it and it is not contrary to the law of the place of the arbitration.
5. David D. Caron and Lee M. Caplan, 'Chapter 17: Interim Measures', *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, Oxford University Press 2013), p. 517.
6. See ICC Case No. 7589 and ICC Case No. 7210 in Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), p. 2454 (where the arbitral tribunals assumed they had the power to grant interim measures even though the ICC Rules 1988 did not expressly provide for such a power). See also Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), pp. 593-594.
7. Born, n 6, pp. 2457 and 2463 ("Relatively little attention has been devoted to the question of what law applies to determine an arbitral tribunal's power to grant provisional measures in an international arbitration. Preliminarily, the law governing the tribunal's power to grant provisional measures is to be distinguished from the law governing the standards applicable to a grant of provisional measures.") See generally Christopher Boog, 'The Laws Governing Interim Measures' in Franco Ferrari and Stephan Kröll (eds),

Conflict of Laws in International Arbitration (Sellier 2011), pp. 409-458.

8. Boog, n 7, p. 432.
9. Beechey and Kenny, n 2, p. 116. See, for example, Article 17I UNCITRAL Mode Law.
10. See Article 25(1) LCIA Rules (2014) which expressly states that "the arbitral tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application […]."
11. See generally CIArb Guideline on Jurisdictional Challenges.
12. See e.g., ICC Case 12361 (2003), (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 61.
13. Born, n 6, pp. 2481-2483. This was the approach adopted in a number of arbitral cases, e.g., *Biwater Gauff (Tanzania) Ltd v United Repub. Of Tanzania*, Procedural Order No. 1 (ICSID Case No. ARB/05/22 of 31 March 2006) at para. 70 ("It is also clear…that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction.".) See also Ibrahim F. I. Shihata and Antonio R. Parra, 'The Experience of the International Centre for Settlement of Investment Disputes', (1999) 14 ICSID Review 326.
14. ICC Interlocutory Award 10596 (2000) (unpublished) and Order for Interim Measures and Arbitral Award 2002 in SCC Case No. 096/2001 in Yesilirmak, n 2, p. 180. See also, Julian D. M. Lew, 'Commentary on Interim and Conservatory Measures in ICC Arbitration Cases' (2000) 11 ICC Bulletin, p. 27.
15. Yesilirmak, n 2, p. 180; Caron and Caplan, n 5, p. 537.
16. Certain arbitral tribunals require an "irreparable harm", see Born, n 6, p. 2470 citing ICSID and Iran-United States Claims Tribunal

awards. However the establishment of such a high barrier is not widely accepted in international commercial arbitration where tribunals only require a showing of a grave, serious or substantial harm. See e.g., Interlocutory Award in ICC Case No. 10596 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration,* vol. XXX (Kluwer Law International 2005); Interim Award in ICC Case No. 8786 (2000) and Interim Award in ICC Case No. 8786 in (1990) 11(1) ICC Bulletin.

17. See CIArb Guideline on Applications for Security for Costs.
18. See e.g., ICC Case No. 6632, ICC Second Partial Award 8113 of 1995 and ICC First Partial Award 8540 of 1999 in Yesilirmak, n 2, pp. 183-184.
19. See e.g., Article 28(1) of the ICC Rules (2012), Article 24 ICDR/ AAA Rules (2014), Article 23(6) HKIAC Rules (2013), Article 25 (1) LCIA Rules (2014), Article 26(6) UNCITRAL Rules (2010/2013).
20. See ICC Case 10062 (2000) in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 31 ("[a]ny award made by an arbitral tribunal, be it final or interim, may only address the parries of the arbitration agreement and any award involving third persons is a domain strictly reserved to state courts and, may, consequently, not be awarded by this arbitral tribunal.") See also, ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 78.
21. Born, n 6, pp. 2445-2446.
22. Amir Ghaffari and Emmylou Walters, 'The Emergency Arbitrator: The Dawn of a New Age?' (2014) 30(1) Arbitration International, pp. 159-163 and Guillaume Lemenez and Paul Quigley, 'The ICDR's Emergency Arbitrator Procedure in Action: Part II' (2008)

Dispute Resolution Journal, p. 3. But see the Note of the Secretariat on the Possible Future Work in the Area of International Commercial Arbitration, UN Doc A/CN.9/460, para. 121 ("The prevailing view, confirmed…by case law in some States, appears to be that the [New York] Convention does not apply to interim awards.")

23. See Status of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available at <http://www.uncitral.org/>. However, there is no case law reported under this Section of the UNCITRAL Model Law, see UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 93.
24. Rufus Rhoades and others, *Practitioner's Handbook on International Arbitration and Mediation* (2nd ed, Juris 2007), p. 228. This is namely the case of France, Belgium and the Netherlands.
25. See CIArb Guideline on Managing Arbitral Proceedings (Forthcoming).
26. See e.g., ICC Case No. 7210 (1994) and ICC Case No. 5835 (1992) in Yesilirmak, n 2, pp. 185-186. See also, *Burlington Resources Inc. et al. v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador* (ICSID Case No ARB/08/05), Procedural Order 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009.
27. Yesilirmak, n 2, pp. 183-185.
28. Yesilirmak, n 2, pp. 185-186 citing a case where the claimant did not do anything for more than two years and then requested an interim measure.
29. English Arbitration Act 1996 is unusual in the sense that arbitrator's powers to grant interim measure depend to a great extent on the parties' agreement. The Act provides that the arbitrator may only

grant certain interim measure without the express agreement of the parties. These include measures for the preservation, detention, inspection or sampling of "property which is the subject matter of the dispute" and the preservation of evidence. For any other type of measure parties' agreement is required. Section 38 Arbitration Act 1996. In the case of both UNCITRAL Model Law and UNCITRAL Arbitration Rules, the relevant provisions provide a generic list which groups the interim measures into broad categories describing their functions. A more detailed list has been provided by the UNCITRAL Working Group, see Note by the Secretariat (30 January 2002), UN Doc. A/CN.9/WG.II/WP.119.

30. See CIArb Guideline on Applications for Security for Costs.
31. See CIArb Costs of International Arbitration Survey 2011.
32. For the purposes of security for costs, costs in arbitration should be understood as the legal costs of the parties as well as the arbitrators' fees and expenses, fees and expenses of the arbitral institutional and other costs (non-legal) of the parties. See Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th ed, Wiley 2014), p. 199.
33. See CIArb Guideline on Applications for Security for Costs.
34. See e.g., ICC Case No. 7544 (1996), (2000) 11(1) ICC Bulletin, p. 56.
35. See e.g., Article 24(2) ICDR/AAA Rules (2014) ("interim order or award"), Article 32 SCC Rules (2012) ("an order or an award"), Article 30(1) SIAC Rules (2016) ("an order or an Award") and Article 23(3) HKIAC Rules (2013) ("an order or an award or in another form") .
36. See e.g., ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 79 (explaining that the ICC Commission

reached a conclusion that "decisions on requests to issue an interim measure should not be taken in the form of arbitral awards" due to the related practical problems with recognition and enforcement of awards containing an interim award under the New York Convention.)

37. See CIArb Guideline on Managing Arbitral Proceedings (Forthcoming).
38. ICC Case 14287 in (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 79.
39. This is the notably the case of the ICC where the Court must review all draft awards pursuant to Article 33 ICC Rules (2012).
40. Melissa Magliana, 'Commentary on the Swiss Rules: Article 26 Interim Measures of Protection' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013), p. 526.
41. See generally CIArb Guideline on Drafting Arbitral Awards Part I—General. See also, UNCITRAL Report of the Working Group on Arbitration on the work of its thirty-sixth session, UN Doc. A/CN.9/508 (12 April 2002), para. 66 ("One suggestion was that the words "arbitral award" should be replaced by the words "partial or interim award". In support to that proposal it was stated that the words "arbitral award" were often understood as referring to the final award in the arbitration proceedings, whereas an order of interim measures, even if issued in the form of an award, was typically an interlocutory decision. Some support was expressed for that proposal, although most speakers objected to the use of the words "partial award", since those words typically referred to a final award that disposed of part of the dispute, but would not appropriately describe an interim measures.")

42. See e.g., Articles 12 and 19B Singapore International Arbitration Act 2012.
43. Christopher Boog, 'Interim Measures in International Arbitration' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013), p. 1363 and Marianne Roth, 'Interim Measures' (2012) Journal of Dispute Resolution, p. 431.
44. Kaj Hobér, 'Interim Measures by Arbitrators' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13 (Kluwer Law International 2007), p. 739.
45. UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-third session (22 September 2000), UN Doc. A/CN.9/WG.II/WP.110, para. 69 ("[…] such measures may be appropriate where an element of surprise is necessary, i.e. where it is possible that the affected party may try to preempt the measure by taking action to make the measure moot or unenforceable. For example, when an interim order is requested to prevent a party from removing assets from the jurisdiction, the party might remove the assets out of the jurisdiction between the time it learns of the request and the time the measure is issued; […].")
46. UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Seventh Session (25 September 2007), UN Doc. A/CN.9/641, para. 57 ("After discussion, the Working Group was generally of the view that, unless prohibited by the law governing the arbitral procedure, bearing in mind the broad discretion with which the arbitral tribunal was entitled to conduct the proceedings under article 15(1), the [UNCITRAL] Rules, in and of themselves, did not prevent the arbitral tribunal from issuing preliminary orders.")
47. See e.g., Articles 17B and 17C of the UNCITRAL Model Law which set a specific regime for *ex parte* preliminary orders and

Article 26(3) Swiss Rules (2012).

48. See e.g., Article 17F(2) UNCITRAL Model Law and UNCITRAL, Report of the Working Group on Arbitration on the Work of its Thirty-sixth session (12 April 2002), UN Doc. A/CN.9/508, para. 78.
49. Emergency Arbitration Rules as an opt-out regime, i.e. they apply automatically to parties' arbitration agreement unless otherwise agreed by the parties. See Grant Hanessian, 'Emergency Arbitrators' in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd ed, Juris 2014), pp. 346-347.
50. Johan Lundstedt, SCC Practice: Emergency Arbitrator Decisions 1 January 2010-31 December 2013, available at <http:// www.sccinstitute.com/>
51. See e.g., Article 1(5), Appendix V, ICC Rules (2012); para. 6, Schedule 1, SIAC Rules (2016); Article 3, Appendix II, SCC Rules (2012); Article 9B, para. 9.5 LCIA Rules (2014). See also, Bernd Ehle, 'Emergency Arbitration in Practice' in Christopher Muller and Antonio Rigozzi (eds), *New Developments in International Commercial Arbitration* (Schulthess 2013), pp. 97-98. But see the Swiss Rules (2012) which allow the emergency arbitrator to order emergency relief ex parte pursuant to Article 43(1) which makes reference to Article 26(3). See generally, Christopher Boog and Bertrand Stoffel, 'Preliminary Orders and the Emergency Arbitrators: Urgent Interim Relief by an Arbitral Decision Maker in Exceptional Circumstances', Nathalie Voser (ed), *Ten Years of Swiss Rules of International Arbitration*, ASA Special Series No. 44 (JurisNet 2014), pp. 71-82.
52. See e.g., Article 2(5), Appendix I CIArb Rules (2015); Article 6(5) ICDR/AAA Rules (2014); para. 6, Schedule 1 SIAC Rules (2016).
53. See e.g., Article 13, Schedule 4 HKIAC Rules (2013); Article 2(2),

Annex V, ICC Rules (2012) and Article 43(7), Swiss Rules (2012).

54. See e.g., para.10, Schedule 1 SIAC Rules (2016) and Article 6(5) ICDR/AAA Rules (2014).

Plenary 4

The Ethics Gameshow!

Hosts: Theodore K. Cheng, Esq.

Felicia T. Farber, Esq.

Experts Panel: Hon. Carol E. Heckman (ret), Esq.

Lewis Tesser, Esq.

AVOIDING COMPLAINTS AND VIOLATIONS

By Lewis Tesser, Tesser, Ryan and Rochman LLP

509 Madison Avenue New York City 10022 (212) 754-9000

Bad things happen to good lawyers. Each year, some well intentioned lawyers cross over the misconduct threshold, and many, many more are the subject of disciplinary complaints even though they have not committed an ethical violation. Therefore, it is worth discussing the factors triggering disciplinary complaints and the circumstances frequently attending disciplinary violations. Whether or not misconduct has been committed, no lawyer wants to receive a Complaint in an envelope from the disciplinary committee marked "Personal and Confidential."

Avoiding Disciplinary Complaints

Probably over 90% of disciplinary complaints emanate from unsatisfied clients. The remedy is apparent; keep the customer satisfied. Every completed litigation has a loser; most deals leave a party feeling disappointed at one point or another. Nevertheless, clients can be very forgiving or not about these let-downs.

The key to avoiding disciplinary complaints is good communication. Open, timely and honest communication with clients is the single easiest and greatest step that any lawyer can take to reduce the likelihood of receiving complaints. What is involved?

PROMPTLY RETURN PHONE CALLS. When attorneys do not respond to client inquiries, clients believe that they and their matter is not important to the attorney. Disciplinary Complaint to follow! Of course, attorneys do not have to immediately respond to the client who calls ten times a day. Again the solution lies in communication. An attorney need not drop everything and immediately respond to every client whistle, but attorneys should have in place a policy regarding response time, such as returning every client call within 24 hours. Even if attorneys are unable to respond, they should be able to have someone call the client to explain the reason for the unavailability and to make a realistic promise as to when the call will be returned.

If you are in a small firm or a solo, these comments apply doubly to you. The reality is that you are more likely to receive a complaint than a lawyer in a large firm. Maybe it is because larger businesses (who employ larger firms) are less likely to file a complaint. Maybe it is because larger firms have more personnel to provide guidance or to run interference and help with communication. Maybe it is just unfair.

All work should be documented, contemporaneous notes kept of conversations, material events, time devoted and expenses incurred. Records should be maintained in a way that they can be easily retrieved.

Clients should not be surprised. The most common example is with billing. An attorney may feel awkward having spent more time than expected. That is the time to communicate with the client. Frequently and regularly convey bills to clients. Clients should be informed of material developments and interim and ultimate outcomes and receive carbon copies of materials. The attorney who is going to be away or is busy on a deal, and cannot work on a matter when the client has reason to think it was to be worked on, should give the client a heads-up.

Avoiding Disciplinary Violations

It is not difficult to commit a disciplinary violation. Despite an attorney's earnest intent, it happens. The most serious violations are often escrow transgressions.

1. Escrow

In his Analysis accompanying Rule 1.5 in Volume 1 of this Treatise, *supra*., Wally Larson describes the Rule, which is captioned, "Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records." The rule's caption is the longest caption in the Rules by a factor of three, perhaps to signal its importance.

If an attorney borrows money from your escrow account, how much time does the attorney have to pay it back and at what interest rate? Trick question! Escrow accounts do not contain the attorney's money — these funds belong to clients. Borrowing from the account is conversion and may well result in disbarment. Correcting the conversion *may but will not always* mitigate the ultimate sanction, but it does not rectify the misconduct.

A principal of a firm is responsible for the firm's escrow account even if someone else has invaded it. In *In re Wallman,* 260 A.D.2d 148, 149 (1st Dept. 1999), an attorney practicing for thirty five years was immediately suspended from the practice of law because his partner converted escrow funds. The court explained, "[a]s one of two partners, respondent should have been aware of how the firm escrow account was being handled and is fully responsible for its misuse."

Clients should be promptly paid all funds they are entitled to. Control should be maintained over who has access to and signs (only attorneys) escrow checks. Never write checks payable to "cash" and do not use credit cards. Fees should be immediately withdrawn upon earning and upon payment to the client. Checks should not be drawn for personal or business expenses. All deposits should clear before drawing on them

The escrow funds of one client cannot not be used for another client's purposes, *i.e*., an attorney should maintain all client funds as if they were in separate accounts. There are record keeping requirements (*see* discussion in the Analysis section accompanying Rule 1.15, in Volume 1, *supra.*).

2. Practice Pointers

A principal in a law firm should open the envelope containing the escrow bank statement from the bank to forestall the possibility of fraud. The statement should be immediately reconciled *vis a vis* what clients should have in their respective accounts. Attorneys should be aware of possible third party claims against client money.

Lawyers can call ethics hotlines for almost immediate guidance on ethical quagmires.

- NYCLA: 212-267-6646
- The Association of the Bar of the City of New York. (212) 382-6624
- NYSBA: (518) 463-3200

In addition to good communication, other good management practices directly correlate to the maintenance of a violation-free practice. Time management, attentiveness to appointments and work, and case selection boundaries, for example, practically forestall the possibility of disciplinary neglect.

Neglect will adversely affect a law license. It is often the lesser case that gets lawyers into trouble. This is the work that gets put aside for work that generates more fees or enthusiasm for whatever reason. The most trouble creating case is frequently a no-fee favor for a relative. It will not matter to the disciplinary committee. Once a matter is accepted by a lawyer, it must be handled competently and diligently.

A problem with a case gets worse with inattention. *See Matter of Straney*, 186 A.D.2d 315 (3d Dept. 1992). "Respondent states that he is a very busy sole practitioner. Neglect is an unacceptable response to such a pressure."

Failure to observe good office management practices can be the canary in the coal mine. It can be a tip-off that you or a colleague is undergoing stress. Stress induces bad judgment.

Law is a collegial practice. We can reach out to help and be helped.

It is easy to get nudged into a conflict of interest. We frequently know or have represented more than one party to a transaction and we want to help as many of them as we can. Sometimes it is possible and sometimes it is not. In New York, attorneys must have a conflict checking system, and must check for conflicts before and during representation.

Candor and Independence. We all want to do a great job for our clients, but it is the client's matter. Professor Thurman Arnold taught his law students, "There may come a time in your practice when, despite your very best efforts, someone has got to go to jail. When that time comes, make sure it's the client."

It is usually necessary and always a good idea to have a written engagement letter specifying the client, fees and scope of representation.

Violations Happen

Anyone reading this far into the article is not likely to have woke up on a particular day, stopped at Starbucks for a triple grande latte, and thought, "Today's the day I want to have a conflict of interest." Yet we do convert, commingle, get conflicted, keep bad records, delay, confuse and get confused.

I think that lawyers become lawyers for good reasons and that lawyers are good people. We believe in a society based on the rule of law and fair principles. We employ logic, creativity, savvy and psychology. We help people and institutions. We join bar associations, do pro bono work and zealously argue our clients' interests. How do good people commit disciplinary infractions? Lawyers are good people, but we are people.

We have stress, financial problems, health crises, alcohol and substance abuse, family situations, depression, employee and partner conflicts, and procrastination tendencies. These situations affect our judgments. It is often easier to recognize stress when it is happening to someone else than when it is happening to ourselves. If we see a colleague's judgment is being affected, we can remember that we are a community serving a higher calling and that we have resources available to all of us.

Bar association involvement creates a near ineluctable self-fulfilling prophecy of professional success and satisfaction.

Even if you are busy, do not neglect to take care of yourself. There is yoga, counseling, exercise, or some other form of game changer that can get you back to where you need to be. If you or a colleague is having a serious personal problem, run, do not walk to the New York State Lawyer's Assistance Program. 1 (800) 255-0569. LAP@NYSBA.ORG.

Guide to Judiciary Policy

Vol 2: Ethics and Judicial Conduct
Pt A: Codes of Conduct

Ch 2: Code of Conduct for United States Judges

Introduction

The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." **See:** JCUS-APR 73, pp. 9-11. Since then, the Judicial Conference has made the following changes to the Code:

- March 1987: deleted the word "Judicial" from the name of the Code;
- September 1992: adopted substantial revisions to the Code;
- March 1996: revised part C of the Compliance section, immediately following the Code;
- September 1996: revised Canons 3C(3)(a) and 5C(4);
- September 1999: revised Canon 3C(1)(c);
- September 2000: clarified the Compliance section;
- March 2009: adopted substantial revisions to the Code;

- March 2014: revised part C of the Compliance section, which appears below, immediately following the Code.

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct
c/o General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544
202-502-1100

Procedural questions may be addressed to:

Office of the General Counsel
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544
202-502-1100

CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be

independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to

serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Canon 2B. Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

Canon 2C. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. *See New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with

knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar

conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities.*

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

C. *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such

securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including

the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Canon 3A(5). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

Canon 3A(6). The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Canon 3B(3). A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3B(5). Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or

otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Canon 3C. Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

Canon 3C(1)(c). In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

A. *Law-related Activities.*

(1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or

(c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

(3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.

(4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.

(5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.

(2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit

the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

(1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.

(3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.

(4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.

(5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

(1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.

H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

(2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.

(3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

COMMENTARY

Canon 4. Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

Canon 4A. Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board.

Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

Canon 4A(4). This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

Canon 4A(5). A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Canon 4B. The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

Canon 4C. A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on

the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

Canon 4D(1), (2), and (3). Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

Canon 4D(5). The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Canon 4E. Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

Canon 4F. The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

Canon 4H. A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of

compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

A. *General Prohibitions.* A judge should not:

(1) act as a leader or hold any office in a political organization;

(2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or

(3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

COMMENTARY

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

Compliance with the Code of Conduct

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge

A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. Judge Pro Tempore

A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

(1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.

(2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. Retired Judge

A judge who is retired under 28 U.S.C. § 371(b) or § 372(a) (applicable to Article III judges), or who is subject to recall under § 178(d) (applicable to judges on the Court of Federal Claims), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. However, bankruptcy judges and magistrate judges who are eligible for recall but who have notified the Administrative Office of the United States Courts that they will not consent to recall are not obligated to comply with the provisions of this Code governing part-time judges. Such notification may be made at any time after retirement, and is irrevocable. A senior judge in the territories and

possessions must comply with this Code as prescribed by 28 U.S.C. § 373(c)(5) and (d).

COMMENTARY

The 2014 amendment to the Compliance section, regarding retired bankruptcy judges and magistrate judges and exempting those judges from compliance with the Code as part-time judges if they notify the Administrative Office of the United States Courts that they will not consent to recall, was not intended to alter those judges' statutory entitlements to annuities, cost-of-living adjustments, or any other retirement benefits.

Applicable Date of Compliance

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association® and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA®.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.**

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

- **(1)** any known direct or indirect financial or personal interest in the outcome of the arbitration;
- **(2)** any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
- **(3)** the nature and extent of any prior knowledge they may have of the dispute; and
- **(4)** any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV: An arbitrator should conduct the proceedings fairly and diligently.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to Paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief.

CANON V: An arbitrator should make decisions in a just, independent and deliberate manner.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

CANON X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations Under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations Under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations Under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;

(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);

(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

(4) Canon X arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;

(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations Under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations Under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations Under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators
2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution[1]. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.[2] Both the original 1994 version and the 2005 revision have been approved by each participating organization.[3]

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

---

[1] The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

[2] Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

[3] The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.

2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.

4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.

5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

NEW YORK STATE UNIFIED COURT SYSTEM

PART 1200

RULES OF PROFESSIONAL CONDUCT

Dated: January 1, 2017

These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court, effective April 1, 2009, and amended on several occasions thereafter. They supersede the former part 1200 (Disciplinary Rules of the Code of Professional Responsibility).

The New York State Bar Association has issued a Preamble, Scope and Comments to accompany these Rules. They are not enacted with this Part, and where a conflict exists between a Rule and the Preamble, Scope or a Comment, the Rule controls.

This unofficial compilation of the Rules provided for informational purposes only. The official version of Part 1200 is published by the New York State Department of State. An unofficial on-line version is available at www.dos.ny.gov/info/nycrr.html (Title 22 [Judiciary]; Subtitle B Courts; Chapter IV Supreme Court; Subchapter E All Departments; Part 1200 Rules of Professional Conduct; § 1200.0 Rules of Professional Conduct).

TABLE OF CONTENTS

Page

Page

Page

PART 1200 - RULES OF PROFESSIONAL CONDUCT

RULE 1.0.

Terminology

(a) "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

(b) "Belief" or "believes" denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances.

(c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

(d) "Confidential information" is defined in Rule 1.6.

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(f) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(g) "Domestic relations matter" denotes representation of a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support or alimony, or to enforce or modify a judgment or order in connection with any such claim, action or proceeding.

(h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other

association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

(l) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or has a purpose to deceive, provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations that can be reasonably expected to induce detrimental reliance by another.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

(k) "Knowingly," "known," "know," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

(m) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional legal corporation or a member of an association authorized to practice law.

(n) "Person" includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.

(o) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(p) "Qualified legal assistance organization" means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof.

(q) "Reasonable" or "reasonably," when used in relation to conduct by a lawyer, denotes the conduct of a reasonably prudent and competent lawyer. When used in the context of conflict of interest determinations, "reasonable lawyer" denotes a lawyer acting from the perspective of a reasonably prudent and

competent lawyer who is personally disinterested in commencing or continuing the representation.

(r) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(s) "Reasonably should know," when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

(u) "Sexual relations" denotes sexual intercourse or the touching of an intimate part of the lawyer or another person for the purpose of sexual arousal, sexual gratification or sexual abuse.

(v) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(w) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.1.

Competence

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

RULE 1.2.

Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

RULE 1.3.

Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

RULE 1.4.

Communication

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5.

Fees and Division of Fees

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a statement of client's rights and responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

RULE 1.6.

Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

RULE 1.7.

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

RULE 1.8.

Current Clients: Specific Conflict of Interest Rules

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including

whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

(1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or

(2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

(1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or

(2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

(3) the client's confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j) *(1)* A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

RULE 1.9.

Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in

which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

RULE 1.10.

Imputation of Conflicts of Interest

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

(h) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

RULE 1.11.

Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this Rule, the term "matter" as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

(f) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

RULE 1.12.

Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

(e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 1.13.

Organization As Client

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and

the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 1.14.

Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

RULE 1.15.

Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

> A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

> *(1)* A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such

banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them

in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an

office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

RULE 1.16.

Declining or Terminating Representation

(a) A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or

(2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

(b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:

(1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

(3) the lawyer is discharged; or

(4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action with which the lawyer has a fundamental disagreement;

(5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;

(8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal;

(9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(10) the client knowingly and freely assents to termination of the employment;

(11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or

(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

RULE 1.17.

Sale of Law Practice

(a) A lawyer retiring from a private practice of law; a law firm, one or more members of which are retiring from the private practice of law with the firm; or the personal representative of a deceased, disabled or missing lawyer, may sell a law practice, including goodwill, to one or more lawyers or law firms, who may purchase the practice. The seller and the buyer may agree on reasonable restrictions on the seller's private practice of law, notwithstanding any other provision of these Rules. Retirement shall include the cessation of the private

practice of law in the geographic area, that is, the county and city and any county or city contiguous thereto, in which the practice to be sold has been conducted.

(b) Confidential information.

(1) With respect to each matter subject to the contemplated sale, the seller may provide prospective buyers with any information not protected as confidential information under Rule 1.6.

(2) Notwithstanding Rule 1.6, the seller may provide the prospective buyer with information as to individual clients:

(i) concerning the identity of the client, except as provided in paragraph (b)(6);

(ii) concerning the status and general nature of the matter;

(iii) available in public court files; and

(iv) concerning the financial terms of the client-lawyer relationship and the payment status of the client's account.

(3) Prior to making any disclosure of confidential information that may be permitted under paragraph (b)(2), the seller shall provide the prospective buyer with information regarding the matters involved in the proposed sale sufficient to enable the prospective buyer to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidential information, the seller may make the disclosures necessary for the prospective buyer to determine whether any conflict of interest exists, subject to paragraph (b)(6). If the prospective buyer determines that conflicts of interest exist prior to reviewing the information, or determines during the course of review that a conflict of interest exists, the prospective buyer shall not review or continue to review the information unless the seller shall have

obtained the consent of the client in accordance with Rule 1.6(a)(1).

(4) Prospective buyers shall maintain the confidentiality of and shall not use any client information received in connection with the proposed sale in the same manner and to the same extent as if the prospective buyers represented the client.

(5) Absent the consent of the client after full disclosure, a seller shall not provide a prospective buyer with information if doing so would cause a violation of the attorney-client privilege.

(6) If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information to a prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

(c) Written notice of the sale shall be given jointly by the seller and the buyer to each of the seller's clients and shall include information regarding:

(1) the client's right to retain other counsel or to take possession of the file;

(2) the fact that the client's consent to the transfer of the client's file or matter to the buyer will be presumed if the client does not take any action or otherwise object within 90 days of the sending of the notice, subject to any court rule or statute requiring express approval by the client or a court;

(3) the fact that agreements between the seller and the seller's clients as to fees will be honored by the buyer;

(4) proposed fee increases, if any, permitted under paragraph (e); and

(5) the identity and background of the buyer or buyers, including principal office address, bar admissions,

number of years in practice in New York State, whether the buyer has ever been disciplined for professional misconduct or convicted of a crime, and whether the buyer currently intends to resell the practice.

(d) When the buyer's representation of a client of the seller would give rise to a waivable conflict of interest, the buyer shall not undertake such representation unless the necessary waiver or waivers have been obtained in writing.

(e) The fee charged a client by the buyer shall not be increased by reason of the sale, unless permitted by a retainer agreement with the client or otherwise specifically agreed to by the client.

RULE 1.18.

Duties to Prospective Clients

(a) Except as provided in Rule l.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more

disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the firm acts promptly and reasonably to notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) the firm implements effective screening procedures to prevent the flow of information about the matter between the disqualified lawyer and the others in the firm;

(iii) the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) written notice is promptly given to the prospective client; and

(3) a reasonable lawyer would conclude that the law firm will be able to provide competent and diligent representation in the matter.

(e) A person is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.

RULE 2.1.

Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

RULE 2.2.

[Reserved]

RULE 2.3.

Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Unless disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is protected by Rule 1.6.

RULE 2.4.

Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or

reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

RULE 3.1.

Non-Meritorious Claims and Contentions

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

RULE 3.2.

Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

RULE 3.3.

Conduct Before a Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal.

RULE 3.4.

Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) *(1)* suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness;

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; or

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

RULE 3.5.

Maintaining and Preserving the Impartiality of Tribunals and Jurors

(a) A lawyer shall not:

(1) seek to or cause another person to influence a judge, official or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal when the recipient is prohibited from accepting the gift or loan but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Part 100 of the Rules of the Chief Administrator of the Courts;

(2) in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except:

(i) in the course of official proceedings in the matter;

(ii) in writing, if the lawyer promptly delivers a copy of the writing to counsel for other parties and to a party who is not represented by a lawyer;

(iii) orally, upon adequate notice to counsel for the other parties and to any party who is not represented by a lawyer; or

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts;

(3) seek to or cause another person to influence a juror or prospective juror by means prohibited by law;

(4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order;

(5) communicate with a juror or prospective juror after discharge of the jury if:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress or harassment; or

(iv) the communication is an attempt to influence the juror's actions in future jury service; or

(6) conduct a vexatious or harassing investigation of either a member of the venire or a juror or, by financial support or otherwise, cause another to do so.

(b) During the trial of a case a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) All restrictions imposed by this Rule also apply to communications with or investigations of members of a family of a member of the venire or a juror.

(d) A lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of his or her family of which the lawyer has knowledge.

RULE 3.6.

Trial Publicity

(a) A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(2) in a criminal matter that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission or statement given by a defendant or suspect, or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test, or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(c) Provided that the statement complies with paragraph (a), a lawyer may state the following without elaboration:

(1) the claim, offense or defense and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal matter:

(i) the identity, age, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the identity of investigating and arresting officers or agencies and the length of the investigation; and

(iv) the fact, time and place of arrest, resistance, pursuit and use of weapons, and a description of physical evidence seized, other than as contained only in a confession, admission or statement.

(d) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RULE 3.7.

Lawyer As Witness

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

RULE 3.8.

Special Responsibilities of Prosecutors and Other Government Lawyers

(a) A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.

(b) A prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.

(c) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutor's office; or

(2) if the conviction was obtained by that prosecutor's office,

(A) notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

(C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

(d) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

(e) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

RULE 3.9.

Advocate In Non-Adjudicative Matters

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

RULE 4.1.

Truthfulness In Statements To Others

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.

RULE 4.2.

Communication With Person Represented By Counsel

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

(b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

(c) A lawyer who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a), but may communicate with a represented person, unless otherwise prohibited by law and unless the represented person is not legally competent, provided the lawyer or the lawyer's counsel gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

RULE 4.3.

Communicating With Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 4.4.

Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.

RULE 4.5.

Communication After Incidents Involving Personal Injury or Wrongful Death

(a) In the event of a specific incident involving potential claims for personal injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e).

RULE 5.1.

Responsibilities of Law Firms, Partners, Managers and Supervisory Lawyers

(a) A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.

(b) *(1)* A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules.

(2) A lawyer with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the supervised lawyer conforms to these Rules.

(c) A law firm shall ensure that the work of partners and associates is adequately supervised, as appropriate. A lawyer with direct supervisory authority over another lawyer shall adequately supervise the work of the other lawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

(d) A lawyer shall be responsible for a violation of these Rules by another lawyer if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the other lawyer practices or is a lawyer who has supervisory authority over the other lawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.2.

Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by these Rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

RULE 5.3.

Lawyer's Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a

lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

RULE 5.4.

Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm or another lawyer associated in the firm may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to

direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.

(d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RULE 5.5.

Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

RULE 5.6.

Restrictions On Right To Practice

(a) A lawyer shall not participate in offering or making:

(1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.

(b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

RULE 5.7.

Responsibilities Regarding Nonlegal Services

(a) With respect to lawyers or law firms providing nonlegal services to clients or other persons:

(1) A lawyer or law firm that provides nonlegal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the provision of both legal and nonlegal services.

(2) A lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(3) A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship.

(4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is de minimis.

(b) Notwithstanding the provisions of paragraph (a), a lawyer or law firm that is an owner, controlling party, agent, or is otherwise affiliated with an entity that the lawyer or law firm knows is providing nonlegal services to a person shall not permit any nonlawyer providing such services or affiliated with that entity to direct or regulate the professional judgment of the lawyer or law firm in rendering legal services to any person, or to cause the lawyer or law firm to compromise its duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services.

(c) For purposes of this Rule, "nonlegal services" shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.

RULE 5.8.

Contractual Relationship Between Lawyers and Nonlegal Professionals

(a) The practice of law has an essential tradition of complete independence and uncompromised loyalty to those it serves. Recognizing this tradition, clients of lawyers practicing in New York State are guaranteed "independent professional judgment and undivided loyalty uncompromised by conflicts of interest." Indeed, these guarantees represent the very foundation of the profession and allow and foster its continued role as a protector of the system of law. Therefore, a lawyer must remain completely responsible for his or her own independent professional judgment, maintain the confidences and secrets of clients, preserve funds of clients and third parties in his or her control, and otherwise comply with the legal and ethical principles governing lawyers in New York State.

Multi-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values. However, a lawyer or law firm may enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a), provided that:

(1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm; and the client has given informed written consent and has been provided with a copy of the "Statement of Client's Rights In Cooperative Business Arrangements" pursuant to section 1205.4 of the Joint Appellate Divisions Rules.

(b) For purposes of paragraph (a):

(1) each profession on the list maintained pursuant to a Joint Rule of the Appellate Divisions shall have been designated sua sponte, or approved by the Appellate Divisions upon application of a member of a nonlegal profession or nonlegal professional service firm, upon a determination that the profession is composed of individuals who, with respect to their profession:

(i) have been awarded a bachelor's degree or its equivalent from an accredited college or university, or have attained an equivalent combination of educational credit from such a college or university and work experience;

(ii) are licensed to practice the profession by an agency of the State of New York or the United States Government; and

(iii) are required under penalty of suspension or revocation of license to adhere to a code of ethical conduct that is reasonably comparable to that of the legal profession;

(2) the term "ownership or investment interest" shall mean any such interest in any form of debt or equity, and shall include any interest commonly considered to be an interest accruing to or enjoyed by an owner or investor.

(c) This Rule shall not apply to relationships consisting solely of non-exclusive reciprocal referral agreements or understandings between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm.

RULE 6.1.

Voluntary Pro Bono Service

Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.

(a) Every lawyer should aspire to:

(1) provide at least 50 hours of pro bono legal services each year to poor persons; and

(2) contribute financially to organizations that provide legal services to poor persons. Lawyers in private practice or employed by a for-profit entity should aspire to contribute annually in an amount at least equivalent to (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time; or (ii) if the lawyer's work is performed on a contingency basis, the amount typically billed by lawyers in the community for one hour of time; or (iii) the amount typically paid by the organization employing the lawyer for one hour of the lawyer's time; or (iv) if the lawyer is underemployed, an amount not to exceed one-tenth of one percent of the lawyer's income.

(b) Pro bono legal services that meet this goal are:

(1) professional services rendered in civil matters, and in those criminal matters for which the government is not obliged to provide funds for legal representation, to persons who are financially unable to compensate counsel;

(2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and

(3) professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

(c) Appropriate organizations for financial contributions are:

(1) organizations primarily engaged in the provision of legal services to the poor; and

(2) organizations substantially engaged in the provision of legal services to the poor, provided that the donated funds are to be used for the provision of such legal services.

(d) This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence.

RULE 6.2.

[Reserved]

RULE 6.3.

Membership in a Legal Services Organization

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rules 1.7 through 1.13; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

RULE 6.4.

Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform

may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer actively participates, the lawyer shall disclose that fact to the organization, but need not identify the client. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7.

RULE 6.5.

Participation in Limited Pro Bono Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest; and

(2) shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9.

(b) Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable to a representation governed by this Rule.

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation.

RULE 7.1.

Advertising

(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that:

(1) contains statements or claims that are false, deceptive or misleading; or

(2) violates a Rule.

(b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

(1) legal and nonlegal education, degrees and other scholastic distinctions, dates of admission to any bar; areas of the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications of law related matters authored by the lawyer; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

(2) names of clients regularly represented, provided that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the lawyer or law firm participates; nonlegal services provided by the lawyer or law firm or by an entity owned and controlled by the lawyer or law firm; the existence of contractual relationships between the lawyer or law firm and a nonlegal professional or nonlegal professional service firm, to the extent permitted by Rule 5.8, and the nature and extent of services available through those contractual relationships; and

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing the information required by paragraph (p);

range of fees for legal and nonlegal services, provided that there be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal and nonlegal services.

(c) An advertisement shall not:

(1) include a paid endorsement of, or testimonial about, a lawyer or law firm without disclosing that the person is being compensated therefor;

(2) include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case;

(3) use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes, without disclosure of same; or

(4) be made to resemble legal documents.

(d) An advertisement that complies with subdivision (e) of this section may contain the following:

(1) statements that are reasonably likely to create an expectation about results the lawyer can achieve;

(2) statements that compare the lawyer's services with the services of other lawyers;

(3) testimonials or endorsements of clients, and of former clients; or

(4) statements describing or characterizing the quality of the lawyer's or law firm's services.

(e) It is permissible to provide the information set forth in subdivision(d) of this section provided:

(1) its dissemination does not violate subdivision(a)of this section;

(2) it can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated;

(3) it is accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome"; and

(4) in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing.

(f) Every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), shall be labeled "Attorney Advertising" on the first page, or on the home page in the case of a web site. If the communication is in the form of a self-mailing brochure or postcard, the words "Attorney Advertising" shall appear therein. In the case of electronic mail, the subject line shall contain the notation "ATTORNEY ADVERTISING."

(g) A lawyer or law firm shall not utilize meta tags or other hidden computer codes that, if displayed, would violate these Rules.

(h) All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) Any words or statements required by this Rule to appear in an advertisement must be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of a web site, the required words or statements shall appear on the home page.

(j) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service. Such legal services shall include all those services that are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(k) All advertisements shall be pre-approved by the lawyer or law firm, and a copy shall be retained for a period of not less than three years following its initial

dissemination. Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.

(l) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm shall not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm shall not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(m) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this Rule in a publication that is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this Rule in a publication that is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this Rule in a publication that has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(n) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this Rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(o) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item.

(p) All advertisements that contain information about the fees charged by the lawyer or law firm, including those indicating that in the absence of a recovery no fee will be charged, shall comply with the provisions of Judiciary Law §488(3).

(q) A lawyer may accept employment that results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(r) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not undertake to give individual advice.

RULE 7.2.

Payment for Referrals

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;

(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under

the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

RULE 7.3.

Solicitation and Recommendation of Professional Employment

(a) A lawyer shall not engage in solicitation:

(1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or

(2) by any form of communication if:

(i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule;

(ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer;

(iii) the solicitation involves coercion, duress or harassment;

(iv) the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer; or

(v) the lawyer intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions:

(1) A copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial district or judicial department wherein the lawyer or law firm maintains its principal office. Where no such office is maintained, the filing shall be made in the judicial department where the solicitation is targeted. A filing shall consist of:

(i) a copy of the solicitation;

(ii) a transcript of the audio portion of any radio or television solicitation; and

(iii) if the solicitation is in a language other than English, an accurate English-language translation.

(2) Such solicitation shall contain no reference to the fact of filing.

(3) If a solicitation is directed to a predetermined recipient, a list containing the names and addresses of all recipients shall be retained by the lawyer or law firm for a period of not less than three years following the last date of its dissemination.

(4) Solicitations filed pursuant to this subdivision shall be open to public inspection.

(5) The provisions of this paragraph shall not apply to:

(i) a solicitation directed or disseminated to a close friend, relative, or former or existing client;

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

(iii) professional cards or other announcements the distribution of which is authorized by Rule 7.5(a).

(d) A written solicitation shall not be sent by a method that requires the recipient to travel to a location other than that at which the recipient ordinarily receives business or personal mail or that requires a signature on the part of the recipient.

(e) No solicitation relating to a specific incident involving potential claims for personal injury or wrongful death shall be disseminated before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident.

(f) Any solicitation made in writing or by computer-accessed communication and directed to a pre-determined recipient, if prompted by a specific occurrence involving or affecting a recipient, shall disclose how the lawyer obtained the identity of the recipient and learned of the recipient's potential legal need.

(g) If a retainer agreement is provided with any solicitation, the top of each page shall be marked "SAMPLE" in red ink in a type size equal to the largest type size used in the agreement and the words "DO NOT SIGN" shall appear on the client signature line.

(h) Any solicitation covered by this section shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.

(i) The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.

RULE 7.4.

Identification of Practice and Specialty

(a) A lawyer or law firm may publicly identify one or more areas of law in which the lawyer or the law firm practices, or may state that the practice of the lawyer or law firm is limited to one or more areas of law, provided that the lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law, except as provided in Rule 7.4(c).

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows:

(1) A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: "The [name of the private certifying organization] is not affiliated with any governmental authority."

(2) A lawyer who is certified as a specialist in a particular area of law or law practice by the authority having jurisdiction over specialization under the laws of another state or territory may state the fact of

certification if, in conjunction therewith, the certifying state or territory is identified and the following statement is prominently made: "Certification granted by the [identify state or territory] is not recognized by any governmental authority within the State of New York."

(3) A statement is prominently made if:

(i) when written, it is clearly legible and capable of being read by the average person, and is in a font size at least two font sizes larger than the largest text used to state the fact of certification; and

(ii) when spoken aloud, it is intelligible to the average person, and is at a cadence no faster, and a level of audibility no lower, than the cadence and level of audibility used to state the fact of certification.

RULE 7.5.

Professional Notices, Letterheads and Signs

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

(1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates;

(2) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law

firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4;

(3) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or

(4) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated "Of Counsel" on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(b) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation shall contain "PC" or such symbols permitted by law, the name of a limited liability company or partnership shall contain "LLC," "LLP" or such symbols permitted by law and, if otherwise lawful, a firm may use as, or continue to include in its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein. A lawyer or law firm may not include the name of a

nonlawyer in its firm name, nor may a lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith. A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(e) A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided:

(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm;

(2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name;

(3) the domain name does not imply an ability to obtain results in a matter; and

(4) the domain name does not otherwise violate these Rules.

(f) A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.

RULE 8.1.

Candor in the Bar Admission Process

(a) A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:

(1) has made or failed to correct a false statement of material fact; or

(2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.

RULE 8.2.

Judicial Officers and Candidates

(a) A lawyer shall not knowingly make a false statement of fact concerning the qualifications, conduct or integrity of a judge or other adjudicatory officer or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of Part 100 of the Rules of the Chief Administrator of the Courts.

RULE 8.3.

Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(b) A lawyer who possesses knowledge or evidence concerning another lawyer or a judge shall not fail to respond to a lawful demand for information from a tribunal or other authority empowered to investigate or act upon such conduct.

(c) This Rule does not require disclosure of:

(1) information otherwise protected by Rule 1.6; or

(2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

RULE 8.4.

Misconduct

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability:

(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified

copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

RULE 8.5.

Disciplinary Authority and Choice of Law

(a) A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

(b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) For any other conduct:

(i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and

(ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice,

the rules of that jurisdiction shall be applied to that conduct.

Plenary 5

Securing the Decision:

A Primer on Arbitral Award Writing

Moderator: Kabir Duggal, Esq.

Panelists: Christian P. Alberti, Esq.

Stephanie Cohen, Esq.

Marek Krasula, Esq.

Kiera S. Gans, Esq.

Richard L. Mattiaccio

RULES-of-THUMB

for

DELIBERATIONS and AWARD DRAFTING

Richard L. Mattiaccio,
F.CIArb, C. Arb
Allegaert Berger & Vogel LLP
111 Broadway, NY, NY 10006
Tel: +1.212.616.7085

RULE 1

- Keep an open mind throughout the proceedings

 richard@mattiaccio.com www.mattiacio.com
www.abv.com

RULE 2

- Avoid discussing ultimate conclusions with Tribunal members while the record is still open
  - Discussing unanswered questions, demeaner can be OK
    - so long as it does not reflect a closed mind as to the ultimate questions submitted to the tribunal for decision

 richard@mattiaccio.com www.mattiacio.com www.abv.com

RULE 3

- Make sure all tribunal members are working with the same record
  - Put counsel to the task, before the record is closed, to keep the tribunal organized

 richard@mattiaccio.com www.mattiacio.com www.abv.com

RULE 4

- *Prepare* for deliberations
  - Re-read
    - The pleadings
    - Witness statements and exhibits
    - Any post-hearing briefs and make a list of questions / discussion topics for the tribunal
  - Prepare a list of Decision Points
    - Cover what the Parties raise – No More, No Less
  - If there is a transcript – read it thoroughly
  - Take notes, highlight, flag points for discussion
  - Read the exhibits with the transcript
  - Annotate your Decision Points with transcript and exhibit references

If there is no transcript, make sure you take good notes and read them in connection with deliberations and drafting

RULE 5

- "Arbitral discretion" is no substitute for reasoning
  - Reasoning explains why arbitrators exercise discretion in a certain manner
  - "The Tribunal, in the exercise of its wide discretion, finds that…" is excess verbiage
    - except to remind counsel and a reviewing court of the standard of review
    - comes across as defensive
      - or worse, *lazy*

RULE 6

- Resolve any doubts as to applicable law long before the parties brief the law
- Be comfortable with the briefing before the record closes
- Limit yourself to the law as it has been briefed, unless you disclose and obtain consent *in advance* authorizing you to independent legal research
  - *Iura novit curia* is for the *courts* in civil law countries
  - In common law countries, the typical party expectation is that, in arbitration, the arbitrators will confine themselves to the law as briefed
- Do not check your prior knowledge at the door – make use of it before and during the hearing process to make sure the briefing is adequate

RULE 7

- Never compromise on essential points
- Compromise on non-essential points to achieve consensus

RULE 8

- Listen carefully to your tribunal colleagues
- Remain collegial even if a disagreement is heartfelt
- Look for points of agreement in the midst of any disagreement

RULE 9

- THINK AGAIN
  - Sleep on it

RULE 10

- Have your draft of the award reviewed
  - By co-arbitrators (INSIST) and/or by the institution
    - Language
    - Sense
    - Reasoning
    - Calculations

 richard@mattiaccio.com www.mattiacio.com www.abv.com

Supplemental Rules for the

Preservation of Arbitrator Sanity

(the "Sanity Rules")

 richard@mattiaccio.com www.mattiacio.com www.abv.com

SANITY RULE 1

- In the pre-hearing phase, maintain an up-to-date chronology of procedural developments
  - Avoid the need to re-construct it at the end of the case
  - Keep it concise, but include dates
    - American parties tend to find lengthy procedural preambles to be an infuriating waste of time and money in commercial cases
    - A detailed procedural history may be necessary or helpful to enforce the award in some countries, so strike an appropriate balance

 richard@mattiaccio.com www.mattiacio.com www.abv.com

SANITY RULE 2

- Have counsel for the parties keep you organized
  - Stipulated chronology
    - Stated in the most neutral terms possible
    - Temporal relations of events to one another – nothing more or the parties will not agree
  - A list of the named parties with essential descriptions
    - Alignment of each party
    - Legal nature/nationality of the party
    - Legal headquarters/ relevant place(s) of operations
    - Membership in any Corporate Group
      - Affiliates relevant to the case

 richard@mattiaccio.com www.mattiacio.com www.abv.com

SANITY RULE 2 cont.

- Witness Lists
  - Identity
  - Affiliation(s)
  - Citizenship; place of business
  - Topic areas of testimony
  - For experts, short description of areas of expertise
  - Date(s) of witness statement(s), testimony
- Exhibit Lists
  - In a logical order
  - Brief description of each document with other identifiers
  - Area(s) of relevance
  - Cross-references, if used with multiple witnesses

SANITY RULE 3

- Persuade the parties to arrange for a verbatim transcript
  - Explain that a transcript will empower the tribunal to provide more detailed reasoning
    - If necessary, explain that the lack of a transcript will adversely impact the level of detail in the award or will increase the time and cost of deliberations, or both

SANITY RULE 4

- Develop a workplan with tribunal members while you are all still together at the hearing
  - Ensure that all tribunal members have their calendars with them on the last day of the hearing
  - Agree on a workplan to ensure completion of the award, taking into account the institutional review process, within the deadline set by the applicable rules
    - Confirm the workplan in writing as soon as you get back to your computer
      - Use your computer to deny your colleagues deniability – send them calendar appointments with the deadlines and with generous reminders.

 richard@mattiaccio.com www.mattiacio.com www.abv.com

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Drafting Arbitral Awards
Part I — General

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Sundra Rajoo, ex officio
Wolf Von Kumberg, ex officio

Drafting Arbitral Awards
Part I — General

Drafting Arbitral Awards Part I — General

Introduction

1. This Guideline sets out the current best practice in international commercial arbitration for drafting arbitral awards. It is divided into three parts dealing with (1) arbitral awards in general, (2) awards of interest,[1] and (3) awards of costs.[2]
2. Part I of this Guideline provides guidance on:
   i. how to draft and communicate arbitral awards (Article 1);
   ii. the titles that are most commonly used (Article 2);
   iii. the conduct of deliberations (Article 3);
   iv. the form and content of awards (Article 4); and
   v. issues arising after a final award has been communicated (Article 5).

Preamble

1. Parties resort to arbitration to obtain a final and binding resolution of their dispute. It is the arbitrators' role to resolve the dispute by deciding all of the disputed issues and recording their decision in a document, called an arbitral award. Arbitral awards should be prepared with the greatest care to ensure they conform with the terms of the arbitration agreement, including any arbitration rules and the law of the place of arbitration (*lex arbitri*), and are enforceable under the New York Convention.[3] Any failure to comply with the agreed process and the requirements as to form and content may lead to challenges and create difficulties with enforcement.
2. Arbitrators have a wide discretion to resolve the disputes in arbitration by issuing different types of awards. Consequently, most national laws and arbitration rules do not define the various types of awards that are available but, when they do, they have taken an inconsistent approach to the labelling of awards. Even though the title of the award does not determine its legal effect, choosing the wrong title may lead to misunderstandings. Accordingly, arbitrators should be careful to use the

appropriate title in order to avoid being prematurely and unintentionally deprived of power.

3. This Guideline addresses the issues that arbitrators need to consider when drafting awards with the aim of minimising any difficulties in their recognition and/or enforcement.

Article 1 — General principles

1. **Arbitrators should make it clear that a decision is an award by including the word 'Award' in the title, if it is indeed intended to be an award.**
2. **Arbitrators should structure an award in a logical sequence and express their decision in a clear, concise and unambiguous manner.**
3. **Arbitrators should endeavour to make an award that is valid and enforceable.**
4. **Arbitrators should make their award in a timely and efficient manner.**
5. **Once arbitrators have made their award, they should communicate it to the parties and to any arbitral institution administering the arbitration following the method provided for in the arbitration agreement, including any arbitration rules and/or the *lex arbitri*.**

Commentary on Article 1

Paragraph 1

Arbitrators' decisions

In the course of an arbitration arbitrators normally issue various decisions. Decisions relating to the organisation and general conduct of the arbitral proceedings which are purely procedural and/or administrative in nature should be made in the form of procedural orders or directions.[4] Such decisions should be clearly distinguished from arbitral awards, which are intended to include a determination on the

merits or affect the parties' substantive rights and which can generally be enforced under the New York Convention (see Article 2 below).

Paragraph 2

Structural requirements

a) Arbitrators should keep in mind at all times that awards are first and foremost written for the parties. The clearer an award is, the more likely it is to be accepted by the parties and the less likely it is to be challenged. For these purposes, awards should be in a format and layout which aids the communication of the arbitrators' decision and invites reading. They may be written as a flowing narrative dealing with the evidence as it arises naturally in the sequence of things or, where there are many different issues, on an issue-by-issue basis, dealing with the evidence and argument applicable to each issue separately.

b) Arbitrators should consider using short sentences. As soon as a sentence ceases to have a clear and logical link to the preceding sentence, arbitrators should write a new paragraph. Arbitrators should use numbered paragraphs. The award should also include informative headings and sub-headings. A table of contents is especially helpful in lengthy awards. To the extent possible, awards should avoid using technical or legalistic expressions and should be written in plain and simple language which sets out the decision in a coherent and unambiguous manner.

c) When drafting an award arbitrators should also consider the wider audience who may read and are invited to take actions in relation to the award, including judges exercising a supportive or supervisory role and/ or third parties (such as insurers) whose interests may be affected by it. An award should contain sufficient information to enable its audience to understand the issues and/or its meaning without the need to make further enquiry into the matter. They should not give rise to any

questions as to their interpretation and they should not need clarifications.[5] Arbitrators should not attach extensive documents to the award and/or refer to documents attached to the award. If it is necessary to refer to key documents it is good practice to quote the relevant passage(s)/part(s) in full. However, sometimes, arbitrators may attach certain documents to the award, such as the terms of reference, provisional orders and/or earlier awards when required under the relevant rules and/or *lex arbitri*[6] or for ease of reference.

Paragraph 3

Making a valid and enforceable award

a) Awards are of no value if they are invalid and of limited value if they are not enforceable internationally. To be valid, an arbitral award needs to conform with the arbitration agreement, including any arbitration rules and the *lex arbitri*. To be enforceable internationally an award should also comply with the requirements of the New York Convention. If one of the parties makes it clear that it may intend to enforce the award in another jurisdiction, the arbitrators may consider it appropriate to take account of any procedural requirements of the law of that jurisdiction to the extent that they are made aware of these. Additionally, arbitrators may consider it appropriate to consider the law of the place where the debtor resides and/or has assets, and/or any other place(s) of likely enforcement, if known and, if so, to seek assistance from the party expecting to enforce as to any particular requirements in such places.[7]

b) Arbitrators are not expected to consider the laws of every possible country where enforcement may be sought by the parties, it suffices to seek to minimise the risk that their award is set aside and/or refused recognition and/or enforcement under the New York Convention.

Paragraph 4

Time limits for making awards

a) Many national laws and arbitration rules do not specify any time limits within which the arbitrators must make their final award, leaving the matter to the arbitrators' discretion. However, some expressly include provisions regarding time limits to expedite the arbitral proceedings and avoid delays in concluding the final award.[8] Parties to the arbitration agreement may also prescribe a time limit, albeit this is less common.

b) If any time limits for issuing a final award are specified in the arbitration agreement, including any applicable rules and/or the *lex arbitri*, arbitrators should manage the whole of the arbitration with this in mind. If they are unable to comply, they should apply for or order an extension following any mechanism set out in the applicable rules and/or the *lex arbitri*. If there is no specified mechanism for granting an extension of time limit, arbitrators should address the matter as early as possible and ask the parties to grant them the power to extend it. Alternatively, arbitrators may invite one or more of the parties to approach the national courts at the place of arbitration to extend it, or apply themselves, if the *lex arbitri* so permits.[9]

c) In the absence of any specified time limit arbitrators should determine the appropriate time frame for making an award after taking into account the particular circumstances of the case, bearing in mind that good practice is to conduct the arbitral proceedings without delay and make awards in a timely manner. Additionally, arbitrators should, at the end of a hearing, inform the parties of the time frame within which they expect to make their award.

d) The rules of some arbitral institutions administering arbitrations provide that they must review all awards in draft before they are communicated to the parties and/or their representatives. In those situations arbitrators must take the delay this may cause into consideration. If an award is not

made and communicated within the time specified, it may be set aside on the grounds that it was not made in accordance with the procedure agreed by the parties.[10]

Paragraph 5

Communication of an award

a) The communication of the award is generally governed by the arbitration agreement, including any arbitration rules and/or the *lex arbitri*. Some arbitration rules may require the arbitrators to send the award to the arbitral institution administering the arbitration for it to communicate the award to the parties. In the absence of any agreement and/or specific provisions, it is for the arbitrators to determine the mode by which they will communicate the award to the parties.

b) In any case, arbitrators should make sure that the award is communicated to all parties and/or the arbitral institution at the same time and by the same means. Arbitrators should not withhold an award pending the payment of their fees, unless the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, provide that they may do so.[11]

Methods of communication

c) The traditional method is to send physical originals of the signed award by courier to the parties and/or their representatives and any arbitral institution administering the arbitration. The advantage of this method is it makes it easier to prove service through the delivery acknowledgment which may be produced in evidence in setting aside and/or enforcement proceedings. Most arbitration rules require service of a physical original of awards. Even where electronic communication is permitted to ensure simultaneous receipt, hard copy originals should still be sent to the parties and/or their representatives by courier.[12]

Article 2 — Titles for arbitral awards

The most common titles given to awards made by arbitrators are:

i) interim awards;

ii) partial awards;

iii) final awards;

iv) consent or agreed awards; and

v) default awards.

Commentary on Article 2

a) Arbitrators have a wide discretion as to the different types of awards that they may make. However, they should always check the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, which may impose limitations on their discretionary powers and/or require decisions to be made in a particular form. It is also good practice for arbitrators to consult the parties as to whether they would like the decision to be made in a particular form.

b) Great care must be taken when choosing the title for an award, particularly the titles 'interim' and 'partial'. This is because there is no universally accepted definition for these titles of awards. Some jurisdictions distinguish between these titles in the following way: an interim award is considered to be an award made at an interim stage of the proceedings which does not finally dispose of a particular issue and is subject to later revision;[13] a partial award is considered to be an award that finally determines some, but not all, of the issues in dispute and the issues determined are not subject to later revision.[14]

c) In other jurisdictions both 'interim' and 'partial' awards are considered to be final as to the issues they deal with and incapable of later revision. In these jurisdictions decisions that are capable of later revision are sometimes described as provisional orders rather than awards. An added complication is that in some jurisdictions awards that are intended to be

capable of later revision are described as 'provisional awards'.[15]

d) A further complication is that to be enforceable under the New York Convention, a decision must be an 'award' and not an order. To assist parties enforce provisional orders, such as security for costs, a practice has arisen of describing these as 'interim awards'.

e) In light of the above, arbitrators should be careful when deciding what title to give to an award because it can have different meanings in different jurisdictions. They should consider whether the relevant rules and the applicable *lex arbitri* contain definitions or specific provisions as to the labelling of arbitral awards.

f) One way to avoid complications is to make it clear in the title of the award whether it is intended to be 'provisional' such as, for example, 'Interim Award on Provisional Measures'. Additionally, the text of the award should spell out whether it is a 'provisional' or a 'final' determination of the issues. If it is intended to be 'provisional' determination, it is helpful for arbitrators to expressly reserve their right to reconsider the issue at a later stage. Conversely, if it is intended to be 'final', it may be helpful, subject to the applicable rules, *lex arbitri* and/ or the law of the place of enforcement, if known, for arbitrators to state that it is not capable of later revision.

i) Provisional decisions

Examples of provisional decisions include decisions to preserve a factual or legal situation necessary to secure the claim which is the subject of the arbitration.[16] These types of decisions are interim or provisional in the sense that they are made pending the final determination of the issues in the arbitration. These may be variously described as provisional orders, interim provisional awards or interim awards. However, the title is not determinative and that is why it is helpful to describe the nature of the award in the text.

ii) Partial awards

Partial awards are most frequently used to record the determination of specific issues where the dispute is complex and can be divided into different stages, each concluded with a separate partial award. For example, if the arbitrators bifurcate the liability and quantum issues, they may make a partial award on liability and another partial award on quantum. If there are several awards, arbitrators should consider numbering their awards consecutively to avoid any confusion. These awards are sometimes called 'partial final' awards to aid understanding of the fact that it is both 'partial' (ie it does not dispose of all issues in dispute) and 'final' in respect of the issues it does decide in the sense that the decision cannot be changed.

iii) Final awards

a) An award should be described as a 'Final Award' when it is intended to bring the arbitration to an end by deciding and disposing of all or the outstanding issues in dispute between the parties. A final award may be the first award dealing with all of the disputed issues or the last in a series of awards which deal with different issues sequentially. If a final award is the last one in a series of awards, arbitrators should summarise any decisions made in earlier awards, so that enables all of the arbitrators' decisions are consolidated into one stand-alone document.
b) A final award should also deal with the costs of the arbitration and their allocation as well as interest, if applicable.[17] If arbitrators decide to deal with the merits before dealing with the costs they should make a partial award containing their decision on the merits and expressly state that they are going to deal with costs in a separate award.[18] Alternatively, they should make a final award save as to costs and deal with the costs in a later award.
c) A critically important consequence of issuing the final award is that

from then on the arbitrators have no jurisdiction to decide issues between the parties[19] except that they may have a very specific and narrow jurisdiction to correct, interpret, supplement and/or reconsider the award in limited circumstances pursuant to the applicable law and/or arbitration rules (see Article 5 below).

Termination of proceedings without a ruling on the merits

d) In certain situations, a final award can put an end to the proceedings without a ruling on the merits. For example, in cases where the arbitrators conclude that they do not have jurisdiction[20] or where the subject matter of the proceedings has ceased to exist or where the proceedings have been terminated because the parties have failed to provide security for costs.[21]

iv) Consent or agreed awards

a) If the parties to a dispute settle their differences during the arbitration proceedings, they may ask the arbitrators to make a consent award or an award on agreed terms. When dealing with such requests, arbitrators should be satisfied that a settlement agreement has in fact been reached by the parties and both parties consented to it.
b) In addition, arbitrators should be satisfied that the matters which are dealt with in the settlement agreement were within the scope of the arbitration agreement pursuant to which they have jurisdiction. If the settlement agreement extends to matters beyond the ambit of the arbitration agreement, arbitrators should ask the parties to agree to broaden their jurisdiction to encompass these new matters before issuing a consent award.
c) Arbitrators should be satisfied that the agreement between the parties is not illegal or otherwise contrary to public policy. If the arbitrators have unresolved concerns, they may decline to record the settlement as an

award without giving reasons. Arbitrators should be particularly wary of requests for consent awards in respect of disputes involving large monetary claims which settle very quickly after the commencement of the arbitration as they may be used as a money laundering device.[22]

d) If the arbitrators are satisfied that they should make a consent award, they do not need to include any reasons for the award except to record that the award reflects the parties' agreement on different issues including, if appropriate, what has been agreed in respect of all of the costs of the arbitration and, more specifically, who is to pay the arbitrators' fees and expenses and when.

v) Default awards

a) Before issuing an award in proceedings where a party fails to appear or otherwise fails to take part in the proceedings, arbitrators should make sure that the dispute is within the scope of the arbitration agreement and they have jurisdiction.[23] For further guidance on proceedings where one or more parties do not appear or cooperate, please refer to the *Guideline on Party Non-Participation*.[24]

b) Even where there is no formal obligation on arbitrators to warn a non-participating party of their intention to consider issuing a default award, it is a sensible precaution against potential challenges to give a non-participating party reasonable notice that arbitrators may be making a default award in their absence unless they participate within the period specified.

c) A default award does not differ from an award made by the arbitrators except that it should include a detailed description of the efforts which have been made to give the non-participating party a fair opportunity to present its case. This is necessary in order to show that the requirements of due process and equal treatment of the parties have been satisfied in order to reduce the risk of later successful challenges to the validity of

the award by the non-participating party.

Article 3 — Deliberations and voting

1. **At the end of a hearing or if there is one followed by written submissions, after submission of the last written statement, arbitrators should declare the proceedings closed. It is good practice to notify the parties at the same time when the arbitrators will be deliberating and when the parties should expect their award. Arbitrators should always deliberate before making any decision. Deliberations should be confidential and should not be disclosed to the parties except for the decision itself and the reasoning as reflected in the award.**
2. **Arbitrators should attempt to make a decision unanimously. If they cannot reach a decision unanimously, the decision may be rendered by the majority, pursuant to any applicable arbitration rules and/or the *lex arbitri*.**
3. **An arbitrator may issue a dissenting or separate opinion to explain a disagreement with the outcome and/or the reasoning of the majority, as long as it is not prohibited under the arbitration agreement, including any arbitration rules and/or the *lex arbitri*. Dissenting or separate opinions should be carefully drafted to avoid any appearance of bias.**

Commentary on Article 3

Paragraph 1

Conduct of the deliberations

a) Arbitrators should agree on a process for deliberations and decide whether to deliberate in person, by videoconference, by teleconference, or in writing. Deliberations can take place at any location the arbitrators consider appropriate. It is good practice to deliberately set aside time,

immediately after the close of proceedings, for at least initial deliberations.

b) The extent of the deliberations necessarily varies depending on the nature of the dispute, the number of claims, the issues to be decided, the type of decisions required and the preferences of the individual arbitrators. In any case, arbitrators should deliberate in a collegiate manner. Each arbitrator should be given an opportunity to express their non-biased and independent view and all of the arbitrators should engage in a constructive dialogue with the aim of reaching a well-reasoned and thorough decision. Arbitrators cannot delegate their responsibility to participate in the deliberations or the decision-making process.

Obstructionist arbitrator(s)

c) If one arbitrator refuses to participate in the deliberations without good reason, the other arbitrators may proceed in the arbitrator's absence after giving appropriate notice of the meeting and offering an opportunity to submit comments on the issues to be decided. In the case where the remaining arbitrators proceed with the deliberations, they should draft the award and ask the arbitrator who refuses to participate to review it, giving that arbitrator another opportunity to submit comments. All these steps should be recorded in any award. If the two co-arbitrators refuse to participate, the presiding arbitrator can proceed by rendering the award alone, if the applicable arbitration rules and/or *lex arbitri* so permit.

Privacy and confidentiality of deliberations

d) Deliberations should take place in private with only the arbitrators present but others, such as a tribunal secretary appointed to assist the arbitrators, may attend if all of the arbitrators agree and after informing the parties. Arbitrators, and others present, should keep all aspects of the

deliberations confidential. Clearly, a party-appointed arbitrator should not communicate any aspect of the deliberations to the party who appointed them. A breach of the duty to keep the deliberations confidential may result in a claim for damages for breach of confidentiality against the arbitrator responsible.

Paragraph 2

Voting

If at the end of the deliberations, the arbitrators are not in agreement and are therefore unable to reach a unanimous decision, then the presiding arbitrator should summarise the opposing opinions and ask the other arbitrators to vote. If there is a majority, this should be reflected in the award without the need for a dissenting opinion. If there is no majority, under some arbitration rules the presiding arbitrator may reach a decision alone.[25] If, however, the presiding arbitrator is not empowered to do so, the presiding arbitrator should engage in further discussions and try to reach a majority. If no majority is reached, there is a risk that there may be no award at all.

Paragraph 3

Dissenting and concurrent opinions

a) An arbitrator may wish to make an individual separate opinion expressing disagreement with the reasoning and/or the conclusions of the majority. There is no required form in which dissenting or concurring opinions should be made. They may be annexed to the final award or included in the award itself; however, they do not have any legal effect and they do not form part of an award.[26]
b) It is good practice for an arbitrator to issue a written draft of any separate opinion for consideration by the other arbitrators before any award is made. The separate opinion should not disclose any details of

the deliberations. It should be clearly identified as the personal opinion of its author; it should be limited to explaining the basis of the opinion; and it should not raise any new arguments that the arbitrator failed to raise at the deliberations.

Article 4 — Form and content of awards

1. **Arbitrators should comply with any requirements as to form and content set out in the arbitration agreement, including any arbitration rules and/or the *lex arbitri*. In any event, an award should:**
   - **i) be in writing;**
   - **ii) contain reasons for the decision, unless the parties have agreed otherwise or if it is a consent award;**
   - **iii) state the date and the place of arbitration; and**
   - **iv) be signed by all of the arbitrators or contain an explanation for any missing signature(s).**
2. **Awards should also contain the following essential elements:**
   - **i) the names and addresses of the arbitrators, the parties and their legal representatives;**
   - **ii) the terms of the arbitration agreement between the parties;**
   - **iii) a summary of the facts and procedure including how the dispute arose;**
   - **iv) a summary of the issues and the respective positions of the parties;**
   - **v) an analysis of the arbitrators' findings as to the facts and application of the law to these facts; and**
   - **vi) operative part containing the decision(s).**

Commentary on Article 4

Paragraph 1

Requirements as to form and content vary according to the arbitration agreement, including any arbitration rules and/or the applicable *lex arbitri*. Therefore, arbitrators should check the relevant law(s) and rules before making an award. Generally speaking, there are certain minimum requirements which are almost universally recognised.

i) Awards in writing

Arbitrators should make an award in writing in order to record their decision. It is an obvious and practical requirement which will avoid dispute as to what actually has been decided. The New York Convention implicitly refers to the written form of an arbitral award pursuant to Article IV(1)(a) requiring 'the duly authenticated original award or a duly certified copy thereof' to obtain enforcement.

ii) Reasons

a) All arbitral awards should contain reasons, unless otherwise agreed by the parties or where the award records the parties' settlement. The inclusion of reasons is necessary to demonstrate that arbitrators have given full consideration to the parties' respective submissions and to explain to the parties why they have won or lost. Most national laws and arbitration rules expressly require arbitrators to include reasons in their awards. Even where they are silent on the matter, it is good practice to provide reasons, unless the parties agree otherwise or where the award records the parties' settlement (see Article 2(iv) above).
b) Arbitrators have a wide discretion to decide on the length and the level of detail of the reasons but it is good practice to keep the reasons concise and limited to what is necessary, according to the particular circumstances of the dispute. In any event, arbitrators need to set out

their findings, based on the evidence and arguments presented, as to what did or did not happen. They should explain why, in the light of what they find happened, they have reached their decision and what their decision is.

c) Arbitrators should also consider whether it is appropriate to include a statement that the parties have had a fair and equal opportunity to present their respective cases and deal with that of their counterparty.

iii) Date and place

a) An award should include the date on which it is made. The date indicated has important consequences for the commencement of any time limits with which applications for a correction or annulment must be made.[27] The date of the award may be the date on which the award is finally approved, the date on which it is signed by all the arbitrators (if it is signed by way of circulation, the date of the last signature), or the date on which it is sent to the parties depending on the relevant rules and/or *lex arbitri*. If the arbitration rules require that an arbitral institution administering the arbitration scrutinises an award before it is communicated to the parties, the award should only be dated after the institution has reviewed the award.[28]

b) The award should also state the place of arbitration. In international arbitration awards are deemed to be made at the place of arbitration and not where they are actually signed,[29] unless the parties have agreed otherwise, or if the applicable arbitration rules provide that awards are made in a specific place.

iv) Signatures

a) The act of signing an award expresses endorsement of its content. The general principle is that all arbitrators should sign the award regardless of whether or not it was rendered unanimously. Arbitrators do not need to sign the award at the same place or at the same time, unless otherwise

required by the applicable rules and/or the *lex arbitri*. In addition, arbitrators should always check for any specific requirements related to signing, including if there is a requirement for their signatures to be witnessed by one or more people, or that arbitrators sign every page of the award.[30]

b) Sometimes, however, arbitrators may be unable to sign an award, or may refuse to do so, to express their disagreement with the decision. In these cases, it is sufficient that the remaining arbitrators or the presiding arbitrator sign the award. If the presiding arbitrator refuses to sign the award, the majority will suffice. It is often a requirement of national laws and/or the arbitration rules, and it is good practice, for an award to include an explanation as to why any of the arbitrators have not signed the award.

Paragraph 2

i-v) Other content requirements

a) It is good practice to start preparing and regularly update as the arbitration develops the narrative paragraphs of an award at an early stage so as to set out the basic information including the names and addresses of the arbitrators, the parties and their representatives, the chronology of the facts, the respective positions of the parties and any agreed matters. The award should describe the process by which the arbitrators have been appointed and basis for their jurisdiction to resolve the dispute.[31] It should also contain a brief procedural history of the main stages in the arbitration, referring to preliminary conferences, exchanges of documents, hearing and post-hearing exchanges. The purpose of this is to enable the reader, such as a judge called upon to enforce the award, to see how the arbitrators came to have the authority to issue an award and understand whether the procedure followed was in accordance with the agreement of the parties, including any arbitration rules and/or the *lex arbitri*.[32]

b) The award should also clearly identify and present in a logical order the issues which need to be decided. They are often phrased as questions. The issues can be found in the parties' submissions or the arbitrators themselves can draft a list based on the parties' submissions.[33] It is good practice to request the parties to provide a list, preferably agreed between them, and/or ask them to comment on the list prepared by the arbitrators in order to make sure that all of the disputed issues have been included and that all matters fall within the arbitrators' jurisdiction. In any case, the list of issues should be presented in a logical sequence and in the order in which they will be discussed.

c) In addition, arbitrators should include a description of all claims and counterclaims, if any. This can be done by way of paraphrasing the relevant sections from the request for arbitration or the submissions made by the parties. Arbitrators should be careful to avoid considering matters that were not raised by the parties and/or leaving out matters which were raised by the parties.

vi) Operative part of an award

a) The award should conclude with a section, known as the operative or dispositive part, setting out the arbitrators' decision and orders issue by issue. This section should be short and clearly separated from the rest of the award. It should be consistent with the conclusions on the issues expressed earlier in the award.

b) The operative part of an award should be drafted using mandatory language that requires compliance from the parties, such as 'we award', 'we direct', 'we order' or the equivalent.[34] In cases of non-monetary awards, where arbitrators have been asked to determine certain factual or legal situation(s), they may use the wording 'we declare'.

Article 5 — Effect of a final award

The arbitrators' mandate is terminated when the final award has been rendered subject to power:

i) to correct, interpret and/or supplement the award; and/or

ii) to resume the arbitral proceedings after a remission order by a court during challenge proceedings in order to eliminate a ground for setting aside or invalidating an award.

Commentary on Article 5

Correction

a) Virtually all arbitration rules and national laws allow corrections of awards.[35] This is necessary to correct unintended consequences of, for example, errors in computation or denomination, and clerical, typographical or similar errors. When correcting an error arbitrators should be very careful not to alter the content of the award beyond correcting that error.

b) To avoid the need for corrections, it is good practice for arbitrators to check that any calculations are correct and the currency is correctly denominated. They should also make sure that the names of the parties are accurate.

Interpretation

Arbitrators may be requested to clarify their decision or remove ambiguities in the award in limited circumstances. Their powers are usually limited by the applicable *lex arbitri* and/or the arbitration rules to interpreting specific parts of the operative part of the award or where it is unclear how the award should be executed.[36] Therefore, arbitrators may be able to reject any request for interpretation which goes beyond that.

Additional award

Arbitrators may be requested to make an additional award where they have failed to decide one of the issues raised by the parties. The purpose of an additional award is to prevent an award from being set aside because of that failure. Before making an additional award, arbitrators should always check the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, in order to make sure that they have the power to do so.

ii) Remission of an award

When a party has applied to a local court to set aside an award, the court may remit an issue or issues back to the arbitrators with a direction that they take appropriate steps to rectify a defect in the award.[37] In such cases, arbitrators need to make a fresh award in respect of the matters remitted to them within the specified time under the applicable rules and/or *lex arbitri* or within a time indicated by the court. When doing so, arbitrators need to be very careful not to change the content of the award beyond the scope of the remitted matters.[38]

Conclusion

Arbitral awards are of great practical importance because they have a direct legal effect on the parties to the dispute and may be enforced under the New York Convention. While there is no prescribed style and form that arbitrators should follow when drafting awards, they should ensure that their award complies with the minimum requirements as to the form and substance laid down in the arbitration agreement, including any arbitration rules and/or the *lex arbitri*, and the New York Convention. To disregard them could create difficulties in enforcing the award or invalidate it.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 22 November 2016

Endnotes

1. See CIArb Guideline on Drafting Arbitral Awards Part II — Interest (2016).
2. See CIArb Guideline on Drafting Arbitral Awards Part III — Costs (2016).
3. One of the principal advantages of arbitration over court proceedings is that arbitral awards can be enforced in over 150 jurisdictions around the world pursuant to the UN Convention for the Recognition and Enforcement of Foreign Arbitral Awards (1958) (also known as the New York Convention), see Status of the New York Convention available at <www.uncitral.org/>.
4. For a useful list of matters that can be addressed and clauses that can be included in the procedural orders, see ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders (2015), available at <www.arbitration-icca.org>.
5. Peter Aeberli, 'Awards and Their Drafting', available at <www.aeberli.co.uk>.
6. See e.g., Articles 215(1) and 216(1) of the UAE Civil Procedure Code, Federal Law No 11 of 1992 (stating that the arbitrators' award may be set aside or refused enforcement where it has been issued without the terms of reference.)
7. Humphrey LLoyd and others, 'Drafting Awards in ICC Arbitrations' (2005) 16(2) ICC Bulletin, p. 21 and Günther J. Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18(2) Journal of International Arbitration, p. 148.
8. See e.g., Article 30 ICC Rules (2012); Article 37 SCC Rules (2010); Rule 28.2 SIAC Rules (2013). It is important to note that the ICC has introduced a new policy, for all cases registered as from 1 January 2016, which allows the ICC Court to impose cost sanctions for

unjustified delays in submitting draft awards for scrutiny. For more details, see <www.iccwbo.org>.

9. See e.g., Section 50 English Arbitration Act 1996 which permits courts to extend a time limit for making the award.
10. Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International 1999), p. 759. See also UNCTAD, 'Making the Award and Termination of Proceedings' UNCTAD/EDM.Misc.232/Add.41 (2005), p. 18.
11. See e.g., Section 56 English Arbitration Act 1996 which expressly states that arbitrators may withhold the award until full payment of their fees. See also, Article 34(1) ICC Rules (2012) which provides that the Secretariat will not send the award to parties until full payment of the costs of arbitration is received.
12. See e.g., under the ICC Rules, an electronic transmission of the award does not constitute official notification of an award and official notification is deemed to occur when a party receives the original signed award, see Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC Publication 729 2012), p. 341.
13. Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), p. 3020; Philipp Peters and Christian Koller, 'The Notion of Arbitral Award: An Attempt to Overcome a Babylonian Confusion in Christian Klausegger and others (eds), Austrian Yearbook on International Arbitration (2010), p. 162 and Fry, n 12, pp. 330-331; Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), pp. 634-635.
14. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), pp. 1272-1273; Born,

n 13, p. 3021 and Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015), para 9.26.

15. See e.g., Section 39 English Arbitration Act 1996 entitled 'Power to make provisional awards'. However, commentaries suggest that provisional decisions are properly entitled 'provisional orders', see Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th ed, Wiley Blackwell 2014), p . 204 and Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th ed, Informa 2014), pp. 155-156.
16. See CIArb Guideline on Applications for Interim Measures (2015). However, the national laws of certain jurisdictions provide that interim measures can be granted only by way of procedural orders. See, for example, Article 12 Singapore International Arbitration Act and Article 19B Singapore International Arbitration Act; see also, Section 39 English Arbitration Act which provides for provisional awards which can be used for granting relief on a provisional basis and expressly states that they can be subsequently changed.
17. See generally, CIArb Guideline on Drafting Arbitral Awards Part II — Interest (2016) and CIArb Guideline on Drafting Arbitral Awards Part III — Costs (2016).
18. Hilary Heilbron, *A Practical Guide to International Arbitration in London* (Informa 2008), p. 111 and Blackaby, n 14, para 9.18.
19. Greg Fullelove, 'Functus Officio' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 24.
20. See CIArb Guideline on Jurisdictional Challenges (2015).
21. See CIArb Guideline on Applications for Security for Costs (2015).
22. Lew, n 13, p. 247 and Waincymer, n 14, p. 1285. See also UNCTAD, n 10, p. 10.
23. See CIArb Guideline on Jurisdictional Challenges (2015).

24. See CIArb Guideline on Party Non-Participation (2016).
25. See eg., Article 31 ICC Rules (2012); Article 26.5 LCIA Rules (2014) and Article 33 UNCITRAL Rules (2010/2013). See also, Section 20(4) English Arbitration Act 1996.
26. Blackaby, n 14, para 9.130.
27. Born, n 13, p. 3037.
28. See, for example, Article 33 ICC Rules (2012) which states that an award can be made only after the Court has approved it. Fry, n 12, p. 323.
29. See e.g., Article 18(2) UNCITRAL Arbitration Rules (2010/2013), Article 31(3) ICC Rules (2012), Section 53 English Arbitration Act 1996.
30. See e.g., in Dubai arbitrators sign every page of the award. Blackaby, n 14, paras 9.148-9.149.
31. For the process of dealing with challenges to jurisdiction, see generally CIArb Guideline on Jurisdictional Challenges (2015).
32. LLoyd, n 7, p. 20; Ray Turner, *Arbitration Awards: A Practical Approach* (Blackwell 2008), p. 30; See Article V(1)(d), New York Convention.
33. In ICC arbitrations, a list of issues is usually included in the Terms of Reference, see Article 23 ICC Rules (2012). See also, Draft revised UNCITRAL Notes on Organizing Arbitral Proceedings which encourage arbitrators to prepare a list of issues based on the parties' submissions, available at <www.uncitral.org/>.
34. Bernardo M. Cremades, 'The Arbitral Award' in Lawrence Newman and Richard Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (Juris 2014), p. 818 and Blackaby, n 14, para 9.154. There is an exception where the parties have agreed upon the inclusion of a conditional element in the award. However, such awards should be avoided. See Peter Ashford, *Handbook on*

International Commercial Arbitration (2nd ed, Juris 2014), p. 426.

35. See e.g., Article 38 UNCITRAL Rules (2010/2013), Article 35 ICC Rules (2012), Article 27 LCIA Rules (2014), Article 37 HKIAC Rules (2013), Article 29 SIAC Rules (2013). See also, Article 33 UNCITRAL Model Law and Section 57 English Arbitration Act 1996.
36. Born, n 13, p. 3148 and Lew, n 13, p. 658.
37. Born, n 13, p. 3153 and Fullelove, n 18.
38. See e.g., *Goldenlotus Maritime Ltd v European Chartering and Shipping Inc* [1993] SGHC 262 (where an award was remitted so that the arbitrators recalculate the damages to be paid. However, when doing so, arbitrators also changed the basis on which they previously awarded the damages. Consequently, the revised award was not binding because the arbitrators exceeded the jurisdiction conferred to them by the court which remitted the original award.) See Leng Shun Chan, *Singapore Law on Arbitral Awards* (Singapore Academy of Law 2011), p. 137.

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Drafting Arbitral Awards
Part II — Interest

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Sundra Rajoo, ex officio
Wolf Von Kumberg, ex officio

Drafting Arbitral Awards
Part II — Interest

Drafting Arbitral Awards Part II — Interest

Introduction

1. This Guideline sets out the current best practice in international commercial arbitration for awarding interest. It provides guidance on:
   i. how to deal with claims to award interest (Article 1);
   ii. over what period interest should accrue (Article 2);
   iii. at what rate interest should be awarded (Article 3); and
   iv. whether simple or compound interest should be awarded (Article 4).
2. This Guideline should be read in conjunction with the *Guideline on Drafting Arbitral Awards Part I — General* and the *Guideline on Drafting Arbitral Awards Part III — Costs*.[1]
3. In this Guideline references to 'paying party' should be understood as the party who is directed to make a payment to another party and references to 'receiving party' should be understood as the party who receives a payment.

Preamble

1. The purpose of an award of interest is to compensate a party for loss of the opportunity to use money to which it is entitled and, at the same time, to prevent the counterparty from being unjustly enriched as a consequence of wrongfully withholding money that did not belong to it. In international commercial arbitration where there is often a significant interval between the origin of a dispute and the time when a final award is issued by the arbitrators, interest may play an important role in compensating the receiving party for the delay in receipt of money and it can represent a significant proportion of the total sum awarded.
2. One of the main challenges for arbitrators considering whether to award interest is that different legal systems apply different approaches to the same issue. Further, most national laws and arbitration rules provide little guidance as to how to deal with a request for an award of interest and do not specify how interest is to be calculated.[2] Complications may

also arise due to the fact that some countries prohibit interest altogether because it is inconsistent with their religious beliefs and other countries consider certain types of interest to be contrary to public policy.[3]

3. In the absence of express provisions allowing the arbitrators to award interest and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules, and/or the the law of the place of arbitration (*lex arbitri*), it is widely accepted that arbitrators have a broad discretion whether to award interest, as part of their inherent powers.[4]
4. This Guideline examines the relevant factors that arbitrators should take into account when deciding whether interest should be awarded, for what periods, on what sums and at what rates.

Article 1 — General principles

1. **Arbitrators should establish what powers they have, if any, to award interest under the arbitration agreement, including any arbitration rules and the *lex arbitri* as well as the substantive law applicable to the contract (*lex causae*).**
2. **Arbitrators should invite the parties to make submissions and present evidence as to whether interest should be awarded and if so, at what rates, on what sums and for what periods, at an early stage of the proceedings.**
3. **When determining interest, arbitrators should have regard to all the circumstances of the case and take into account the economic reality within which the parties operate with a view to reaching a decision which is both just and fair to all parties.**
4. **An award of interest should compensate the receiving party. It should not punish the paying party.**
5. **An award of interest should state the arbitrators' decision as to interest and should contain reasons for any determination of rates**

and dates as well as whether interest awarded is simple or compound.

Commentary on Article 1

Paragraph 1

Applicable law(s)

a) Some national laws provide that the right, if any, to interest is a matter governed by the substantive law of the contract, while others provide that it is a matter governed by the procedural law of the arbitration. Accordingly, when considering the issue as to whether to award interest arbitrators should take into account: (1) the substantive law applicable to the contract (*lex causae*),[5] (2) the *lex arbitri*, (3) the applicable arbitration rules and (4) any provisions in the arbitration agreement. They may also choose to consider the law of the place of likely enforcement, if known.

b) Arbitrators have to be wary that the laws of certain countries forbid the application of interest because of public policy or overriding mandatory rules and therefore an award ordering interest may be unenforceable in such a country. Arbitrators who anticipate that the receiving party may seek to enforce their award in such a country should consider whether it is appropriate to make a separate partial award in respect of interest[6] or to award interest as a form of 'compensation' without any specific reference to interest.

Express or implied terms of the agreement between the parties

c) Arbitrators should also determine whether the contract between the parties contains express or implied terms as to interest to which they should give full effect, subject to any mandatory provisions of the applicable law prohibiting interest. If an express term as to interest exists, it may assist the arbitrators in determining such issues as (1) the

period for which interest may be awarded, (2) the rate and (3) whether interest should be simple or compound. Alternatively, interest may be awarded on the basis of a term implied by a trade usage.

Paragraph 2

Early consideration of matters related to the award of interest

a) Arbitrators should encourage the parties to agree, or at least to discuss, the issue of interest at an early stage in the arbitral proceedings, such as the preliminary meeting or case management conference. If no claim at all is made for interest and the arbitrators consider that this is an oversight, they would be justified in drawing the oversight to the attention of the parties, subject to the provisions of the arbitration agreement including any arbitration rules and/or the *lex arbitri*.

b) Issues to discuss should include the rate of interest, the date from which interest should start to accrue and the type of interest. In cases where there is a disagreement as to the currency in which award should be made or there are multiple currencies, arbitrators should invite submissions and consider the matter because this may affect the rate of interest.

Scope of arbitrators' powers to order interest

c) Arbitrators may apply interest to any amounts awarded, including (1) a pecuniary sum awarded to one of the parties, (2) an amount claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award was made up to the date of payment and (3) costs.[7]

Paragraph 3

Just and fair compensation

When awarding interest, arbitrators should, as far as possible, seek to award an appropriate level of compensation for the receiving party, without unfairly injuring the paying party. They should avoid either overcompensating or undercompensating the receiving party and unfairly benefiting the paying party. Arbitrators should decide what is just and fair for both the paying and the receiving parties based on both parties' commercial circumstances. In exercising any broad discretion that they have in awarding interest, arbitrators should use the same level of care and diligence as they do in determining awards of damages and awards of costs.

Paragraph 4

Compensatory nature of interest

The purpose of awarding interest is to compensate the injured party by placing it in the same position as it would have been in if no breach had occurred. Accordingly, the amount of interest should be designed purely to compensate a receiving party for being kept out of its money and provide it with a form of commercially realistic restitution without punishing the paying party. Courts in some jurisdictions may refuse to enforce awards of interest that they consider punitive or usurious according to their national laws.[8]

Paragraph 5

Treatment of interest in awards

In the award on interest arbitrators should describe the basis of their power to decide on the matter and any agreed and/or adopted procedure. They should summarise the parties' positions and arguments regarding interest and provide reasons for their decision.[9] Arbitrators should

calculate the amount(s) of interest payable up to the date of the award, applying the relevant interest rates. They should also provide sufficient information so that interest can be calculated for the period between the date of the award and final payment of all sums due. Finally, the decision as to interest should be repeated in the dispositive part of the award in order to be enforceable.

Article 2 — Period of interest accrual

1. **Arbitrators should determine the date or dates when liability for interest starts to accrue.**
2. **Arbitrators should include in their award of interest:**
   i) **the amount of interest payable up to the date of the award ('pre-award interest'); and**
   ii) **the information required to calculate the interest payable between the date of the award and the date of payment ('post-award interest').**

Commentary on Article 2

Paragraph 1

Time from which interest accrues

In their award, the arbitrators should identify the date or dates from which interest started running and state the interest rate or rates to be applied to the amounts in question for the applicable time periods. Generally, interest should be awarded from the date or dates of default or breach of contract if the damage started to accrue on that date. Alternatively, if the arbitrators conclude that it is not possible to establish the exact date or dates when the damage started to accrue, for example, where damages were incurred over a period of time, they may conclude that it is just and fair to both parties to award interest from a middle or average date from which the damage started to accrue. In the

absence of evidence as to when damage began to be incurred, the arbitrators may conclude that it is just and fair to both parties to award interest from the date of the formal demand for payment (ie demand of payment made in writing with notice to the debtor) or from the date of the commencement of the arbitration. In the case of debts, interest should normally be awarded from the date when the debt fell due.

Paragraph 2

Period over which interest accrues

Pre-award interest accounts for the time between the original breach and the award. Post-award interest accounts for the period between the date of the award and the date on which the sums awarded are actually paid. To encourage prompt payment, arbitrators may decide to allow the paying party a grace period say, for example, of 30 to 60 days, during which interest will not accrue.[10] Additionally, they may specify that interest should accrue for the grace period in the event that the award is not satisfied before the grace period expires.

Article 3 — Rate of interest

1. **Once the date or dates for which interest accrues have been determined, arbitrators should decide the applicable interest rate or rates.**
2. **Arbitrators frequently award the same rate for both pre-award and post-award interest, although they should consider in all cases whether it would be more appropriate to charge a different rate for each period.**

Commentary on Article 3

Paragraph 1

a) If the parties do not agree on the rate of interest in their contract or during the arbitration, it is up to the arbitrators to determine the appropriate rate. The rate should be reasonable and take into account all relevant circumstances, in particular applicable contractual provisions and interest rates prevailing in the markets for the relevant currency during the relevant period.

Determining the interest rate

b) It is good practice to assess the rate of interest by reference to the rate at which a party in the position of the receiving party would have had to pay to borrow the sum awarded for the period in question.[11] The starting point for that assessment is the rate of interest applicable to short term unsecured loans prevailing for the currency of payment at the place of payment.

c) In the absence of evidence of that rate, reference may be made to rates in the country of the relevant currency, place of performance or the domicile of the receiving party. An alternative approach is to consider the rate of interest at which a party in the position of the paying party would have to borrow to pay the sum awarded.[12] If arbitrators consider that the parties intended to avoid the norms of their respective jurisdictions, they may conclude that it is more appropriate to award the rate or rates used on the international financial market for that currency.[13]

d) In any case, arbitrators should avoid determining a rate of interest that it is so low that the paying party will have little incentive to pay. At the same time, arbitrators should also avoid determining a rate of interest so high that the receiving party may be disinclined to pursue enforcement of its award vigorously.

e) The fact that a particular claimant was in a special position such that it could only borrow the money at a very high rate or it was able to borrow at favourable rates is only relevant if it was known or ought to have been known at the inception of the relationship when the contract was entered into. The arbitrators may wish to enter into this type of analysis only if they are provided with persuasive evidence by the parties.

Currency of compensation

f) The question of what is the currency of compensation is usually fixed in the contractual provisions for payment. If it is not, arbitrators may consider that another currency is more appropriate for compensation depending on the specific circumstances of the case. Arbitrators have a wide discretion in determining the currency of the award and in dealing with issues of currency conversion. However, arbitrators need to be wary of the fact that interest rates may vary significantly depending on the currency to which they are applied. When deciding the question of currency, it is good practice for arbitrators to state the reasons for their choice.

Paragraph 2

Consistency between the rate of pre-award and post-award interest

Arbitrators should consider separately what to award in respect of pre-award interest and post-award interest and should also decide whether to choose a fixed or floating rate for both the pre-award and post-award interest. Arbitrators may consider it appropriate to award a single rate for both periods, making no distinction between pre-award and post-award interest,[14] particularly if interest rates are the same in both periods. Alternatively, if interest rates are fluctuating, arbitrators may consider it more appropriate to award different rates which better reflect increases or decreases in the value of money over the period(s) in

question. Arbitrators should be wary of the fact that awarding post-award interest at a higher rate may be argued to be punishing the paying party which is contrary to the general principle that awards of interest should be to compensate and not punish (see Article 1.4 above). In the event that arbitrators consider it appropriate to award post-award interest at a higher rate, they should explain the reasons for their decision in order to reduce the risk of challenge.

Article 4 — Simple or compound interest

Arbitrators should decide whether to award interest on a simple or compound basis. If they determine that the application of simple interest will not provide adequate compensation to the injured party, they may award compound interest, in the absence of any contrary provisions in the arbitration agreement, including any applicable rules and the *lex arbitri*.

Commentary on Article 4

'Simple interest' is interest payable only on the principal sum awarded and not on the accumulated interest. 'Compound interest', on the other hand, is interest that is applied periodically, depending on the compounding period, on both the principal sum awarded and accumulated interest.

Simple interest

a) Arbitrators should award simple interest where they consider that it provides the appropriate level of compensation to the receiving party for the delayed receipt of the principal sum awarded.

Compound interest

b) Arbitrators should award compound interest where they consider that it provides the appropriate level of compensation to the receiving party for the delayed receipt of the principal sum awarded to include, for example, circumstances where: (1) the parties have agreed on the payment of compound interest; (2) a party's failure to fulfil its obligations caused the receiving party to incur financing costs on which it paid compound interest; (3) the receiving party has established that it would have earned compound interest in the normal course of business on the money owed if it had been paid on time.[15]

c) However, before awarding compound interest, arbitrators should always check the applicable law(s) and rules because certain jurisdictions may prohibit the payment of compound interest or limit the circumstances in which it may be awarded.

Compounding period

d) If compound interest is awarded, arbitrators should state the length of the compounding period. The compounding period is the frequency with which interest is calculated and added to the principal sum outstanding. As a result, the principal sum on which interest is calculated for the next compounding period is increased by reference to the interest earned from the previous period. Arbitrators should be aware that the impact of the choice of compounding period can be substantial, since the more frequent the compounding, the greater the amount of interest.

Conclusion

The availability and rate of interest in arbitration can have substantial practical importance, especially where the amount in dispute is large and/or the time periods involved are extended. This Guideline summarises the various considerations arbitrators should take into

account when considering whether to award interest with the objective of reaching a decision that takes into account the financial and economic realities of each case.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 8 June 2016

Endnotes

1. See generally CIArb Guideline on Drafting Arbitral Awards Part I — General (2016) and CIArb Guideline on Drafting Arbitral Awards Part III — Costs (2016).
2. See Article 26(4) LCIA Rules (2014) as well as Section 49 English Arbitration Act 1996 which provide a broad discretion for awarding interest.
3. For an overview of countries which prohibit the payment of compound interest or limit the circumstances in which it may be awarded, see John Yukio Gotanda, 'Compound Interest in International Disputes' (2003) Law and Policy in International Business, pp. 403-407.
4. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), p. 1177; Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International, 2014), p. 3103; International Law Association (ILA), 'The Practice of Inherent and implied Powers', Report from the Biennial Conference in Washington DC (April 2014), p. 10.
5. Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015), para 9.73; Born, n 4, pp. 3104-3108 and John Yukio Gotanda, 'Awarding Interest in International Arbitration' (1996) 90 The American Journal of International Law, p. 52;
6. Blackaby, n 5, paras 9.81-9.82; Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), para 24-89.
7. It is important to note that under the English Arbitration Act 1996, interest on costs may only be awarded in respect of the period after they have been awarded. See Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: Commentary* (Blackwell

2014), p. 256.

8. Steven H. Reisberg and Kristin M. Pauley, 'An Arbitrator's Authority to Award Interest on an Award until "date of payment": Problems and Limitations' (2013) 16(1) International Arbitration Law Review, p. 27.
9. See CIArb Guideline on Drafting Arbitral Awards Part I — General (2016).
10. See e.g., Final Award in Case No 16015 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXVIII (Kluwer Law International 2013), p. 201.
11. See e.g., Article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts.
12. Lawrence W. Newman and David Zaslowsky, 'Awards of Interest in International Arbitration', New York Law Journal, 22 May 2014.
13. See e.g., ICC Case No 11849, 2003 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXI (Kluwer Law International 2006), pp. 148-171.
14. See Final Award in Case No 16015, n 10, para 106 and Blackaby, n 5, para 9.83
15. Gotanda, n 3, p. 440; Rutsel Silvestre J. Martha, *Financial Obligations in International Law* (OUP 2015), p. 469; T. Senechal, 'Time Value of Money: A Case Study' (2007) 4(6) Transnational Dispute Management, p. 4 and Michael Knoll, 'A Primer on Prejudgment Interest' (1996) 75(2) Texas Law Review, pp. 307-308.

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Drafting Arbitral Awards
Part III — Costs

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

TABLE OF CONTENTS

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair
Andrew Burr
Bennar Balkaya
Ciaran Fahy
Jo Delaney
Karen Akinci
Lawrence W. Newman
Michael Cover
Mohamed S. Abdel Wahab
Murray Armes
Nicholas Gould
Richard Tan
Shawn Conway
Sundra Rajoo, ex officio
Wolf Von Kumberg, ex officio

Drafting Arbitral Awards
Part III — Costs

Drafting Arbitral Awards Part III — Costs

Introduction

1. This Guideline sets out the current best practice in international commercial arbitration for awarding costs. It provides guidance on:
   i. arbitrators' powers to decide on costs, including the use of techniques for controlling costs (Article 1);
   ii. matters to take into account when allocating costs between the parties (Article 2);
   iii. determining what costs are recoverable (Article 3); and
   iv. the timing and content of costs awards (Article 4).
2. In this Guideline, the terms 'costs of the arbitration' or 'costs' include two broad categories of costs:
   i. procedural costs, which include the arbitrators' fees and expenses and the administrative charges of any arbitral institution; and
   ii. party costs, which include legal costs and other expenses incurred by a party in respect of the arbitration, including the fees and expenses of outside counsel, experts and witnesses and so on.[1]
3. This Guideline should be read in conjunction with the *Guideline on Drafting Arbitral Awards Part I — General* and the *Guideline on Drafting Arbitral Awards Part II — Interest*.[2]

Preamble

1. Arbitrators' powers to make costs awards derive from the terms of the arbitration agreement including any arbitration rules and/or the law of the place of arbitration (*lex arbitri*). Alternatively, if there are no express powers, provided that making a costs award is not prohibited,[3] arbitrators may conclude that they have an inherent power to do so. Even where there are express powers, most national laws and arbitration rules provide little or no guidance as to the standards, criteria or procedures for awarding costs. This gives arbitrators a wide discretion to take into account the particular circumstances of the case when

addressing these issues and, at the same time, allows them to manage the costs of the arbitration.

2. Managing the costs of arbitration is a very important element of the arbitrators' role in the light of criticism that arbitration takes too long and is too expensive. Accordingly, new practices are being adopted to encourage more efficient conduct of the arbitration. For example, arbitrators are increasingly likely to invite the parties to discuss costs issues at the earliest opportunity rather than leaving it to be the last issue addressed at the end of the arbitration.[4]
3. Even though at an early stage it may be difficult to have a clear picture as to the course of the arbitration and the costs that will be incurred, such a discussion can nevertheless be helpful in arbitrations involving parties and/or counsel from different jurisdictions who have different expectations as to how costs will be dealt with. Additionally, arbitrators may make interim costs awards relating to the costs incurred in connection with discrete issues as they are dealt with rather than leaving the decision on all costs issues to the final award.
4. There are two primary opposing approaches for allocating costs. These are the English rule of 'costs follow the event' according to which the losing party has to compensate the winner for its costs and the American rule that each party will bear its own legal costs regardless of the outcome of the dispute.[5] The 'costs follow the event' rule is reported to be almost universally recognised in both common and civil law countries.[6] It is also argued that there is an emerging trend to use it as a default rule in international arbitration.[7] However, in practice, it is used only as a starting point which leads to a much moderated approach taking into account various factors and subject to a test of reasonableness and proportionality.[8]
5. This Guideline addresses all aspects of costs awards, interim and final, as well as how best to address costs issues at the outset of arbitration so

as to encourage efficient management of the process to speed it up and manage its costs.

Article 1 — General principles

1. **Arbitrators should consider and discuss with the parties, at the outset of the arbitration, how best to manage and control the costs of the arbitration.**
2. **At the same time, arbitrators should address the matter of costs recovery and invite the parties to agree on an approach according to which costs should be assessed and/or allocated.**
3. **If there is no agreement, arbitrators should inform the parties as to the principles and criteria they propose to adopt when awarding costs, taking into consideration any specific requirements provided in the arbitration agreement including any arbitration rules and/or the *lex arbitri*.**
4. **Arbitrators should remind the parties that they may make interim decisions on costs, unless otherwise stated in the arbitration agreement including any arbitration rules and/or the *lex arbitri*.**

Commentary on Article 1

Paragraph 1

Cost control techniques

a) Arbitrators should discuss with the parties at the first opportunity, such as the preliminary meeting or case management conference, the various measures and techniques that can be used to control the procedure and consequently the costs.[9] Even though it may be difficult to take any definitive approach as to certain procedural aspects of the arbitration at such an early stage, arbitrators may, for example, seek an agreement as to the length of a hearing, requests for document production, number of witnesses, use of experts and number of pages in written submissions.

b) If the arbitrators conclude that normal case management techniques will be insufficient to control costs to an acceptable level, they may consider whether it is within their inherent powers to use cost capping, so long as it is not prohibited under the arbitration agreement, including any arbitration rules and/or the *lex arbitri.*

Cost capping

c) The objective of this technique is to put a ceiling on the costs recoverable by a successful party so that, while parties may spend as much as they wish, they would not be able to recover more than the set limit. This can be used to discourage parties with more dominant positions from putting pressure on their counterparty by incurring costs that would be beyond the counterparty means.

d) Arbitrators may therefore prospectively limit the recoverable costs either for the whole of the arbitration or any part of the proceedings and, in doing so, they should take into account the amount in dispute, the complexity of the case and the likely cost of work required. Before imposing any cost cap, arbitrators should have sufficient information about the dispute, including the nature of the work and expenses that parties may require for the particular stage of the arbitration to which the cap may relate. This is necessary in order to enable them to determine what amount of costs would be reasonable for each party to incur.

e) Normally, the same cap is set on the costs recoverable by each party. However, it may be appropriate, in exceptional circumstances, to set different caps for each party. Any differentiation should be expressly fixed to reflect the different tasks to be performed by each party. For example, if the arbitrators are satisfied that the work required to be undertaken is likely to be significant, they may conclude that, in fairness, different caps should be set for the costs recoverable by each party. Alternatively, arbitrators may set the limit at the higher figure for

both parties and, in those circumstances, they should warn the parties that, when considering what costs to award in respect of that work, they will consider their reasonableness and proportionality which may result in party recovering less than the cap.

f) Once a cap is set, arbitrators should be wary of any application subsequently to increase it. They should only contemplate an increase to costs not yet incurred and they should only agree to an increase if they are satisfied that there are good reasons for the increase.

g) A cost cap should be recorded in a procedural order. The order should expressly state the amount of the cap for each party's costs. To be effective, the cap should be set sufficiently in advance of the parties' incurring the costs to which it relates.

Paragraph 2

Consultation with the parties

a) Arbitrators should also discuss other matters related to costs, including the information that will be required to support any future application for costs as well as the timing and sequence of submissions on costs. Arbitrators should warn the parties that, towards the end of the arbitration, they will usually require each party to submit an accounting of its costs to inform them of the exact amount sought and the reasons as to why any costs claimed are justified.

b) Arbitrators may indicate their preliminary views as to what costs they are likely to allow or disallow because, depending on their legal background, parties and/or their counsel may claim different types of costs.[10] In addition, arbitrators should use the discussion as an opportunity to advise the parties that their conduct and other relevant factors may be taken into account when they are considering any application for an interim or final decision on costs (see Article 3 below).[11]

Paragraph 3

Arbitrators' directions as to costs

Following the discussion with the parties, arbitrators should include their directions in relation to costs issues, preferably in the first procedural order.[12] They should indicate the principles which they intend to adopt when considering applications for costs taking into account any specific requirements contained in the parties' agreement including any arbitration rules and/or the *lex arbitri*.

Paragraph 4

Interim decisions on costs

The final award of the costs of an arbitration should be decided at the end of the arbitration (see Article 4 below). However, a party may apply for a costs order in respect of an interim stage of the arbitration, where, for example, the arbitrators have found in its favour on an application for interim measures. In such a case, arbitrators may make an interim costs order in favour of the successful party, provided that they have power to do so.[13] Alternatively, they may defer their decision in order to decide that application in light of their decision on the merits in the context of the whole arbitration.

Article 2 — Allocation of liability for costs between the parties

1. Arbitrators should consider whether it is appropriate to order that a losing party pay some or all of a winning party's recoverable costs taking into consideration the following factors:

i) the outcome of the proceedings in terms of relative success of the parties;

ii) the conduct of the parties;

iii) any offers to settle the dispute; and

iv) any other factor which they consider to be relevant.

2. **Arbitrators should consider whether it is appropriate to allocate liability for both the procedural and party costs following the same approach. If arbitrators decide to treat them differently, they should provide an explanation for their decision.**

Commentary on Article 2

Paragraph 1

i) Relative success of the parties

When allocating costs, arbitrators should take into account the relative success of each party rather than a broad-brush approach as to who won or lost. In purely monetary awards, arbitrators may determine success by comparing the amounts claimed (including any counterclaims) and the amounts, if any, ultimately recovered. However, in other cases, especially those involving counterclaims, it may not be possible or adequate to simply examine the relationship between the amounts claimed and the amounts recovered. That is why, arbitrators should look at whether parties have won or lost on issues and claims advanced in light of their importance and relevance to the case. For example, if a party has succeeded in part, but not all, of its case, arbitrators should consider whether it was reasonable for that party to have raised these issues on which it was unsuccessful and, provided that they have not led to significant extra costs , then it may be fair to award to that party the whole of its costs on the basis of the principle that costs follow the event. However, where a generally successful party has failed on issues it unreasonably raised on which significant costs were incurred dealing with them, arbitrators may decide the successful party is not entitled to its costs in respect of those issues; in extreme cases the arbitrators may decide the unsuccessful party is entitled to its costs in respect of those issues.

ii) Parties' conduct

Arbitrators should consider whether it is appropriate to take into account the conduct of the parties. Factors that may have an adverse impact on costs allocation include instances where a party and/or its counsel has acted unreasonably or has obstructed the proceedings, for example, by advancing spurious arguments or making unreasonable applications for interim measures as a delaying tactic, or presenting grossly exaggerated claims leading to an unnecessarily high cost and unwarranted document production requests. Where a party and/or its counsel has behaved unreasonably, arbitrators should decide whether and to what extent such conduct has led the counterparty to incur additional costs and/or delayed the proceedings. Conversely, arbitrators may also take into account the fact that a party acted reasonably and contributed to the efficient conduct of the proceedings and conclude that their costs claims are reasonable and proportionate.[14]

iii) Settlement offers

a) Arbitrators may take into account any offer to settle made prior to the final award brought to their attention. When faced with a settlement offer, arbitrators should determine whether the claimant has achieved more by reasonably rejecting the offer and proceeding with the arbitration. This therefore requires arbitrators to assess the value of the offer which was made and make a comparison of the benefit to the claimant in accepting the offer as compared with the final award, so that if the claimant achieves more, the offer will have no effect, unless of course there are special circumstances which affect the matter.
b) In a purely monetary award, if the offer was made in a form which included a fixed sum together with interest to the date of the offer plus payment of the claimant's recoverable costs to be assessed, then it should be relatively simple for the arbitrator to reach a conclusion.

However, if the offer is for a fixed sum which includes costs and/or is silent as to a counterclaim, it may be difficult for arbitrators to determine whether, taking the claimant's costs into account at the stage when the offer could have been accepted, the remaining sum would have been more or less than the sum eventually awarded. In such circumstances, the offer may have to be disregarded. Similarly, if there is no offer to pay interest on top of the sum which is offered, this will also need to be evaluated when comparing the offer with the total sum awarded.

c) If arbitrators find that the claimant would have achieved the same or more by accepting the offer than by proceeding with the arbitration, the claimant will generally recover its costs up to the time when the offer could have been accepted and, after that date, the respondent is to recover its costs from the claimant. However if the claimant has achieved a more favourable outcome by proceeding with the arbitration, arbitrators may conclude that the offer should have no effect on the arbitrators' order as to costs.

d) Where the respondent has made a counterclaim and the claimant's offer is silent as to whether a counterclaim was taken into account, arbitrators should consider whether in light of all of the surrounding factors, the offer should be presumed to refer only to the claim. If it refers also to the counterclaim, arbitrators should consider whether it is appropriate to make a single order for costs; where this is the case, arbitrators should compare the success which the claimant has achieved in both pursuing the claim and resisting the counterclaim with that which it would have achieved in both respects by accepting the offer.

iv) Other factors

The factors outlined in Article 2.1(i)-(iii) are not exhaustive. Arbitrators may also consider the parties' conduct before the arbitral proceedings, including, for example, whether one party triggered the dispute by

repeatedly acting in bad faith or unreasonably failed to take steps to settle the dispute.

Paragraph 2

Consistency between procedural costs and party costs

Arbitrators should allocate both procedural and party costs following the same approach, unless the parties have agreed otherwise. Sometimes, however, arbitrators may consider it appropriate to order each party to bear its own legal costs in order to achieve overall fairness. In such a case it is usually appropriate to order that each party bear half the procedural costs.

Article 3 — Determination of recoverable costs

1. **After determining the allocation of liability for costs, arbitrators should consider what types of costs should be recoverable in the particular circumstances of the arbitration.**
2. **Once the arbitrators have determined what costs are recoverable, they should consider whether, in light of all of the circumstances of the case, the costs claimed have been reasonably incurred and are proportionate to the matters in issue.**

Commentary on Article 3

Paragraph 1

Types of recoverable costs

a) For the purposes of determining what types of costs are recoverable, arbitrators should first consider the parties' arbitration agreement, including any arbitration rules and/or the *lex arbitri*, which may contain provisions limiting and/or listing range of expenditures which constitute costs. Subject to any such limitations, arbitrators may award any costs which they consider have been properly and reasonably incurred in the

pursuit or defence of the issues in the arbitration. Indirect costs are not generally recoverable. The burden of satisfying the arbitrators that costs were reasonably incurred or reasonable in amount rests on the receiving party and if that party does not discharge that burden then the decision should be resolved in favour of the paying party.

Legal costs

b) Parties to arbitration are normally represented by lawyers or other legal practitioners. In order to assess whether the legal costs are reasonable and related to the arbitration, arbitrators should compare the amounts claimed by each party, taking into account the time spent, hourly rates and level of skill engaged in the light of the complexity and duration of the case as well as the amount in dispute. If arbitrators are of the view that the number of representatives or the fees claimed are in excess of what is reasonable, they may disallow some or all of the claims for costs made in respect of individual representatives.

c) Depending on the relevant jurisdiction, lawyers may claim contingency fees or similar success fees. Arbitrators faced with such an issue, should always check whether such an arrangement is permissible under the *lex arbitri* and under the law of the place or places of likely enforcement.

Costs for party-appointed experts

d) Parties may appoint experts to assist them in proving their case. Costs will include experts' fees in producing a report, travel, accommodation and ancillary expenses. When considering whether to include in their award the costs of the receiving party's expert evidence, arbitrators may consider the extent to which the experts' evidence assisted them in their understanding the case and/or whether the expert evidence was material for the case.

Costs for witnesses and evidence

e) The costs of evidence include those for preparing witness statements, attendance of witnesses at the hearing, preservation of physical evidence, tests, etc. The costs of needless duplication and evidence to prove facts admitted in the pleadings may be disallowed. In cases where the witnesses are not employees of a party, the parties may agree to reimburse them for loss of income and for their time. Such expenses can be claimed and recovered, if reasonable.

Parties' internal costs

f) The staff of a company or firm involved in arbitration proceedings often dedicates substantial time to the case. These costs, except for reasonable out-of-pocket expenses necessarily incurred in the arbitration, are normally irrecoverable on the general principle that they fall under the general operational expenses of the company or firm. However, arbitrators have discretion to allow the recovery of such costs, if they are satisfied that the work done internally obviated the need for outside counsel or experts to do it and hence led to an overall saving of costs.[15]

Costs of ancillary proceedings

g) Costs incurred in relation to ancillary judicial proceedings, especially in another jurisdiction (e.g. to obtain security for a claim) are normally excluded from the costs of arbitration, since they are not directly related to the arbitration. However, where the local courts have been seized in support of the arbitration, for example in relation to applications for interim measures, such costs may be recoverable, if they can not be dealt with by the local court, or the court has referred them to the arbitration tribunal for decision.

Costs incurred prior to the arbitration

h) Costs incurred prior to the commencement of arbitration proceedings, including costs related to any negotiations or mediation initiated prior to the notice of arbitration, are usually not considered recoverable. Arbitrators may, however, take into account costs which contributed to the arbitration, such as, for example, any activities linked to the preparation of the arbitration, including the drafting of the request for arbitration.[16]

Paragraph 2

Reasonableness and proportionality

a) The only costs that arbitrators can award are those which have been reasonably incurred by a party to the arbitration in connection with the arbitration. Arbitrators should therefore determine to what extent the recoverable costs are reasonable or necessary in light of all of the circumstances of the arbitration.

b) The test of reasonableness consists of (1) deciding whether each and every activity for which the costs were incurred was necessary or prudent for the arbitration in light of the complexity of the case; and (2) if so, whether the amounts claimed for such activities were reasonable from an objective point of view. As a result, if certain expenses are deemed to be unreasonable or unnecessary, arbitrators have the discretion to reduce the amount or decide not to reimburse such expenses.

c) Arbitrators should also consider whether the reasonable costs are proportionate to the sums in dispute. When deciding whether the costs are proportionate, arbitrators should take into account the complexity of the case and the amount in dispute. Where the costs are disproportionate to the sums in dispute, arbitrators should consider whether the receiving party could have incurred less costs and whether it was evident to the

party at the time those costs were incurred. If the costs as a whole appear disproportionate, arbitrators should seek to limit the recoverable costs to the amount which would have been incurred if the arbitration had been conducted in a proportionate manner.

Article 4 — Timing and content of decisions on costs

1. **Arbitrators may make interim decisions on costs at any time during the course of the arbitration.**
2. **Final decisions on costs should be included in the final award at the conclusion of the arbitration.**
3. **Final decisions on costs should record and take account of all earlier decisions on costs.**
4. **Final awards of costs should be for a quantified amount.**

Commentary on Article 4

Paragraph 1

Form of interim decisions on costs

When arbitrators decide to issue an interim decision on costs during the course of the arbitral proceedings and before the final award, they should carefully consider what the appropriate form in which to record such a decision is. If they do not intend it to be enforceable immediately, they should issue a procedural order. If, on the other hand, they intend it to be paid immediately they should record their decision in an interim or partial costs award to facilitate the enforcement of the decision under the New York Convention. Arbitrators should always check the applicable *lex arbitri* and arbitration rules for any specific requirements as to the form of costs decisions. Depending on the jurisdiction, awards expressed as interim and/or partial may be recognised as final for enforcement purposes.

Paragraph 2

Final awards on costs

It is good practice to include the final award on costs in the same award that deals with the merits because to do otherwise may cause delay and expense. However, depending on the circumstances of the case, arbitrators may consider it more appropriate to decide to issue their award on the merits first and deal with costs separately in a subsequent award. In that case, it is therefore good practice to describe the award as 'final award save as to costs'. Arbitrators should be mindful that their mandate ends when they issue their final award. The main advantage of this approach is that it enables the parties to focus their submissions on costs in light of the decision on the merits. Alternatively, the arbitrators can order the parties to send them their submissions on costs contained in sealed envelopes or password protected electronic files immediately after the merits hearing on express terms that the arbitrators will only open the submissions when they have completed their deliberations and drafting of the award on the merits. The arbitrators will then deliberate on the issues of costs and draft the award on costs which will be incorporated into the award on the merits.

Paragraph 3

If arbitrators have made an interim decision on costs during the proceedings, such a decision should be taken into account and incorporated in the final award and/or any subsequent separate award on costs.

Paragraph 4

Content of a final decision on costs

a) The final award on costs should describe the basis for arbitrators' power to award costs and make reference to any agreed and/or adopted

procedure (see Article 1 above). The arbitrators should summarise the parties' submissions as to costs and then set out any factors which they took into account when dealing with costs and give reasons for their decision, unless the parties have agreed that reasons are not required.

b) Arbitrators should specify the items of recoverable costs and the amount referable to each item of recoverable cost.[17] They should also state the date by which such sums should be paid and the consequences in terms of interest, if applicable, of late payment.[18] The decision as to costs, including the amounts, should be repeated in the dispositive part of the final award.[19]

Conclusion

One of the most important tasks which arbitrators have to perform relates to the making of awards on costs. There are a great variety of ways in which costs are allocated and numerous factors that are likely to influence the arbitrators' decision. This Guideline aims at assisting arbitrators in formulating their decisions as to costs in a more consistent manner.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 8 June 2016

Endnotes

1. These costs are also referred to as 'central costs', see Colin Ong and Michael O'Reilly, *Costs in International Arbitration* (LexisNexis 2013), p. 5 and Michael O'Reilly, 'The Harmonization of Costs Practices in International Arbitration: The Search for the Holy Grail' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 25. These costs are also sometimes referred to as 'tribunal costs', Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015), paras 9.87-9.88.
2. See generally CIArb Guideline on Drafting Arbitral Awards Part I — General (2016) and CIArb Guideline on Awarding Part II — Interest (2016).
3. Even though this is not common, there may be cases where the parties stipulate that the arbitrators have no power to award party costs. See Ong and O'Reilly, n 1, p. 25.
4. See ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs in Arbitration* (2012), para 82; ICC Arbitration and ADR Commission Report, *Decisions on Costs in International Arbitration* (2015), paras 30-35.
5. Ong and O'Reilly, n 1, pp. 13-14.
6. Michael Bühler, 'Awarding Costs in International Commercial Arbitration: an Overview' (2004) 22 ASA Bulletin, p. 250.
7. Ong and O'Reilly, n 1, pp. 69-70. See Queen Mary and White & Case Survey, *Current and Preferred Practices in the Arbitral Process* (2012), p. 40; David Williams and John Walton, 'Costs and access to International Arbitration' (2014) 80(4) Arbitration, p. 432. See also, Annette Magnusson and Celeste E. Salinas Quero, 'Recent Developments in International Arbitration Allocation of Costs: a

Case Study' paper presented at the International Conference on Arbitration and Mediation (Taipei, 30-31 August 2014).

8. Ong and O'Reilly, n 1, p. 20 (suggesting that there is a trend towards a moderated cost follow the event policy.) ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 20.
9. See ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, which lists a number of techniques available to arbitrators to reduce costs.
10. Difficulties may arise when counsel from different legal traditions claim costs that are in other jurisdictions considered as legally problematic, such as contingency or success fees.
11. Article 37(5) ICC Rules (2012), for example, specifically states that arbitral tribunal may take into account whether 'each party has conducted the arbitration in an expeditious and cost-effective manner'. See also, ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, para 82.
12. ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 8.
13. See e.g., Article 37(3) ICC Rules (2012) which provides that arbitrators may make decisions on party's costs and order payment during the course of the proceedings; Article 17G UNCITRAL Model Law on International Commercial Arbitration.
14. See e.g., Article 37(5) ICC Rules (2012) and Article 28(4) LCIA Rules (2014) which include express references as to parties' conduct. See also, ICC Arbitration and ADR Commission Report, *Techniques for Controlling Time and Costs*, n 4, para 82 which includes a non-exhaustive list of examples of behaviour which is considered to be unreasonable and the ICC Arbitration and ICC Arbitration and ADR Commission Report, *Decisions on Costs*, n 4, p. 19 and pp. 23-24.
15. Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's*

Guide to ICC Arbitration (ICC Publication No. 729E, 2012), p. 409. See also, Marie Berard, '"Other Costs" in International Arbitration: A Review of the Recoverability of Internal and Third-Party Funding Costs' in Julio Cesar Betancourt (ed), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators* (OUP 2016), chapter 27.

16. Ong and O'Reilly, n 1, p. 98-99; Fry, n 15, p. 410.
17. In institutional arbitrations, the arbitrators' and administrative fees are fixed by the institution pursuant to a pre-established fee schedule or scale which forms part of the cost provisions in the applicable arbitration rules and therefore arbitrators can only determine the allocation of such costs. See e.g., Article 37(1) ICC Rules (2012) which reserves the power to the ICC Court and Article 28(1) LCIA Rules (2014) which reserve the power to the LCIA Court.
18. See CIArb Guideline on Drafting Arbitral Awards Part II — Interest (2016).
19. See CIArb Guideline on Drafting Arbitral Awards Part I — General.