NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees, please complete, sign and return this form to the registration staff **before you leave** the program.

PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Dispute Resolution Section Fall Meeting 2019:
The Future of ADR: Where Are We Going and How Do We Get There?
Friday, October 25, 2019—New York Law School, NYC

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

The Future of ADR: Where Are We Going and How Do We Get There?

Dispute Resolution Section Chair:
Theodore K. Cheng, Esq.

Program Chairs:
Laura A. Kaster, Esq.
Marcia L. Adelson, Esq.
M. Salman Ravala, Esq.

October 25, 2019

New York Law School
185 West Broadway, New York, NY

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

ACCESSING THE ONLINE ELECTRONIC COURSE MATERIALS

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

The course materials may be accessed online at:
http://www.nysba.org/DRSFall19coursebook/

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **The Future of ADR: Where Are We Going and How Do We Get There?**
Date: Friday, October 25, 2019 Location: New York, NY

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_daOHF7JQGHs06EJ
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **7.0 New York CLE credit hours**

Credit Category:
3.5 Areas of Professional Practice
2.5 Skills
1.0 Ethics and Professionalism

This course is approved for credit for **newly admitted attorneys only** (admitted to the New York Bar for less than two years).

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

Newly admitted attorneys (admitted to the New York Bar for less than two years) may not be eligible to receive credit for certain program credit categories or formats. For official New York State CLE Board rules, see www.nycourts.gov/attorneys/cle.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452
(or (518) 463-3724 in the Albany area).

AGENDA

Friday, October 25

8:30 – 9:30 a.m. **Executive Committee Meeting**

8:45 – 9:30 a.m. **Registration and Continental Breakfast**

9:30 – 9:35 a.m. **Welcoming Remarks - Theodore K. Cheng, Esq.** | Dispute Resolution Section Chair

9:35 – 10:50 a.m. **The Coming Revolution in International Mediation - The Singapore Convention and Its Impact**
1.5 MCLE Credit | Skills
The New York Convention enhanced the use of international arbitration to facilitate growth in international trade. Will the Singapore Convention foster the same advances for mediation and result in enhanced global trade?

Moderator: **M. Salman Ravala, Esq.** | Criscione Ravala, LLP

Panelists: **Carolyn E. Hansen, Esq.** | Carolyn E. Hansen, Esq.
Christina G. Hioureas, Esq. | Foley Hoag, LLP
Luis M. Martinez, Esq. | International Centre for Dispute Resolution
Deborah Masucci, Esq. | Masucci Dispute Management and Resolution Services

10:50 – 11:00 a.m. Break

11:00 – 12:15 p.m. **Change is Here: ADR and the NY Courts – The New Presumptive ADR Program**
1.5 MCLE Credit | Areas of Professional Practice
By September 1, the Chief Judge has directed all Judicial Districts in the State of New York to develop plans for implementing Presumptive ADR. We will have a townhall presentation allowing all of us to speak with the two Deputy Chief Administrative Judges as well as the Senior Administrators working with them to implement the ADR initiative state-wide – all of our presenters are closely involved with this revolution that litigators and ADR professionals need to understand. They can answer your questions. We can engage in a dialogue about the Chief Judge's groundbreaking initiative.

Moderator: **Daniel F. Kolb, Esq.** | Davis Polk & Wardwell

Panelists: **Hon. Vito C. Caruso** | Deputy Chief Administrative Judge for Courts Outside New York City
Hon. George J. Silver | Deputy Chief Administrative Judge for New York City Courts
Lisa Courtney, Esq. | Statewide Alternative Dispute Resolution Coordinator for the New York State Unified Court System
Lisa M. Denig, Esq. | Special Counsel for ADR Initiatives in New York City
Hon. Joel R. Kullas | Alternative Dispute Resolution Coordinator for the 3rd, 4th, 9th and 10th Judicial Districts
Bridget M. O'Connell, Esq. | Alternative Dispute Resolution Coordinator for the 5th, 6th, 7th and 8th Judicial Districts

12:15 – 1:15 p.m. **Fostering a Successful New York Presumptive ADR Program**

1.0 MCLE Credit | Areas of Professional Practice

The new presumptive program will hopefully bring a culture change for New York lawyers and parties. How can ADR professionals assure its success, aid the courts, and assist all stakeholders? What can our Section do? A panel of experts who are addressing the issues in New York, have already addressed similar issues in other States, and will raise issues and report on possible solutions.

Moderator: **Laura A. Kaster, Esq**. | Laura A. Kaster LLC

Panelists: **Robert E. Margulies Esq.** | Schumann Hanlon Margulies, LLC
Rebecca Price, Esq. | Director, ADR Program United States District Court, Southern District of NY
Jonathan Rosenthal, Esq. | Director of the Maryland Judiciary's Mediation & Conflict Resolution Office (MACRO)
Hon. Jeffery S. Sunshine | Justice Supreme Court Kings County NY

1:15 –2:00 p.m. Lunch

2:00 – 3:00 p.m. **Expert Insights on Drafting Awards That Will Stick**

1.0 MCLE Credit | Skills

An extraordinary panel of arbitrators will focus on protecting the award and provide actual drafting techniques.

Moderator: **Marcia L. Adelson, Esq.** (Introduction: Laura Kaster)

Panelists: **Hon. William Bassler** (ret. U.S. Dist. Ct. for DNJ) | AAA, ICDR, ICC and CPR Arbitrator
Sasha Carbone, Esq. | American Arbitration Association
Hon. Timothy Lewis (ret. U.S. Court of Appeals 3rd Cir.) | Schnader Harrison Segal & Lewis, LLP
Edna Sussman, Esq. | Sussman ADR LLC

3:00 – 3:10 p.m. Break

3:10 – 4:10 p.m. **Artificial Intelligence and its Impact on the Future of ADR**

1.0 MCLE Credit | Areas of Professional Practice

What can AI do for dispute resolution? Can AI improve risk assessment? What are Lexis/Nexis and Westlaw planning for our future?

Moderator: **Ross J. Kartez, Esq.** | Ruskin Moscou Faltischek, P.C

Panelists: **Lucas Bento, Esq.** | Quinn Emanuel Urguhart & Sullivan, LLP
Alyson Carrel | Pritzker School of Law, Northwestern University
Diana Colon, Esq. | New York State Unified Court System
Colin Rule | Tyler Technologies

4:10 – 5:10 p.m. **Ethics in Mediation: Threats, Realities, and Modalities**

1.0 MCLE Credit | Ethics and Professionalism

This panel will begin with a debate on whether the ethics rule that bars threat of criminal prosecution to gain advantage in a civil matter should be altered. It will end with a participatory group reflection on dealing with coercion and manipulation in negotiation and mediation.

Moderator: **Simeon H. Baum, Esq.** | Resolve Mediation Services, Inc.

Panelists: **Lawrence S. Goldman, Esq.** | Law Offices of Lawrence S. Goldman
James B. Kobak, Jr., Esq. | Hughes Hubbard & Reed, LLP and COSAC
Kathleen M. Scanlon, Esq. | Chief Circuit Mediator at United States Court of Appeals for the Second Circuit

5:15 – 6:30 p.m. Networking Reception

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

☐ As a NYSBA member, **PLEASE BILL ME $35 for Dispute Resolution Section dues.** (law student rate is $10)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Dispute Resolution Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Dispute Resolution Section Committees

Please designate in order of choice (1, 2, 3) from the list below, a maximum of three committees in which you are interested.

___ Continuing Legal Education and Programming (DRS1020)
___ Legislation (DRS1030)
___ Membership (DRS1040)
___ Diversity (DRS1100)
___ Collaborative Law (DRS1200)
___ Domestic Arbitration (DRS1300)
___ International Dispute Resolution (DRS1301)
___ ADR within Governmental Agencies (DRS1400)
___ ADR in the Courts (DRS1500)
___ Publications (DRS1600)
___ Ethical Issues and Ethical Standards (DRS1700)
___ Mediation (DRS1800)
___ Mediation of Wills, Trusts, Estates, and Adult Guardianship (DRS1801)
___ International Mediation (DRS1802)
___ Education (DRS2200)
___ Public Relations (DRS2300)
___ Liaison and District Rep Coordination (DRS2400)
___ Negotiation (DRS2500)
___ New Lawyers and Law Students (DRS2600)
___ Liaisons (DRS2900)
___ Healthcare (DRS3000)

JOIN OUR SECTION

2020 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2012 and prior	$275
Attorneys admitted 2013-2014	185
Attorneys admitted 2015-2016	125
Attorneys admitted 2017 - 3.31.2019	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2012 and prior	$180
Attorneys admitted 2013-2014	150
Attorneys admitted 2015-2016	120
Attorneys admitted 2017 - 3.31.2019	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2019

Please return this application to:

MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

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Message from the *New York Dispute Resolution Lawyer* Co-Editors in Chief

When this issue is published, we will already have a new set of general rules for early presumptive mediation and ADR throughout the New York court system. Many of the individual courts will have proposed initial plans. This presents our Section and its members with an enormous challenge and opportunity. We, who teach, practice, and promote the value of mediation, must play a role in making this important initiative a success.

The initiative was announced in a May 14 press release:

> New York–In a transformational move to advance the delivery and quality of civil justice in New York as part of the Chief Judge's Excellence Initiative, Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks today announced a systemwide initiative in which, aside from appropriate exceptions, parties in civil cases will be referred to mediation or some other form of alternative dispute resolution (ADR) as the first step in the case proceeding in court. Dubbed "presumptive ADR," this model builds on prior successes of ADR in New York State and in other jurisdictions by referring cases routinely to mediation and other forms of ADR earlier in the life of a contested matter.

The announcement contemplated that the new initiative would apply to the widest variety of civil cases, including personal injury, matrimonial and estate matters. The initiative reflects the evidence provided by the Court's ADR Advisory Committee's interim report that early referral to mediation often leads to the settlement of disputes or the narrowing of issues. The driving force behind this initiative is the desire to enhance and streamline the litigation process, to promote faster and less expensive outcomes, and to enhance party involvement in and satisfaction with the resolution of their disputes.

The initiative contemplates that the Administrative Judges will formulate plans that will begin to take effect in the fall of 2019, tailored to local conditions and circumstances. In order to provide services in a vastly expanded number of cases, there will have to be a much larger cadre of mediators. It is anticipated that local protocols, guidelines and best practices will be developed in each jurisdiction to facilitate the process. Additionally, comprehensive data will be collected to help evaluate the progress of court-sponsored ADR programs and allow for changes to improve the programs going forward. In other words, this will be a work in progress with varied approaches in different courts and self-assessment of successes.

However good the framework rules and the individual plans are, the challenge is to change the legal culture and that challenge is enormous. Those of you who have participated in state-wide programs in neighboring states or who have tracked them, know that the litigating bar and the neutrals must be made a continuing part of the process and must be convinced of its efficacy. Even lawyers who are committed to the most cost-efficient outcomes for their clients are sometimes stymied by their habits and timelines in approaching litigation. For example, if an attorney generally does not plan to turn to a matter until document discovery is well in process, the earliest least costly opportunity to resolve a matter may feel like an imposition that disables the attorney from proper evaluation of the case or even a projection of litigation costs. A neutral

must be proactive in focusing the parties on an exchange of only that information needed for the early mediation. Inside counsel are well aware that early internal (and therefore one-sided) examination of documents and key witnesses can give them a good feel for the issues in the case and the costs of consuming litigation. We have to talk about this – the culture of hiding your cards needs to change. The benefits to reputation, and therefore to future business, of serving clients efficiently and satisfactorily need to be underscored to promote this program. The success of this program will also reflect on and impact private mediation.

We hope our Section will be one of the thought leaders, evaluators and promoters of this important initiative. The reputation of mediation itself as well as the culture of the bar is at stake. Our October meeting will focus on the new rules and on the contributions we can all make to assure the training of new mediators and the success of this initiative. Join us, invest in the future of mediation in New York.

Laura A. Kaster
Sherman W. Kahn
Edna Sussman

The Coming Revolution in International Mediation – The Singapore Convention and Its Impact

M. Salman Ravala, Esq.
Criscione Ravala, LLP

Carolyn E. Hansen, Esq.

Christina G. Hioureas, Esq.
Foley Hoag, LLP

Luis M. Martinez, Esq.
International Centre for Dispute Resolution

Deborah Masucci, Esq.
Masucci Dispute Management and Resolution Services

"An ounce of Mediation is worth a pound of Arbitration and ton of Litigation".

--- Joseph Gymbaum

United Nations Convention on International Settlement Agreements Resulting from Mediation

UNITED NATIONS

Further information may be obtained from:
UNCITRAL secretariat, Vienna International Centre
P.O. Box 500, 1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 Telefax: (+43-1) 26060-5813
Internet: www.uncitral.org Email: uncitral@uncitral.org

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

United Nations Convention on International Settlement Agreements Resulting from Mediation

UNITED NATIONS
New York, 2019

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Contents

Resolution adopted by the General Assembly on 20 December 2018

[on the report of the Sixth Committee (A/73/496)]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting

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[1] Resolution 57/18, annex.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

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[3] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.

[5] Ibid., annex I.

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1. Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2. Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3. General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph *(a)* above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5. Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7. Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8. Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force

of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9. Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "Party to the Convention", "Parties to the Convention", a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: *(a)* if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or *(b)* as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14. Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third

of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.


V.19-00316

Annex II

UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

Section 1 — General provisions

Article 1. Scope of application of the Law and definitions

1. This Law applies to international commercial[1] mediation[2] and to international settlement agreements.

2. For the purposes of this Law, "mediator" means a sole mediator or two or more mediators, as the case may be.

3. For the purposes of this Law, "mediation" means a process, whether referred to by the expression mediation, conciliation or an expression of similar import, whereby parties request a third person or persons ("the mediator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The mediator does not have the authority to impose upon the parties a solution to the dispute.

Article 2. Interpretation

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Section 2 — International commercial mediation

Article 3. Scope of application of the section and definitions

1. This section applies to international[3] commercial mediation.

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1 The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.

2 In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In preparing this Model Law, the Commission decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

3 States wishing to enact this section to apply to domestic as well as international mediation may wish to consider the following changes to the text:

- Delete the word "international" in paragraph 1 of articles 1 and 3; and
- Delete paragraphs 2, 3 and 4 of article 3, and modify references to paragraphs accordingly.

2. A mediation is "international" if:

(a) The parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

3. For the purposes of paragraph 2:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to mediate;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

4. This section also applies to commercial mediation when the parties agree that the mediation is international or agree to the applicability of this section.

5. The parties are free to agree to exclude the applicability of this section.

6. Subject to the provisions of paragraph 7 of this article, this section applies irrespective of the basis upon which the mediation is carried out, including agreement between the parties whether reached before or after a dispute has arisen, an obligation established by law, or a direction or suggestion of a court, arbitral tribunal or competent governmental entity.

7. This section does not apply to:

(a) Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement; and

(b) […].

Article 4. Variation by agreement

Except for the provisions of article 7, paragraph 3, the parties may agree to exclude or vary any of the provisions of this section.

Article 5. Commencement of mediation proceedings[4]

1. Mediation proceedings in respect of a dispute that has arisen commence on the day on which the parties to that dispute agree to engage in mediation proceedings.

2. If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to mediate.

Article 6. Number and appointment of mediators

1. There shall be one mediator, unless the parties agree that there shall be two or more mediators.

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[4] The following text is suggested for States that might wish to adopt a provision on the suspension of the limitation period:

Article X. Suspension of limitation period

1. When the mediation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the mediation is suspended.

2. Where the mediation proceedings have terminated without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement.

2. The parties shall endeavour to reach agreement on a mediator or mediators, unless a different procedure for their appointment has been agreed upon.

3. Parties may seek the assistance of an institution or person in connection with the appointment of mediators. In particular:

(a) A party may request such an institution or person to recommend suitable persons to act as mediator; or

(b) The parties may agree that the appointment of one or more mediators be made directly by such an institution or person.

4. In recommending or appointing individuals to act as mediator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial mediator and, where appropriate, shall take into account the advisability of appointing a mediator of a nationality other than the nationalities of the parties.

5. When a person is approached in connection with his or her possible appointment as mediator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.

Article 7. Conduct of mediation

1. The parties are free to agree, by reference to a set of rules or otherwise, on the manner in which the mediation is to be conducted.

2. Failing agreement on the manner in which the mediation is to be conducted, the mediator may conduct the mediation proceedings in such a manner as the mediator considers appropriate, taking into account the circumstances of the case, any wishes that the parties may express and the need for a speedy settlement of the dispute.

3. In any case, in conducting the proceedings, the mediator shall seek to maintain fair treatment of the parties and, in so doing, shall take into account the circumstances of the case.

4. The mediator may, at any stage of the mediation proceedings, make proposals for a settlement of the dispute.

Article 8. Communication between mediator and parties

The mediator may meet or communicate with the parties together or with each of them separately.

Article 9. Disclosure of information

When the mediator receives information concerning the dispute from a party, the mediator may disclose the substance of that information to any other party to the mediation. However, when a party gives any information to the mediator, subject to a specific condition that it be kept confidential, that information shall not be disclosed to any other party to the mediation.

Article 10. Confidentiality

Unless otherwise agreed by the parties, all information relating to the mediation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement.

Article 11. Admissibility of evidence in other proceedings

1. A party to the mediation proceedings, the mediator and any third person, including those involved in the administration of the mediation proceedings, shall not

in arbitral, judicial or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation proceedings or the fact that a party was willing to participate in mediation proceedings;

(b) Views expressed or suggestions made by a party in the mediation in respect of a possible settlement of the dispute;

(c) Statements or admissions made by a party in the course of the mediation proceedings;

(d) Proposals made by the mediator;

(e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the mediator;

(f) A document prepared solely for purposes of the mediation proceedings.

2. Paragraph 1 of this article applies irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement.

4. The provisions of paragraphs 1, 2 and 3 of this article apply whether or not the arbitral, judicial or similar proceedings relate to the dispute that is or was the subject matter of the mediation proceedings.

5. Subject to the limitations of paragraph 1 of this article, evidence that is otherwise admissible in arbitral or judicial or similar proceedings does not become inadmissible as a consequence of having been used in a mediation.

Article 12. Termination of mediation proceedings

The mediation proceedings are terminated:

(a) By the conclusion of a settlement agreement by the parties, on the date of the agreement;

(b) By a declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration;

(c) By a declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or

(d) By a declaration of a party to the other party or parties and the mediator, if appointed, to the effect that the mediation proceedings are terminated, on the date of the declaration.

Article 13. Mediator acting as arbitrator

Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator in respect of a dispute that was or is the subject of the mediation proceedings or in respect of another dispute that has arisen from the same contract or legal relationship or any related contract or legal relationship.

Article 14. Resort to arbitral or judicial proceedings

Where the parties have agreed to mediate and have expressly undertaken not to initiate during a specified period of time or until a specified event has occurred

arbitral or judicial proceedings with respect to an existing or future dispute, such an undertaking shall be given effect by the arbitral tribunal or the court until the terms of the undertaking have been complied with, except to the extent necessary for a party, in its opinion, to preserve its rights. Initiation of such proceedings is not of itself to be regarded as a waiver of the agreement to mediate or as a termination of the mediation proceedings.

Article 15. Binding and enforceable nature of settlement agreements

If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable.

Section 3 — International settlement agreements[5]

Article 16. Scope of application of the section and definitions

1. This section applies to international agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreements").[6]

2. This section does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This section does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

4. A settlement agreement is "international" if, at the time of the conclusion of the settlement agreement:[7]

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

5. For the purposes of paragraph 4:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the

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[5] A State may consider enacting this section to apply to agreements settling a dispute, irrespective of whether they resulted from mediation. Adjustments would then have to be made to relevant articles.

[6] A State may consider enacting this section to apply only where the parties to the settlement agreement agreed to its application.

[7] A State may consider broadening the definition of "international" settlement agreement by adding the following subparagraph to paragraph 4: "A settlement agreement is also 'international' if it results from international mediation as defined in article 3, paragraphs 2, 3 and 4."

settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

6. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

Article 17. General principles

1. A settlement agreement shall be enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this section.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, the party may invoke the settlement agreement in accordance with the rules of procedure of this State, and under the conditions laid down in this section, in order to prove that the matter has already been resolved.

Article 18. Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this section shall supply to the competent authority of this State:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of this State, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of this section have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 19. Grounds for refusing to grant relief

1. The competent authority of this State may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of this State may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of this State; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of this State.

Article 20. Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 18, the competent authority of this State where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

United Nations A/RES/73/198

General Assembly

Distr.: General
11 January 2019

Seventy-third session
Agenda item 80

Resolution adopted by the General Assembly on 20 December 2018

[*on the report of the Sixth Committee (A/73/496)*]

73/198. United Nations Convention on International Settlement Agreements Resulting from Mediation

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade,

Recalling also its resolution 57/18 of 19 November 2002, in which it noted the adoption by the Commission of the Model Law on International Commercial Conciliation[1] and expressed the conviction that the Model Law, together with the Conciliation Rules of the Commission[2] recommended in its resolution 35/52 of 4 December 1980, contributes significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

Recognizing the value of mediation as a method of amicably settling disputes arising in the context of international commercial relations,

Convinced that the adoption of a convention on international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would complement the existing legal framework on international mediation and contribute to the development of harmonious international economic relations,

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[1] Resolution 57/18, annex.

[2] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 106; see also *Yearbook of the United Nations Commission on International Trade Law*, vol. XI: 1980, part three, annex II.

Noting that the decision of the Commission to concurrently prepare a convention on international settlement agreements resulting from mediation and an amendment to the Model Law on International Commercial Conciliation was intended to accommodate the different levels of experience with mediation in different jurisdictions and to provide States with consistent standards on the cross-border enforcement of international settlement agreements resulting from mediation, without creating any expectation that interested States may adopt either instrument,[3]

Noting with satisfaction that the preparation of the draft convention was the subject of due deliberation and that the draft convention benefited from consultations with Governments as well as intergovernmental and non-governmental organizations,

Taking note of the decision of the Commission at its fifty-first session to submit the draft convention to the General Assembly for its consideration,[4]

Taking note with satisfaction of the draft convention approved by the Commission,[5]

Expressing its appreciation to the Government of Singapore for its offer to host a signing ceremony for the Convention in Singapore,

1. *Commends* the United Nations Commission on International Trade Law for preparing the draft convention on international settlement agreements resulting from mediation;

2. *Adopts* the United Nations Convention on International Settlement Agreements Resulting from Mediation, contained in the annex to the present resolution;

3. *Authorizes* a ceremony for the opening for signature of the Convention to be held in Singapore on 7 August 2019, and recommends that the Convention be known as the "Singapore Convention on Mediation";

4. *Calls upon* those Governments and regional economic integration organizations that wish to strengthen the legal framework on international dispute settlement to consider becoming a party to the Convention.

62nd plenary meeting
20 December 2018

Annex

United Nations Convention on International Settlement Agreements Resulting from Mediation

Preamble

The Parties to this Convention,

Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,

Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,

[3] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 238–239; see also A/CN.9/901, para. 52.

[4] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 49.

[5] Ibid., annex I.

Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,

Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

Have agreed as follows:

Article 1
Scope of application

1. This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

(i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

(ii) The State with which the subject matter of the settlement agreement is most closely connected.

2. This Convention does not apply to settlement agreements:

(a) Concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes;

(b) Relating to family, inheritance or employment law.

3. This Convention does not apply to:

(a) Settlement agreements:

(i) That have been approved by a court or concluded in the course of proceedings before a court; and

(ii) That are enforceable as a judgment in the State of that court;

(b) Settlement agreements that have been recorded and are enforceable as an arbitral award.

Article 2
Definitions

1. For the purposes of article 1, paragraph 1:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

2. A settlement agreement is "in writing" if its content is recorded in any form. The requirement that a settlement agreement be in writing is met by an electronic

communication if the information contained therein is accessible so as to be useable for subsequent reference.

3. "Mediation" means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

Article 3
General principles

1. Each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.

2. If a dispute arises concerning a matter that a party claims was already resolved by a settlement agreement, a Party to the Convention shall allow the party to invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention, in order to prove that the matter has already been resolved.

Article 4
Requirements for reliance on settlement agreements

1. A party relying on a settlement agreement under this Convention shall supply to the competent authority of the Party to the Convention where relief is sought:

(a) The settlement agreement signed by the parties;

(b) Evidence that the settlement agreement resulted from mediation, such as:

(i) The mediator's signature on the settlement agreement;

(ii) A document signed by the mediator indicating that the mediation was carried out;

(iii) An attestation by the institution that administered the mediation; or

(iv) In the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.

2. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator is met in relation to an electronic communication if:

(a) A method is used to identify the parties or the mediator and to indicate the parties' or mediator's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.

3. If the settlement agreement is not in an official language of the Party to the Convention where relief is sought, the competent authority may request a translation thereof into such language.

4. The competent authority may require any necessary document in order to verify that the requirements of the Convention have been complied with.

5. When considering the request for relief, the competent authority shall act expeditiously.

Article 5
Grounds for refusing to grant relief

1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:

(a) A party to the settlement agreement was under some incapacity;

(b) The settlement agreement sought to be relied upon:

(i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;

(ii) Is not binding, or is not final, according to its terms; or

(iii) Has been subsequently modified;

(c) The obligations in the settlement agreement:

(i) Have been performed; or

(ii) Are not clear or comprehensible;

(d) Granting relief would be contrary to the terms of the settlement agreement;

(e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or

(f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.

2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:

(a) Granting relief would be contrary to the public policy of that Party; or

(b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Article 6
Parallel applications or claims

If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper, adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

Article 7
Other laws or treaties

This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.

Article 8
Reservations

1. A Party to the Convention may declare that:

(a) It shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration;

(b) It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

2. No reservations are permitted except those expressly authorized in this article.

3. Reservations may be made by a Party to the Convention at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto, or at the time of making a declaration under article 13 shall take effect simultaneously with the entry into force of this Convention in respect of the Party to the Convention concerned. Reservations deposited after the entry into force of the Convention for that Party to the Convention shall take effect six months after the date of the deposit.

4. Reservations and their confirmations shall be deposited with the depositary.

5. Any Party to the Convention that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect six months after deposit.

Article 9
Effect on settlement agreements

The Convention and any reservation or withdrawal thereof shall apply only to settlement agreements concluded after the date when the Convention, reservation or withdrawal thereof enters into force for the Party to the Convention concerned.

Article 10
Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 11
Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in Singapore, on 7 August 2019, and thereafter at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval by the signatories.

3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 12
Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of Parties to the Convention is relevant in this Convention, the regional economic integration organization shall not count as a Party to the Convention in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a “Party to the Convention”, “Parties to the Convention”, a “State” or “States” in this Convention applies equally to a regional economic integration organization where the context so requires.

4. This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention: (a) if, under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization.

Article 13
Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 14
Entry into force

1. This Convention shall enter into force six months after deposit of the third instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 13 six months after the notification of the declaration referred to in that article.

Article 15
Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the Parties to the Convention with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the Parties to the Convention favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the Parties to the Convention present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all the Parties to the Convention for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 16
Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited

to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. The Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

SINGAPORE CONVENTION ON MEDIATION

List of Signatory Countries

- Afghanistan
- Belarus
- Benin
- Brunei Darussalam
- Chile
- China
- Colombia
- Congo
- Democratic Republic of the Congo
- Eswatini
- Fiji
- Georgia
- Grenada
- Haiti
- Honduras
- India
- Iran (Islamic Republic of)
- Israel
- Jamaica
- Jordan
- Kazakhstan
- Lao People's Democratic Republic
- Malaysia
- Maldives
- Mauritius
- Montenegro
- Nigeria
- North Macedonia
- Palau
- Paraguay
- Philippines
- Qatar
- Republic of Korea
- Samoa
- Saudi Arabia
- Serbia
- Sierra Leone
- Singapore
- Sri Lanka
- Timor-Leste
- Turkey
- Uganda
- Ukraine
- United States of America
- Uruguay
- Venezuela (Bolivarian Republic of

Total Count: 46 countries
Updated: August 22, 2019

The Singapore Convention: A First Look

By Deborah Masucci and M. Salman Ravala

On 25th June, 2018, at its 51st session, the United Nations Commission on International Trade Law (UNCITRAL), the U.N.'s core legal body in the field of international trade law, approved by consensus of its member States a "Convention on International Settlement Agreements Resulting from Mediation." It will be commonly referred to as the "Singapore Convention" upon adoption by the United Nations General Assembly and ratification by at least three member States. The official signing ceremony for the Singapore Convention is expected to be in late 2019.[1]

The Background: A Timely Proposal

In May 2014, UNCITRAL, through its Working Group II (WGII), received a proposal from the United States[2] government to develop a multilateral convention on the enforceability of international commercial settlement agreements.[3] The foundation of the proposal was to encourage the acceptance and credibility of mediation as a tool for resolving international cross-border disputes. A second goal of the proposal was to find a more efficient and robust enforcement mechanism when a party breached a mediated settlement agreement without resorting to costly and time-consuming processes such as initiating a new lawsuit to obtain a judgment or court decree on a settlement agreement or utilizing consent awards in arbitration. The need for the proposal was premised on the existing conviction of the global community, adopted by United Nations, that the use of mediation and conciliation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by [member] States."[4] The United Nations previously adopted UNCITRAL Conciliation Rules (1980) and UNCITRAL Model Law on International Commercial Conciliation (2002), as well as the widely ratified Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention" (1958). Adoption of the Singapore Convention therefore moved relatively swiftly and also included the adoption of UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements resulting from International Commercial Mediation (the "UNCITRAL Model Law on ICM-ISA"). Adoption of the Model Law will ensure a more widespread global acceptance by member States in their local jurisdictions and smoother domestic implementation across the world.

The Deliberations: Mediation in Action

Since 2014, deliberations on the international instruments took place over eight UNCITRAL Working Group II sessions, by 85 member States and 35 non-governmental organizations, including the International Mediation Institute (IMI). Delegations vigorously participated in debate over the proposed Singapore Convention and related Model Law. The diversity of voices that contributed to the deliberations and eventual adoption is to be celebrated and welcomed by the global business community.

Progress on the instruments had many parallels to a multi-party co-mediation. WG II elected a Chairperson from the member states. The Chairperson (the lead mediator) effectively developed the agenda for the proceedings, secured consensus from the participating members, framed and reframed for action agreements and disagreements, and brought in experts and others to supplement the knowledge of delegates. As meetings progressed, member States substituted delegates to include internal mediation experts in their delegations. Each session convened with a joint caucus. Consultation meetings or private caucuses were used during the sessions to work out language with one or two delegates filling the role of co-mediators. The UNCITRAL Secretariat provided technical assistance to the group ensuring consistency of provisions and language with other instruments adopted by UNCITRAL. Educational programs were held between and during WGII sessions. They provided opportunities for delegates to learn more about practices globally and why there is a need for a Convention despite lack of evidence that mediated agreements are not being honored.

The Key Provisions: Integrating the ADR Landscape

The Preamble section of the Singapore Convention acknowledges that "mediation is increasingly used in international and domestic commercial practice as an alternative to litigation"[5] and further acknowledges the "significant benefits"[6] of mediation. There are only 16 Articles in the Convention.

Article 1 outlines the scope, applying the Convention to cross-border commercial disputes resolved through mediation where "at least two parties to the [written] settlement agreement have their places of business in different States"[7] or in which parties "have their places of business different from either the State in which a substantial part of the obligations under the settlement agreement is performed or the State in which the subject matter of the settlement agreement is most closely connected."[8] Article 1 specifically excludes settlement agreements

related to consumer, family, inheritance, and employment matters, as well as those enforceable as a judgment or as an arbitral award.[9]

Article 2 defines key terms used in the Convention such as "place of business," "in writing," including in electronic form, and even "mediation." Article 3 summarizes the general principles and obligates member States that ratify the Convention and also permits a party subject of the Convention to invoke a defense and to subsequently prove that a particular dispute being raised was already previously resolved by a settlement agreement.

Article 4 provides a specific but broad checklist of what a party must supply for enforcement of the international settlement agreements that result from mediation. Article 4 includes submission of a "settlement agreement signed by the parties"[10] and "evidence that the settlement agreement resulted from mediation."[11] Evidence includes items "such as" a "mediator's signature on the settlement agreement,"[12] or "a document signed by the mediator,"[13] or "an attestation by the institution" administering the mediation. In the absence of such proof, Article 4 allows a party to submit "other evidence" acceptable or required by a competent authority of the member State where relief is sought. Article 4 also addresses key issues related to electronic communication, translation of settlement agreements, and calls for the competent authority of the member States enforcing the settlement agreements to "act expeditiously."[14]

Article 5 was vigorously debated and certain overlaps within the Article are intentional to accommodate the concerns of a member State's domestic legal systems. Article 5 includes the grounds when a competent authority may refuse to grant enforcement. These circumstances include incapacity of a party, or where the settlement agreement a) is null and void, inoperative or incapable of being performed; b) not binding or not final; c) was subsequently modified; d) was performed; e) is not clear or comprehensible; or where granting relief would be contrary to terms of the settlement agreement or contrary to public policy, and subject matter is not capable of settlement by mediation under the law of that party. A competent authority may also refuse to grant relief where there is a serious breach by the mediation of standards applicable to the mediator or the failure by the mediator to disclose to the parties' circumstances as to the mediator's impartiality or independence.

Article 6 addresses issues of parallel applications or claims and draws inspiration from the New York Convention. It grants, to the competent authority of the member State where relief is being sought, wide discretion to adjourn its decision under the Convention where an application or claim relating to a settlement agreement was made in a court, an arbitral tribunal, or other competent authority.

Article 7 also draws inspiration from the New York Convention and allows member States flexibility to enact national legislation in their countries to expand the scope of settlement agreements excluded by Article 1, Paragraphs 2 and 3 of the Singapore Convention.

Article 8 allows for a tailored adoption of the Convention by each member State, allowing for two reservations when ratifying the Convention. The first reservation is one which relates to the member State or its own governmental agency. The second allows for a declaration that the Convention applies only where the parties to the settlement agreement resulting from mediation have agreed to the application of the Convention.

Article 9 clarifies that the settlement agreements encompassed by the Convention include those concluded *after* entry into force of the Convention, related reservations, or withdrawals by the member State. Article 16 similarly clarifies that the settlement agreements encompassed by the Convention include those concluded *before* denunciation of the Convention.

The Future: Mediation Benefits Our World

In 2016 and 2017, the IMI convened the Global Pound Conference series which surveyed an array of participants from around the world, including those in the business community.[15] Participants surveyed represented many fields such as law, construction, energy, architecture, international business, healthcare, food and beverage, tourism, trade, education, and finance.[16] One survey question asked respondents to rank why they believed parties do not try to solve their commercial cross-border dispute through mediation. Lack of a universal mechanism to enforce a mediated settlement was cited as the second highest ranked reason. On a similar question about the likely use of a mediation clause in contracts if there existed a uniform global mechanism to enforce mediation settlements, the survey result found over 80 percent of the respondents answering in the affirmative. One respondent event added a comment that "lack of uniform enforcement mechanism is a problem."

The enforcement regime promulgated by the Singapore Convention and related Model Law address the concerns raised by those surveyed by the IMI. Incorporating input from around the world, it promises to foster international trade, improve access to justice, and increase confidence, predictability and certainty amongst the business community. It also assists member States and their respective judiciaries to become more efficient in resolving disputes, especially those of commercial nature where parties seek stability and certainty.

Adoption of the Singapore Convention and Model Law on the global stage signals the most credible acknowledgment of mediation as a meaningful tool to resolve cross-border commercial disputes. The timing of the adoption is also significant and perhaps eye-opening,

a subliminal reminder to the world community that the Singapore Convention, akin to the New York Convention, has the power to significantly and positively shape a harmonious regime of international trade around the world.

Endnotes

1. The final text of the Singapore Convention and Model Law is forthcoming on UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, *see* UNCITRAL, 51st Sess. UN Doc A/CN.9/942 and UN Doc A/CN.9/943.
2. The U.S. is one of 60 member States that consider proposals for recommendation and adoption by UNCITRAL.
3. UNCITRAL, 51st Sess. UN Doc A/CN.9/942 (25 June, 2018).
4. General Assembly resolution 57/18, *Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law,* A/RES/57/18 (19 November 2002), available from undocs.org/A/RES/57/18.
5. UN Doc A/CN.9/942, *supra* note 1, at Preamble.
6. *Id.*
7. UN Doc A/CN.9/942, *supra* note 1, at Art. 1.
8. *Id.*
9. UN Doc A/CN.9/942, *supra* note 1, at Art. 2, 3.
10. UN Doc A/CN.9/942, *supra* note 1, at Art. 4.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Global Pound Conference Series 2016-2017, Shaping the Future of Dispute Resolution and Improving Access to Justice, Cumulated Data Results, *available a*t https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf (last visited, June 25, 2018).
16. Weiss, David S. and Griffith, Michael R., Report on International Mediation and Enforcement Mechanisms, *available at* https://www.imimediation.org/download/.../imi-njcuidr-wgii-report2017v4-0-pdf.pdf (last visited, June 25, 2018), at p.7.

Deborah Masucci, Esq. is a full time arbitrator and mediator. She established and led the Office of Dispute Resolution at American International Group (AIG). She currently serves as the Chair of the New York State Bar Association's Section of Dispute Resolution Section and is Co-chair of the International Mediation Institute. She also formerly served as Chair of the ABA Section for Dispute Resolution. She can be reached at dm@debmasucciadr.com.

M. Salman Ravala, Esq. practices commercial litigation and international business law in New York. He serves as a mediator and arbitrator on several dispute resolution rosters and was most recently selected by the American Arbitration Association as its Judge L. Higginbotham Fellow. He is co-chair of the New York State Bar Association's Dispute Resolution Section, Diversity Committee. He can be reached at sravala@lawcrt.com.

New Convention Aims to Make Mediated Settlements an Attractive Means of Resolution of International Disputes . . . But Will It?

September 03, 2019| Blog | By **Gilbert A. Samberg**

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The United States joined 45 other countries on August 7, 2019 as the initial signatories of the UN Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"). Other notable vanguard signatories included China, India, South Korea, and of course Singapore. The aim of this Convention is to make mediated international settlement agreements as easily enforceable as international arbitration awards now are under the New York Convention. But is it likely to succeed? We think it could . . . to a degree.

The Singapore Convention applies to mediated settlement agreements, reached outside of judicial or arbitral proceedings, that are "concluded by the parties in writing," "resolve a commercial dispute," and are "international" in nature. The operative provision is that "[e]ach party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention." Singapore Convention Art. 3(1). The Convention seeks to eliminate the need for a court to address all but a few enumerated defenses relating to the mediation process and the subject of the settlement. In principle, a breached qualifying settlement agreement should be enforced according to its terms more or less summarily by the national courts of a Convention country, rather than being considered merely the basis for a plenary proceeding for breach of contract.

However, the ultimate breadth of use of the Singapore Convention seems less than clear. One possible impediment to the success of the Convention is a consequence of the differences in (a) the arbitration and mediation processes, (b) the motivations for employing one or the other, and (c) their respective "products".

Arbitration is an adjudication in a private proceeding, and entry into that process generally signals the termination of a commercial relationship. The arbitrator has authority, by agreement, to resolve certain claims and defenses and to prescribe a remedy, much as a judge would. In most instances that remedy is likely to be money damages; less frequently, it might include an injunction against the continuation of specific conduct that is deemed wrongful. A continuing relationship of the parties is rarely in contemplation in an arbitral award.

Judicial involvement in the review of an arbitral award is limited to assessing (a) whether the adjudication process was corrupted by bias or interest or fraud; (b) whether the arbitrator exceeded his/her contractedly-authorized powers; and possibly (c) whether the arbitrator knowingly ignored well established determinative law. If the arbitration has "run amok" in any of these ways, then the losing party is presumed to have been prejudiced, and a court may vacate such an award. If, on the other hand, the court determines to confirm and/or enforce the award, the award remedy will very likely be consistent in kind with what a court would ordinarily order, and the local laws governing enforcement of the resulting judgment will be attuned to enforcing just such remedies.

Compare mediation -- a facilitated settlement negotiation with no adjudicator. The mediator has virtually no noteworthy "powers," as his/her job is merely to assist the parties in reaching a settlement. Any evaluation of the law and the facts is up to the parties, and they devise the "remedy" for their dispute(s). A mediation may produce an agreed remedy that looks a lot like an arbitral award -- perhaps involving a payment of money (although possibly with a structured payment schedule), perhaps including an agreement to cease specified conduct, and perhaps ending the commercial relationship. Enforcement of an agreed "plain vanilla" remedy of this sort could be expedited by reason of the Singapore Convention. A court's order of compliance with such settlement terms would produce a familiar-looking judgment, to be enforced by familiar means.

However, an agreed resolution of a commercial dispute could easily be significantly different -- for example, preserving a complex commercial relationship and/or requiring specified commercial

conduct or "cooperation" for an extended period. In case of a breach, are national courts and applicable laws geared to enforcing specific performance of such terms, e.g., requiring a court to act as a monitor and umpire for an extended period? Courts in the U.S., for example, rarely order and are rarely required to enforce a judgment of specific performance in a commercial dispute, and they are even less often (if ever) required to enforce a judgment of specific performance in a commercial relationship over an extended period.

If a court, following its own rules of procedure, will not order such specific performance of settlement terms, what happens then? Could the court in effect amend the settlement terms by ordering the parties to engage an independent monitor and umpire (i.e., a private adjudicator)? Could it conduct a proceeding to determine an enforceable standard remedy for breach of contract -- e.g., money damages -- that is different from the terms of the settlement agreement? The Convention expressly provides that resort to its mechanism shall not be the exclusive means of enforcement of such an agreement. Id. Art. 7.

So it is fair to ask how much the Singapore Convention will expedite the ultimate resolution of a dispute in the event of a breach of a mediated settlement agreement. The answer may be that, except in the case of a plain vanilla settlement principally involving an exchange of money for a release, we don't know.

In any case, here are the Convention's principal details.

Scope of Convention's Applicability

A mediated settlement agreement that is to be recognized and enforced under the Singapore Convention must have the following characteristics: (i) it resolved a commercial dispute; (ii) it resulted from mediation; (iii) it is written; (iv) it is signed by the parties; (v) it is "international"; (vi) it does not concern certain excluded types of disputes, such as consumer or employment disputes, or family or inheritance disputes; and (vii) none of the other few grounds, enumerated in the Convention, to decline enforcement exist. Id. Art. 1. For example, other excluded settlement agreements are those that have been approved by a court, concluded in the course of proceedings before a court, or are otherwise enforceable as a court judgment or as an arbitral award. Id. Art. 1(3).

Defined Terms

For these purposes, "mediation" is defined broadly. See id. Art. 2(3).

A settlement agreement is "in writing" if it is recorded in any form, including electronically (with minimal qualifiers). See id. Art. 2(2). An electronic signature is permitted if specified conditions are satisfied. See id. Art. 4(2).

The "place of business" (or "habitual residence") of each of the parties to a settlement agreement, and the place in which the agreement is to be performed, are the principal determinants of whether the settlement is "international". See id. Arts. 1(1), 2(1)(a), 2(2).

Mediated Settlement Agreement as Basis for Claim or Defense in Accordance with Local Procedures

A qualifying mediated settlement agreement may be invoked under the Convention either for enforcement or as the basis for a defense. Id. Art. 3. When presented with a request for relief, the "competent authority" within a Convention country "shall act expeditiously," id. Art. 4(5), albeit "in accordance with its rules of procedure," id. Art. 3(1). So too, a party invoking a qualifying settlement agreement as a defense, contending that a dispute has already been resolved by settlement, may do so only in accordance with the Convention country's rules of procedure.

Convention Defenses to Enforcement of Mediated Settlement Agreement

The party resisting enforcement of course has the burden of proof of grounds for a court's refusing to grant relief under the Convention. Id. Art. 5(1).

Like the New York Convention concerning arbitral awards, the Singapore Convention identifies limited grounds to decline summary enforcement of a mediated settlement agreement. See id. Art. 5. They concern the settlement agreement's (i) validity and enforceability under applicable law, (ii) finality, (iii) nature of terms, and (iv) prior performance. They also include severe misconduct of the mediator, provided it can be shown by the breaching/objecting party that it would not have entered into the settlement agreement absent that misconduct.

Finally, a court in a Convention country may decline to grant relief under the Convention (a) if granting such relief would be contrary to the public policy of that Convention country or (b) if the subject of the dispute is not settleable by mediation under the law of that Convention country. Id. Art. 5(2).

Commencing Proceeding Under Convention

When invoking the Convention, a party is required to supply to "the competent authority" of the Convention country: (a) the signed settlement agreement and (b) evidence that that agreement

resulted from mediation. Id. Art. 4(1). Examples of such evidence are described in the Convention. See id. Art. 4(1)(b).

Ratification and Reservation vis-à-vis the Convention

Finally, in order to bring the Convention into effect, a signatory state must ratify it, and such ratification may be qualified by one or two permitted "reservations". See id. Art. 8. One such reservation, which would affect the breadth of application of the Convention substantially, would require an agreement of the parties to a mediated settlement agreement that the Convention applies in order for it to have effect. Id. Art. 8(1)(b).

Authors

Gilbert A. Samberg, Member

Gilbert A. Samberg is a Mintz litigator with experience in complex international and domestic commercial disputes. He focuses on international arbitration and other cross-border alternative dispute resolution proceedings, drawing on his science background to assist biotech and chemical companies.

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The Singapore Convention
Promoting the Enforcement and Recognition of International Mediated Settlement Agreements

Edna Sussman

Edna Sussman (esussman@sussmanadr.com) serves on many institutional arbitration and mediation panels around the globe and is a full time independent arbitrator and mediator of complex commercial disputes. She is the Distinguished ADR Practitioner in Residence at Fordham University School of Law, Chair of the AAA-ICDR Foundation, Vice-Chair of the New York International Arbitration Center and on the Board of Directors of the American Arbitration Association. She has published extensively on arbitration and mediation subjects (https://sussmanadr.com).

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Current enforcement mechanisms for mediated settlement agreements vary widely across jurisdictions providing little certainty in international disputes. In recent years, there have been numerous calls by scholars, practitioners and users for the development of a mechanism for the uniform enforcement and recognition of international mediated settlement agreements. Following three years of effort, the UNCITRAL Working Group II successfully completed the drafting of a multilateral convention for enforcement and recognition titled 'The Convention on International Settlement Agreements Resulting from Mediation' which will be commonly known as the 'Singapore Convention'. The new convention was approved by consensus of UNCITRAL's Member States on 25 June 2018, at its fifty-first session. Parallel amendments have been made to the 2002 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation to add provisions that mirror those of the Singapore Convention. These new instruments promise to provide parties with a clear, uniform framework for the enforcement and recognition of international mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

Introduction

In 2002, the United Nations recognized that the use of mediation[1] 'results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States'.[2] The use of mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, the development of the IBA's rules for mediation of investor-state disputes, and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of mediation, it is generally viewed to be under-utilized. Many reasons have been offered to explain this. A commonly cited impediment is that settlement agreements reached in international disputes through mediation are more difficult to enforce across borders than arbitral awards.

To further the goal of promoting mediation of international commercial disputes, the United States proposed that the United Nations Commission on International Trade Law (UNCITRAL) Working Group II develop a multilateral convention for enforcement[3]. The US recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through mediation which conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization, just as under the

1 While the process was described in 2002 and in the early discussions of the new convention as 'conciliation', the more common and more useful term now is 'mediation' and, as discussed below, is the terminology that has now been adopted in the new convention and the amended model law.

2 *U.N. Comm'n on Int'l Trade Law, Model Law on International Commercial Conciliation*, at V, U.N. Sales No. E.05.V.4 (2002).

3 United Nations Commission on International Trade Law (UNCITRAL) is the core legal body of the United Nations system in the field of international trade law. UNCITRAL's business is the modernization and harmonization of rules on international business. Working Group II is assigned Arbitration and Conciliation.

New York Convention, they have their own procedures governing arbitration.[4] The US requested that this initiative be given high priority and explained:

> Solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.[5]

Thus, the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

After extensive discussions over a period of three years, on 25 June 2018, at its fifty-first session, UNCITRAL approved by consensus of its Member States a 'Convention on International Settlement Agreements Resulting from Mediation'. It will be commonly referred to as the 'Singapore Convention' upon adoption by the United Nations General Assembly and ratification by Member States starting as early as August 2019.[6]

I - Prior efforts

The basis on which mediated settlement agreements should be enforced has been the subject of much debate but no single mechanism for the enforcement of mediated settlement agreements had previously emerged.

There was a strong effort by those working on the *UNCITRAL Model Law on International Commercial Conciliation* ('2002 Model Law on Conciliation') to develop a uniform enforcement mechanism.[7] However, notwithstanding the effort made, that goal was not achieved. Article 14 provides:

> If the parties conclude an agreement settling a dispute, the settlement agreement is binding and enforceable, [the enacting state may insert a description of the method of enforcing the settlement agreement or refer to provisions governing such enforcement].

The comments to Article 14 recognized that 'many practitioners put forth the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would enjoy a regime of expedited enforcement or would for the purposes of enforcement be treated as or similarly to an arbitral award'.[8] The Commission supported 'the general policy that easy and fast enforcement of settlement agreements should be promoted'.[9] Notwithstanding that, because of the differences among domestic procedural laws, it was concluded that harmonization by way of uniform legislation was not feasible. Thus, the UNCITRAL provision left the enforcement mechanism in the hands of the local jurisdiction. The UNCITRAL failure to arrive at a definitive single enforcement mechanism has been criticized by some scholars as the major failing of this model law.

The *EU Mediation Directive*[10] recognizes the importance of enforcement and expressly stipulates at paragraph 19:

> Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties.

However, while the EU Mediation Directive calls in Article 6 for Member States to ensure that it is possible for parties to make a written agreement resulting from mediation enforceable, it leaves the mechanism to be employed to the Member State as it may be 'made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member state'.

4 'Proposal by the Government of the United States of America: future work for Working Group II', A/CN.9/822 (Jun. 2, 2014).

5 'Settlement of commercial disputes: Enforceability of settlement agreements resulting from international commercial conciliation/mediation — Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings', 7, A/CN.9/WG.II/WP.188 (Dec. 23, 2014).

6 The final text of the Singapore Convention and the companion Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation is forthcoming on the UNCITRAL's website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, the draft convention and draft amended Model Law have been made available by the Secretariat. *See* 'International Commercial Mediation: Draft Convention on International Settlement Agreements Resulting from Mediation', available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html; 'International Commercial Mediation: Draft Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation', A/CN.9/943 (Mar. 2, 2018). *See also* a commentary on the Singapore Convention by T. Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (August 27, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239527.

7 Supra note 2.

8 *2002 UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use*, at 55, U.N. Sales No. E.05.V.4 (2002).

9 Id.

10 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters.

The same result was reached by the drafters of the *US Uniform Mediation Act* ('UMA').[11] A concerted effort was made to develop a uniform enforcement mechanism. The final draft had included a provision allowing the parties to move jointly for a court to enter a judgment in accordance with the mediated settlement agreement, but the reviewing committees ultimately recommended against that provision. It was concluded that by the time the provision was circumscribed sufficiently to protect rights, the section would not add significantly to the law related to mediation and no enforcement mechanism was ultimately included in the UMA.

II - Calls for action

The desirability of an enforcement mechanism has been echoed repeatedly. As the years have passed since the UNICTRAL work on conciliation in 2002, mediation has increasingly come to be considered an important dispute resolution mechanism that should be developed and supported. Scholars,[12] practitioners and users have called for the development of an enforcement mechanism.

The *European Parliament's study* assessing the progress made in the five years following the promulgation of the EU Mediation Directive found that many concerns were expressed regarding the enforcement of settlement agreements, especially in cross-border disputes. The study 'suggested that if enforcement were uniform, mediation would become more attractive, in particular, in the international business sector'.[13]

A survey conducted by the *International Bar Association's Mediation Committee* in 2007 emphasized the importance of enforcement.

The results of the survey were summarized by the Committee:

> (T)he enforceability of a settlement agreement is generally of the utmost importance...
>
> [...]
>
> [I]n international mediation ... reinforcement is more likely to be sought because of the potential of expensive and difficult cross-border litigation in the event of a failure to implement a settlement.[14]

Recent surveys and comments by users uniformly reinforce the wisdom of the proposal made by the US and confirm that the development of a mechanism for the international enforcement of mediated settlement agreements is a project whose time has come and it would be a significant factor in encouraging and increasing the use of mediation.

In order to assist the Working Group II delegates in their consideration of the US proposal, a survey was conducted in the fall of 2014 by *S.I. Strong* to ascertain the need for and level of interest in such a mechanism.[15] The survey responses were compelling:

- An overwhelming majority of respondents, 74%, indicated that they thought an international instrument concerning the enforcement of settlement agreements arising out of an international commercial mediation or conciliation akin to the New York Convention would encourage mediation and conciliation, with 18% saying maybe.
- Only 14% felt that enforcement of a settlement agreement in their home jurisdiction would be easy when the settlement agreement arose out of an international commercial mediation or conciliation seated in another country.
- 93% said they would be more likely to use mediation and 87% thought it would be easier to come to conciliation in the first place if such a mechanism were in place.

11 The US Uniform Mediation Act was adopted by the National Conference of Commissioners on Uniform State Laws in 2001. A 2003 amendment to the UMA incorporated the 2002 Model Law on Conciliation into the UMA and provides that unless there is an agreement otherwise, the 2002 Model Law on Conciliation applies to any mediation that is 'international commercial mediation'.

12 See, e.g., Lawrence Boulle, 'International Enforceability of Mediated Settlement Agreements: Developing the Conceptual Framework', 7(1) *Contemp. Asia Arb. J.* 34 (2014); Chang-Fa Lo, 'Desirability of a New International Legal Framework for Cross-Border Enforcement of Certain Mediated Settlement Agreements', 7(1) *Contemp. Asia Arb J.* 119 (2014); Bobette Wolski, 'Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research', 7(1) *Contemp. Asia Arb. J.* 87 (2014).

13 Directorate-General for Internal Affairs, '"Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU' (2014), http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL-JURI_ET(2014)493042.

14 IBA Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation, IBA (Oct. 2007), https://www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.aspx

15 S. I. Strong, 'Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation' (Nov. 17, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. For a discussion of the methodology employed in the survey, see S.I. Strong, 'Large-Scale Empirical Study of International Commercial Mediation and Conciliation Provides Support to UNCITRAL Process', *N.Y. Disp. Resol. L*, Spring 2015, at 36.

In October and November 2014, the *International Mediation Institute* ('IMI') conducted a short survey of internal counsel and business managers to assist the Working Group's deliberations. The survey sought to assess the extent to which a mediation convention was desired.

- As to whether they would be more likely to mediate a dispute with a party from another country if they knew that country ratified a UN Convention on the Enforcement of Mediated Settlements and that consequently any settlement could easily be enforced, 93% responded that they would be likely to do so ('much more likely' or 'probably').
- In response to whether the existence of a widely-ratified enforcement convention would make it easier for commercial parties to come to mediation in the first place, 87% said yes ('definitely' or 'probably').
- With respect to whether the absence of any kind of international enforcement mechanism for mediated settlements presents an impediment to the growth of mediation as a mechanism for resolving cross-border disputes, 90% said yes ('major impediment' or 'a deterring factor').[16]

IMI also put a proposition to 150 delegates, comprised of users, educators, providers and advisors, at its conference in October 2014:

> An international convention is needed to ensure that any mediated settlement agreement ... could be automatically recognized and enforced in all signatory countries.

73% of all delegates voted in favor. A sorting of the votes by delegate affiliations showed that not one user disagreed.[17]

A 2015 study by the *Queen Mary University of London* further supported such an effort with a majority (54%) agreeing that a convention on the enforcement of settlement agreements resulting from a mediation would encourage the use of mediation.[18]

16 Edna Sussman, 'A Path Forward; a Convention for the Enforcement of Mediated Settlement Agreements', 12(6) *Trade Disp. Mgmt*. (2016).

17 Id.

18 Queen Mary University of London School of Int'l Arb. and White & Case, 'International Arbitration Survey: Improvements and Innovations in International Arbitration' (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

The most recent relevant survey results were developed at the *Global Pound Conference Series* (GPC Series), which convened more than 4,000 people at 28 conferences in 24 countries across the globe in 2016 and 2017.[19] The delegates who attended the GPC Series, and the hundreds who participated online, voted on a series of 20 Core Questions. In response to the question 'which of the following areas would most improve commercial dispute resolution' 51% selected legislation or conventions that promote recognition and enforcement of settlements, including those reached in mediation.[20]

Roland Schroeder, speaking on behalf of the *Corporate Council International Arbitration Group*[21] at the UNCITRAL Working Group II session held on February 3, 2015, echoed the clear message delivered by users and strongly supported the US effort. He reported that it is often a challenge to convince counterparties to engage in a mediation process and many decline both because the process does not have a sufficiently international imprimatur and because the result is not easily enforceable cross-border. He was of the view that a convention like the New York Convention would be a catalyst that would drive an increased use of mediation. He noted that the benefits of mediation are generally recognised, but once one is already in a dispute, there is considerable concern about enforceability, suggesting a clear need for a cross-border enforcement mechanism. Mr Schroeder reported that he personally had experiences where he tried to enforce a settlement agreement but was ultimately required to re-litigate the merits of the underlying dispute.[22]

III - Existing enforcement mechanisms

The process pursuant to which mediated settlement agreements may be enforced varies widely across jurisdictions. The UNCITRAL Secretariat circulated a questionnaire to all Member States on the legislative framework and enforcement of international settlement

19 Details about the GPC Series, global data trends, and regional differences are all available at **www.globalpound.org**. Also see, Amal Bouchenaki et al.; 'What Users Want and How to Address their Needs and Expectations Using the Results of the Global Pound Conference', *N.Y. Disp. Resol. L.*, Fall 2018 (forthcoming).

20 International Mediation Institute, GPC Series 'Cumulated Data Results' (2017), **https://www.globalpound.org/wp-content/uploads/2017/11/2017-09-18-Final-GPC-Series-Results-Cumulated-Votes-from-the-GPC-App-Mar.-2016-Sep.-2017.pdf**.

21 The Corporate Council International Arbitration Group (CCIAG) is an association of corporate counsel from approximately one hundred multinational companies which focuses on international arbitration and dispute resolution.

22 Confirmation on file with author.

agreements resulting from mediation to inquire as to (i) whether expedited procedures were already in place, (ii) whether a settlement agreement could be treated as an award on agreed terms, (iii) the grounds for refusing enforcement of the settlement agreement, and (iv) the criteria to be met for a settlement agreement to be deemed valid. The Secretariat reported that there was a great deal of interest in the subject. The wide variety of responses led the Secretariat to conclude that 'the diversity of approaches towards enforcing settlement agreements might militate in favor of considering whether harmonization of the field would be timely'.[23] The UNCITRAL report reviews a variety of methods for enforcement of mediated settlement agreements across jurisdictions.

In many jurisdictions, including the US, the principal method for enforcing a mediated settlement agreement is as a contract, an unsatisfactory result since that enforcement mechanism leaves the party precisely where it started in most cases, with a contract which it is trying to enforce. In the US, while there is a very strong policy favoring the settlement of disputes by agreement by the parties, and the courts, in fact, almost invariably uphold the mediated settlement agreements, the mediated settlement agreements nonetheless remain a contract, such that all contract defenses are available to the parties.[24]

In other jurisdictions, mediated settlement agreements can be entered as a judgment. If a lawsuit has been filed before the mediation has commenced, it is possible in many jurisdictions to have the court enter the settlement agreement as a consent decree and incorporate it into the dismissal order. The court may, if asked, also retain jurisdiction over the court decree. Even if there is no court proceeding, in some jurisdictions the courts are available to enter a judgment on a mediated settlement agreement. Some jurisdictions have expedited enforcement mechanisms where settlement agreements can be enforced in a summary fashion provided the requirements are met. Other jurisdictions have opted for a mechanism of deposition or registration at the court as a way of making a settlement agreement enforceable. The practice of requesting a notary public to notarize the settlement agreement is also prevalent in several jurisdictions as a means of enforcement. In yet other jurisdictions, acts by a notary are required to make a mediated settlement agreement enforceable.[25]

However, even if a court judgment on the mediated settlement agreement is available, the issue presented by cross border enforcement is not resolved. Court judgments and decrees have not been accorded the deference shown to arbitral awards which are recognized and enforced in the over 155 countries that are signatories to the New York Convention. Thus, even if a judgment or court decree can be obtained, the difficulty of enforcing a foreign judgment in an international matter often presents significant obstacles to enforcement and renders the judgment of diminished utility. This moreover leads to an anomalous result. As the US stated:

> [G]iven that the parties to a conciliated settlement consent to the substantive terms on which the dispute is resolved, a conciliated settlement should not be less easily enforceable than an award arising from arbitration in which the parties consented to the process of resolving the dispute, but the result itself is usually imposed on them.[26]

IV - Entry of an arbitration award based on mediated settlement agreements

At the UNCITRAL Working Group II sessions, certain delegates suggested that the simple solution was to have the mediated settlement agreement entered as an arbitral award which would then be recognized under the established enforcement mechanisms of the New York Convention. The rules of several institutions expressly provide that an agreement reached in conciliation can be entered as an arbitral award.[27] Some jurisdictions expressly provide for the entry of an arbitration award to record an agreement reached in mediation. For example, the California Code of Civil Procedure provides for such a process for international conciliations.[28]

23 Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation, 8, A/CN.9/WG.II/WP.187 (Nov. 27, 2014).

24 For a treatment of all contract defenses in the context of enforcing mediated settlement agreements, see Edna Sussman, 'Survey of U.S. Case Law on Enforcing Mediation Settlement Agreements over Objections to the Existence or Validity of such Agreements and Implications for Mediation Confidentiality and Mediator Testimony', *IBA Mediation Committee Newsletter*, Apr. 2006, at 32.

25 'Rebooting the Mediation Directive', supra note 13 (reporting a wide variety of enforcement processes in the States of the EU).

26 Supra note 5, at 8.

27 See, e.g., Article 14 of the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

28 Cal. Civ. Proc. Code § 1297.401 (West).

While the enactment of such provisions would seem to be a useful avenue for mediated settlement agreements enforcement,[29] the appointment of an arbitrator after the dispute is settled may not be possible in many jurisdictions because under local law, there must be a dispute at the time the arbitrator is appointed. For example, the English Arbitration Act of 1996 provides in its definition of an arbitration agreement in Section 6(1) that an 'arbitration agreement' means 'an agreement to submit to arbitration present or future disputes'. Similarly, New York state law provides that an 'agreement to submit any controversy thereafter arising or any existing controversy to arbitration' is enforceable.[30] As there is no *present or future dispute* or *controversy thereafter arising or existing* once the dispute is settled in mediation, such provisions may be construed to mean that it is not possible to have an arbitrator appointed to record the settlement in an award. Thus, it could be argued that any arbitral award issued by an arbitrator appointed after the settlement would be a nullity and incapable of enforcement under the laws of those jurisdictions.

Even if this impediment could be overcome by providing that the mediated settlement agreement be governed by the law of a country where such an arbitrator appointment is valid, the question of whether such an award would be enforceable under the New York Convention remains.

Institutional rules provide for entry of an award on agreed terms if the matter is settled during the pendency of the arbitration.[31] Some jurisdictions explicitly give consent awards the same status and effect as arbitral awards.[32] Article 30(2) of the UNCITRAL Model Law on International Commercial Arbitration provides:

> An award on agreed terms... shall state that it is an award. Such an award has the same status and effect is any other award on the merits of the case.

But can an award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved in mediation? Without this enforcement mechanism, such an arbitration award in an international dispute would not suffice to meet the parties' needs. Commentators that have analysed this question have come to differing conclusions. Some have concluded that it is not enforceable.[33] Others have concluded that it is.[34] While yet others conclude that the result is not clear.[35]

The relevant New York Convention section provides in Article 1(1) that the Convention applies to the recognition and enforcement of awards 'arising out of differences between persons'. The language of the New York Convention does not have the precise temporal element of such local arbitration rules as set forth in the definition of an arbitration agreement found in the English or New York law that require a 'present or future' dispute or a 'controversy thereafter arising or ... existing'. The reference to a 'difference' in Article 1(1) of the New York Convention does not specify when that 'difference' has to exist in time in relation to the time of the appointment of the arbitrator. Thus, the New York Convention language does not seem to expressly bar recognition of an award rendered by an arbitrator appointed after resolution of the dispute. But the differences of opinion as to the applicability of the New York Convention to consent awards issued by arbitrators appointed after a settlement agreement is reached suggests that the New York Convention is ambiguous on this point.[36]

Moreover, while it is generally accepted that consent awards are enforceable, at least if the arbitrators are appointed before the settlement is achieved,

29 See David Weiss & Brian Hodgkinson, 'Adaptive Arbitration: An Alternative Approach to Enforcing Cross-Border Mediation Settlement Agreements', 25(2) *Am. Rev. of Int'l Arb.* (2014) (urging the enactment of such legislation).

30 N.Y. C.P.L.R. 7501 (McKinney).

31 See, e.g., UNCITRAL Arbitration Rules 2013, Article 36 (Settlement or other grounds for termination); ICC Arbitration Rules 2017, Article 33 (Award by Consent); ICDR International Dispute Resolution Procedures 2014, Article 32 (Settlement or Other Reasons for Termination); LCIA Arbitration Rules 2014, Article 26.9 (Consent award); SIAC Arbitration Rules 2016, Article 32.10 (The Award); HKIAC Administered Arbitration Rules 2013 Article 36 (Settlement or Other Grounds for Termination).

32 See, e.g., Arbitration Act, 1996, c. 23 §51 (Eng.) ('An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.').

33 Christopher Newmark & Richard Hill, 'Can a Mediated Settlement Agreement Become an Enforceable Arbitration Award?' 16(1) *Arb. Int'l 81* (2000); James T Peter, Med-Arb in International Arbitration', 8 *Am. Rev. Int'l Arb.* 83, 88 (1997)

34 Harold I. Abramson, 'Mining Mediation Rules for Representation Opportunities and Obstacles', 15 *Am. Rev. Int'l Arb.* 103 (2004).

35 See Edna Sussman, 'The New York Convention Through a Mediation Prism', Dispute Resolution Magazine, 8 (Summer 2009); Ellen E. Deason, 'Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide', 80 *Notre Dame L. Rev.* 553 (2005) (see footnote 173). See also, Brette L. Steele, 'Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention', 54 *UCLA L. Rev.* 1385 (2007).

36 Singapore has taken steps to obviate this issue with the development of the SIAC-SIMC Arb-Med-Arb Protocol pursuant to which parties that wish to avail themselves of the Protocol can file an arbitration with the Singapore International Arbitration Center, have an arbitral tribunal appointed, have the case referred to mediation with the Singapore International Mediation Centre and have the settlement recorded as an arbitral award by the tribunal when the matter is settled. See Nadja Alexander, 'SIAC-SIMC's Arb- Med- Arb Protocol', *N. Y. Disp. Resol. L.*, Fall 2018 (forthcoming).

that matter too is not without some doubt.[37] The UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards states:

> The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue.[38]

Two recent decisions in the United States confirmed the enforceability of consent awards issued by arbitrators appointed before settlement was achieved.[39] However, decisions of the French courts raise some uncertainty.[40]

Apart from concerns about enforceability, practical considerations make the enforcement of the mediated settlement agreement by means of a consent award unattractive for many reasons. Even if an arbitrator is already in place, the flexibility of the mediation process may lead to a resolution that is beyond the scope of the arbitrator's authority. If an arbitrator is not already in place, the parties would be required to identify an arbitrator who is willing to rubberstamp a resolution, even though he or she has no knowledge of the parties or the issues in dispute. This would no doubt be a difficult and costly exercise.

The lack of a uniform and certain mechanism for the enforcement and recognition of international mediated settlement agreements and the repeated call for the development of such a mechanism begged for a solution. The US proposal offered the path forward to its development.

37 Yaraslau Kryvoi & Dmitry Davydenko, 'Consent Awards in International Arbitration: From Settlement to Enforcement', 40 *Brook. J. Int'l L.* 852 (2015).

38 *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 16-17, U.N. Sales No.: E.16.V.7 (2016).

39 *Albtelecom Sh.A v. Unifi Communications, Inc.*, 2017 WL 2364365 (S.D.N.Y. May 30, 2017); *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, 2018 WL 1251924 (S.D. Tex. Mar. 12, 2018).

40 *Société Viva Chemical (Europe) NV c APTD*, CA Paris, 9 April 2009, No 07/17769; *M A c Société´ B-C*, Cass civ 1e, 14 November 2012, (2013) *Rev arb* 138. The aforementioned case has been referred to as a 'death sentence for awards on agreed terms.' *See* Giacomo Marchisio, 'A Comparative Analysis of Consent Awards: Accepting their Reality', 32(2) *Arbitration International* 331, 343 (2016).

V - Working Group II deliberations: Issues raised and resolved

Launched by the US in 2014, over the course of the following years, the UNCITRAL Working Group II ('WGII') deliberations were conducted at eight UNCITRAL WGII sessions with 85 Member States and 35 non-governmental organizations participating. The delegates addressed and resolved numerous issues and looked for guidance both from the New York Convention and the 2002 Model Law on Conciliation.

For several issues that were difficult to resolve, the delegates continued to work on other aspects while leaving those for later resolution. In February 2017, a compromise proposal on those issues was achieved[41] and served to break through the impasse and ultimately led to the successful completion of the convention.

First, a seminal question was the form of the instrument. Some were of the view that the current divergence and, in some cases, non-existence of practice with respect to mediated settlement agreements did not lend itself to harmonization efforts through the preparation of a convention, but rather required a more flexible approach, offered by model legislative provisions. The model law would not aim at harmonizing respective legislative frameworks on mediation but focus on enforcement aspects, thus, harmonizing the approach to enforcement of settlement agreements, both in legislation and practice. Others expressed a strong preference for a convention since the 2002 Model Law on Conciliation was not widely adopted and a convention could more efficiently contribute to the promotion and harmonization of mediation given the cross-border nature of the enforcement and the need for a binding instrument to bring certainty. The success of international arbitration under the purview of the New York Convention of 1958 was emphasized as a reference and it was argued that a convention had additional benefits since it could provide State Parties flexibility through declarations or reservations, improving its chances of ratification by more States. As a compromise between the divergent views, it was agreed that WGII would prepare parallel instruments, complementary in nature: a model legislative text amending the 2002 Model Law on Conciliation, and a convention on the enforcement and recognition of international commercial settlement agreements resulting from mediation. The provisions of the draft amended model law would and do mirror in all essential respects the provisions of the convention.

41 Report of Working Group II (Dispute Settlement) on the Work of its Sixty-Sixth Session, 51-53, A/CN.9/901 (Feb. 16, 2017).

Second, consideration was given to whether an opt-in should be required. It was suggested that since mediation was by its nature a consensual process, the regime envisaged by the instrument should apply only where the parties consented to its application. An opt-in provision would ensure that parties were aware of the international framework to which they would be subjected and could avoid situations which they might not find desirable. Opposing views were expressed that making application of the convention the default would be more consistent with party autonomy because it is what parties would want and would reinforce that agreements should be respected. An opt-out, which the parties can include in their settlement agreement under the convention, would provide party autonomy and would be more consistent with the purpose of the convention. Moreover, an opt-in as a practical matter limits the draft instrument's application. Numerous studies have demonstrated that where a choice is required to opt-in, few elect it.[42] It was noted that the New York Convention does not have an opt-in provision. It was further suggested that it was counterintuitive to request parties to confirm their consent to enforce their obligations under a settlement agreement. Moreover, there was concern that allowing flexibility on this issue could result in an imbalance between parties in different jurisdictions as the settlement agreement might be enforceable in one jurisdiction, but not in another. It was agreed that the convention would apply by default but that State Parties could include a reservation that the convention would only apply to the extent that the parties to the settlement agreement had agreed. A parallel footnote is inserted in the draft model law as an optional provision.

Third, whether or not the convention would provide for recognition of a mediated settlement agreement when it is presented to a State's competent authority by a party to prove that a claim brought against it had already been settled and resolved was a subject on which it was difficult to achieve consensus. Following further discussions, it was agreed that the convention would not only cover enforcement of mediated settlement agreements but also their recognition - and would do so without using the term 'recognition' - which was seen to imply different procedural consequences in different legal systems.

Fourth, in assessing the grounds for refusing to grant relief, there was concern that if there were too many bases upon which a party could resist enforcement, it would be an invitation to extensive and protracted litigation which would defeat the purpose of the convention. There was a particularly vigorous debate as to whether there should be any defenses based on the conduct of the mediator or a mediator's failure to make disclosures related to independence and impartiality, since that would open the door to some of the gamesmanship that has become problematic in the context of enforcement under the New York Convention. Others felt that it was crucial that these grounds be included in order to ensure the fairness of the mediation process. As part of the package of compromises, it was agreed that grounds related to the conduct of mediators would be included as grounds for refusing to grant relief but that they would only apply in narrow circumstances.

Fifth, there had been ongoing discussions as to how to handle mediated settlement agreements which resulted in a consent award or a court judgment. While some delegates disagreed, many thought it was essential to exclude mediated settlement agreements in these contexts in order to avoid conflicts with other enforcement mechanisms available pursuant to the New York Convention, the Hague Convention on Choice of Courts and the Hague Convention on Foreign Judgments in Civil and Commercial Matters. It was agreed that these would be excluded.

Other material issues considered included whether the convention should include enforcement of agreements to mediate, just as the New York Convention provides for enforcement of agreements to arbitrate. Whether or not agreements to mediate are enforceable and whether they are considered conditions precedent that preclude the progression to employing other dispute resolution modalities varies across jurisdictions. Moreover, mediations are not always employed by parties pursuant to an agreement and it was considered too difficult to achieve consensus on including enforcement of agreements to mediate. Thus, the consensus view was that the convention should be limited to only mediated settlement agreements.

What to call the process that was being addressed was the subject of considerable discussion. While there was some desire to preserve the word 'conciliation' which was the term used in previous UNCITRAL instruments, there was recognition of the fact that the term 'mediation' was currently more commonly and more broadly used. Moreover, some view conciliation as a process in which the neutral facilitator suggests a solution whereas mediation is a broad term that

42 See, e.g., SPARQ Social Psychological Answers to Real-World Questions, 'Opt Out' Policies Increase Organ Donation, Stanford, **https://sparq.stanford.edu/solutions/opt-out-policies-increase-organ-donation** (last visited Aug. 15, 2016) (demonstrating that in opt-out countries 90% of the population donates their organs while in such countries as the U.S. and Germany which are opt-in countries fewer than 15% donate their organs at death).

encompasses a variety of process design modalities. It was concluded that the word mediation would be used instead 'in an effort to adapt to the actual and practical use of the terms and with the expectation that this change will facilitate the promotion and heighten the visibility of the [Convention/ Model Law]'.[43] The change in terminology is not intended to have any substantive or conceptual implications.

Adopting what may be an emerging tradition in WGII, the new Convention on International Settlement Agreements Resulting from Mediation will be commonly referred to as the 'Singapore Convention', in honor of the home jurisdiction of the very able chair, Natalie Morris–Sharma of the Singapore Ministry of Law, who shepherded the deliberations in WGII. This designation follows the designation of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration as the Mauritius Convention on Transparency in honor of Salim Moollan from Mauritius, who chaired WGII in its deliberations on that convention.

VI - The Singapore Convention text

The final text of the Singapore Convention (the 'Convention') has not yet been released at the time of this writing. However, it is anticipated that no significant changes will be made. This review of the articles of the Convention is based on the draft of the Convention reviewed and approved at the United Nations Commission on International Trade Law at its 51st session held in June, 2018 subject to any further modifications provided by the Commission.[44]

Preambles

The Parties to the Convention recognized the value for international trade of mediation as a method for settling commercial disputes, noted the increasing use of mediation as an alternative to commercial litigation, considered the significant benefit in facilitating the administration of international transactions and producing savings in the administration of justice, and are convinced that the establishment of a framework for international settlement agreements resulting from mediation would contribute to the development of harmonious international economic relations.

Scope of application (Article 1)

Article 1 defines the essential parameters of the Convention. It identifies the requirements necessary for a settlement agreement to fall within the scope of the Convention, and it specifies the exclusions.

The Convention requires that the settlement agreements resulting from mediation be:

1) In 'writing'.
2) 'International' at the time of its conclusion based primarily on the place of business of the parties. The definition tracks the definition in the 2002 UNCITRAL Model Law on International Commercial Conciliation and resolved the debate as to when the international nature of the dispute should be determined in favor of ascertaining coverage at the time of the mediation's conclusion;
3) Specifies that it be 'commercial' by excluding transactions engaged in by one of the parties (a consumer) for personal, family or household purposes or relating to family inheritance or employment law. With these limitations, the Convention avoids conflicts with local mandatory laws that address disputes that arise in connection with such transactions and relationships.
4) Excludes categories of settlement agreements that have been approved by a court or concluded in the course of proceedings before a court and enforceable as a judgment and settlement agreements that have been recorded and are enforceable as an arbitral award.

Definitions (Article 2)

Article 2 provides further specification as to the meaning of certain terms.

1) The Convention clarifies further Article 1's 'internationality' requirement. It provides the solution to a situation where a party has more than one place of business. In such a case, the relevant place of business is the one that has closest relationship to the dispute resolved by the settlement agreement. Where the party does not have a place of business, the Convention prescribes that reference be made to the party's habitual residence.
2) The Convention then expands on what it means by 'writing.' and reflects that the writing requirement may be satisfied by various forms of electronic communication.

43 International Commercial Mediation: Preparation of Instruments on Enforcement of International Commercial Settlement Agreements Resulting from Mediation, paras. 4-5, A/CN.9/WG.II/WP.205 (Nov. 23, 2017).

44 Supra note 6.

3) The Convention defines 'mediation' as 'a process, irrespective of the expression used or the basis upon which the process is carried out, where parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator"), lacking the authority to impose a solution upon the parties to the dispute'.

The Convention deliberately avoided defining 'mediation' *prescriptively* so as to allow for the wide range of differences in the understanding of the term among different jurisdictions. How mediations are conducted and what process modalities are permitted in mediation vary across jurisdictions. The Convention's broad definition resolves those differences by offering a definition that is simple and does not introduce any rigidity. It does not prescribe a specific technique of mediation; for example, the Convention does not specify whether the mediation must be evaluative, facilitative, or transformative, does not address whether or not caucus sessions can be used, and does not address whether or not the mediator can propose solutions. The Convention's usage of broad phrases provides coverage for all mediations, however, the process is carried out in different jurisdictions and by different mediators.

General principles (Article 3)

Article 3 addresses the obligations of the Parties to the Convention and provides both for affirmative enforcement of mediated settlement agreements and for recognition of mediated settlement agreements as a defense if a party seeks to relitigate a dispute already resolved in mediation.

1) Under the Convention, the Parties to the Convention have the substantive obligation to enforce a settlement agreement (subject to the exceptions, of course) 'in accordance with its rules of procedure.' With this provision, the drafters deftly circumvented the fact that enforcement mechanisms for mediated settlement agreements vary across jurisdictions, a fact which had stymied the earlier efforts to achieve an enforcement mechanism for cross-border mediated settlement agreements. Like the New York Convention which leaves procedural issues to be governed by the law of the seat, this Convention leaves those procedural issues to be governed by the State of enforcement.

2) The General Principles also addresses the claim which a party considers to be an attempt to relitigate a dispute already resolved in mediation and provides for recognition of a mediated settlement agreement. By meeting all the conditions set in the Convention, a party seeking relief would be allowed to prove that the dispute had been settled. Here again, the rules of procedure are the prerogative of the Party to the Convention.

Requirements for reliance on settlement agreements (Article 4)

Article 4 addresses what a party seeking to rely on the settlement agreement must provide to satisfy the Convention's requirements. The delegates vigorously debated whether or not confirmation in the state where the mediation took place should be required before enforcement could be sought elsewhere. It was concluded that there should be no such requirement. As a practical matter, it did not make sense. A mediation in a cross-border dispute might well take place in a jurisdiction with no connection to the parties or to the dispute. And more importantly, as was decided with respect to the New York Convention, requiring such a confirmation would require a double exequatur and contribute significantly to the complexity and cost of any enforcement process, precisely what the Convention is intended to remedy.

The draft Convention specifies what a party relying on a settlement agreement must supply to the competent authority of the Party to the Convention where relief is sought.

1) A settlement agreement signed by the parties.

2) Evidence that the settlement agreement resulted from mediation, which may be satisfied by the mediator's signature on the agreement, attestation by the mediator that a mediation was carried out, or an attestation by the administering institution. In order to allow for situations where none of these are available and to preserve the flexibility of the process, the Convention permits evidence of the fact that the mediation took place by means of any other evidence acceptable to the competent authority. A signature or an attestation would be only to prove the mediator's involvement in the process and is not to be construed as an endorsement of the settlement agreement nor as an indication that the mediator was a party to the settlement agreement. This requirement followed extensive deliberations by the delegates as to whether an unassisted negotiation which leads to a settlement agreement should also be covered by the

Convention. Delegates questioned whether there was a sound basis for distinguishing between those two contexts. Persuaded that mediation provides a qualitatively different process with many jurisdictions regulating the manner in which the mediation must be conducted and the conduct of mediations by many certified mediators, it was concluded that the Convention should be limited to mediated settlements. It is noted that the draft Model Law provides in footnote 5 that a State may consider the application of the Model Law to agreements settling the dispute irrespective of whether they resulted from mediation.

3) The draft Convention expands on how the requirement that a settlement agreement shall be signed by the parties or, where applicable, the mediator, is met in relation to an electronic communication.

Grounds for refusing to grant relief (Article 5)

Article 5 is intended to encompass both the right of a party to seek enforcement as well as to invoke a settlement agreement. And both these reliefs may be refused by the competent authority if the objecting party furnishes the requisite proof with respect to any of the grounds provided under Article 5.

The development of these grounds for refusing to grant relief was extensively discussed by the delegates. It was concluded that the limited grounds of the New York Convention were insufficient in the context of a mediated settlement agreement where other potential defenses must be addressed. But it was important to limit the available grounds only to those that were necessary so as to prevent litigation over enforcement and defeat the purpose of the Convention. The grounds finally included in the Convention were the result of a compromise solution achieved by the delegates. The grounds track many, but not all, of the defenses available in resisting enforcement of a contract and include issues related to mediator conduct. The Convention further adopts two of the principal grounds specified in the New York Convention.

Relief may be refused by the competent authority if the party opposing enforcement or recognition of a mediated settlement agreement furnishes proof with respect to any of the following grounds:

Substantive grounds	> Incapacity of a party to the settlement agreement, or > Settlement agreement is null and void, inoperative or incapable of being performed under the law to which the parties have subjected it, or failing any indication, under the law applicable by the competent authority where relief is sought.
Grounds relating to the terms of the settlement agreement	> The settlement agreement is not binding, or is not final, according to its terms, or > The settlement agreement has been subsequently modified, or > Obligations in the settlement agreement have been *performed* or are *not clear or comprehensible*, or > Granting relief would be contrary to the terms of the settlement agreement.
Grounds relating to the mediator's conduct and the process	> Serious breach by the mediator of standards applicable to the mediator or the mediation without which breach the party would not have entered into the settlement agreement, or > Failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence.
Sua moto/ sua sponte grounds invokable by the competent authority of the Party to the Convention where relief is sought or a requesting party	> Granting relief would be contrary to the public policy of that Party, or > The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

Parallel applications or claims (Article 6)

Article 6 grants discretion to the competent authority to adjourn the decision and/or order security in situations where the decision of another court or arbitral tribunal may affect the relief being sought before it. The provision applies to both when enforcement of a settlement agreement is sought and when a settlement agreement is invoked as a defense.

Other laws or treaties (Article 7)

Article 7 preserves a Party's right to avail itself of a settlement agreement pursuant to other laws or treaties to which the Contracting State may be a party.

Reservations (Article 8)

Article 8 addresses two issues vigorously debated by the delegates: whether the Convention should apply to governments or governmental entities, and whether the parties should be required to opt-in for the Convention to apply. The compromise achieved by the delegates was to make these issues the subjects of permissible reservations.

1) The Convention provides State Parties with the option to make the following reservations:
   a. *States and other public entities:* This reservation permits a Party to the Convention to provide that the Convention will not apply to settlement agreements to which it or any government, governmental agency or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.
   b. *Opt-in*: This reservation permits a Party to the Convention to provide that the Convention will only be applicable if the parties opt-in, and have affirmatively agreed to the application of the Convention
2) No other reservations are permitted.

Generally, the rest of the provisions on reservations deal with temporal determinations of the applicable reservation, their confirmation and deposition with the depositary, and withdrawals.

Effect on settlement agreements (Article 9)

Article 9 specifies that the Convention and any reservation or withdrawal applies only to settlement agreements concluded after the date on which the Convention, reservation or withdrawal enters into force for the Party to the convention concerned.

Depositary (Article 10)

Article 10 designates the Secretary General of the UN as the depositary of this Convention.

Signature, ratification, acceptance, approval, accession (Article 11)

Article 11 opens the Convention for signature. In the context of the place of signing of the Convention, the delegation of Singapore expressed an interest in hosting a ceremony for the signing of the Convention, once adopted. That proposal was welcomed and supported by the WGII delegates and it was agreed to make the corresponding recommendation to the Commission.

Participation by regional economic integration organizations (Article 12)

Article 12 facilitates a regional economic integration organization ('REIO') in becoming a Party to the Convention. REIOs that accede to the Convention shall have the rights and obligations of a Party to the Convention to the extent that the organization has competence over matters governed by the Convention. At the time of accession, the REIO shall make a declaration specifying the matters in respect of which competence has been transferred to that organization by its Member States. The Convention specifies the circumstances under which the Convention should not prevail over conflicting rules of an REIO.

Non-unified legal systems (Article 13)

Article 13 permits Parties to the Convention to declare that the Convention would extend to all its territorial limits or only to one or more of them. State Parties may make such declaration at the time of signature, ratification, acceptance, approval or accession. Moreover, Parties to the Convention shall be free to amend its declaration by submitting another declaration at any time.

Entry into force (Article 14)

Article 14 provides that it shall enter into force six months after the date of deposit of the third instrument of ratification, acceptance, approval, or accession.

Amendment (Article 15)

Article 15 provides that any State Party may propose an amendment by submitting it to the Secretary General of the UN, who shall communicate the proposed amendments to the rest of the State Parties. A conference shall be convened if at least one-third of the State Parties favor such a conference. The adoption of any amendment would require a two-thirds majority vote of the State Parties present and voting at the conference.

The Convention also provides that amendments should enter into force for Parties to the Convention only when they expressly consent to it.

Denunciations (Article 16)

Article 16 provides that a State Party may denounce the Convention by a formal notification in writing addressed to the depositary (the Secretary General of the UN). Such denunciation shall take effect twelve months after the notification is received by the depositary.

However, it must be noted that the Convention shall continue to apply to settlement agreements concluded before the denunciation takes effect.

Conclusion

The Singapore Convention will deliver the uniform enforcement and recognition mechanism for international mediated settlement agreements which has long been called for by scholars, practitioners, and users. It has already gained recognition. For example, the proposed changes to the ICSID rules on conciliation specifically suggests that the parties sign a settlement agreement embodied in the report so that parties in ICSID conciliation proceedings can benefit from the enforcement regime for mediated settlements contemplated by the Singapore Convention.[45] The invitation to accede to the Convention will shortly be before the State Parties. Their accession will ensure the success of the UNCITRAL effort, and pave the way for a clear, uniform framework for the enforcement and recognition of mediated settlement agreements that will enable users of mediation to reap the benefits of their agreed solutions and drive the increased use of mediation just as the New York Convention drove the increased use of arbitration.

45 'ICSID, Proposals for Amendment of the ICSID Rules — Synopsis', para. 95 (Aug. 2, 2018), https://icsid.worldbank.org/en/Documents/Amendments_Vol_One.pdf.

UNPUBLISHED ARTICLE FOR CARDOZO DISPUTE RESOLUTION SYMPOSIUM

FROM SKEPTICISM TO REALITY—THE PATH TO THE CONVENTION FOR THE ENFORCEMENT OF MEDIATED SETTLEMENTS

Deborah Masucci[*]

I. INTRODUCTION

The United States Delegation[1] to the United Nations Commission on International Trade Law's ("UNCITRAL") Working Group II submitted a proposal for the Convention for the Enforcement of Mediated Settlements ("Convention") in May 2014. The proposal was met with skepticism. Delegates questioned the necessity of a convention citing past discussions where similar proposals were tabled. Some commentators went so far as to call the proposal the "Mediators Full Employment Act." Despite the pushback, the Working Group II decided to proceed with discussions to determine what a convention would look like while gathering more information from business users about the need for a convention. What followed can only be described as multi-party cross-border mediation.

Clearly the mediation community supported a convention. The real interest was to find out whether there is a business interest for a convention. Surveys were scoured to examine viewpoints and new surveys were launched to measure interest including the Global Pound Conference Series. So what information was gathered and how did the process unfold, and what impact will the Convention have on the practice of mediation globally?

II. IS THERE BUSINESS INTEREST FOR A CONVENTION AND ADOPTION IMPACT MEDIATION USE?

There were several surveys or studies undertaken during the Working Group II deliberations. These included: the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration conducted by Queen Mary, University of London and White and Case[2] (Queen Mary/White and Case); the International Mediation Institute[3] (IMI) 2016 International Mediation & ADR Survey;[4] Report on International Mediation and Enforcement

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[*] Deborah Masucci is an arbitrator and mediator who is also co-Chair of the Board of the International Mediation Institute. She is a global expert on dispute management and resolution with over thirty years of experience in the field and an adjunct at Fordham Law School. For more information about her background, see MASUCCI DISPUTE MANAGEMENT AND RESOLUTION SERVICES, www.debmasucciadr.com.

[1] The United States is one of sixty member States that consider proposals for recommendation and adoption by UNCITRAL.

[2] WHITE & CASE, QUEEN MARY UNIVERSITY OF LONDON, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION (2015), https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf [hereinafter WHITE & CASE SURVEY].

[3] IMI is a not-for-profit charitable organization established under Netherlands law. IMI promotes high standards for the practice of mediation and offers certification criteria for mediators, mediation advocates, inter-cultural, and training. For more information, see INTERNATIONAL MEDIATION INSTITUTE, www.imimediation.org (last visited Mar. 24, 2019).

[4] *Results Published—IMI 2016 International Mediation & ADR Survey*, IMI, https://www.imimediation.org/2016/10/16/results-published-imi-2016-international-mediation-adr-survey/ (last visited Mar. 24, 2019); *see also* INTERNATIONAL MEDIATION INSTITUTE, 2016 INTERNATIONAL MEDIATION & ADR SURVEY (2016), https://www.imimediation.org/wp-content/uploads/2018/02/2016_Biennial_Census_Survey_Report_Results.pdf [hereinafter IMI SURVEY].

Mechanisms: Issued by the Institute for Dispute Resolution (IDR) New Jersey City University (NJCU) School of Business;[5] and the global and local reports from the Global Pound Conference Series.[6] What did they say?

In 2015, Queen Mary/White and Case published its International Arbitration Survey. There were 763 questionnaires received and 105 interviews.[7] After reviewing the data, the survey reports that a convention on enforcement of mediation agreements and settlement agreements resulting from mediations may or may not have any effect on the practice of mediation, particularly in terms of encouraging the use of mediation. The reason for this lack of a conclusion was because of the large number of "not applicable" answers given when respondents were asked whether, over the past five years, they had experienced difficulties enforcing agreements to mediate or whether they had experienced difficulties enforcing settlement agreements resulting from a mediation.

Since the focus of the survey was international arbitration, it was unsurprising that less than half of the respondents (44%) indicated they used mediation to resolve cross-border disputes when asked about their experience with different types of alternative dispute resolution (ADR) processes. Despite the lack of experience, 54% of respondents stated that a convention on the enforcement of settlements resulting from mediation would encourage them to use mediation more frequently.

There were both positives and negatives gathered from interviews about attitudes toward a convention. Proponents believed that a convention similar to the New York Convention for Arbitration Awards as well as any initiative that would give mediation more "teeth" would increase its popularity among users.[8] Some interviewees went further, believing that the limited use of mediation is a result of a deficient understanding of the benefits. Further, they thought that the demystification of "mediation voodoo" could increase its popularity.[9] Education through the adoption of a convention might go a long way to address this barrier to the use of mediation. On the opposite side, some interviewees already believe they are strong proponents of mediation and a convention would not increase their use of mediation. Others simply resisted enforcement of mediation agreements. Still, some interviewees believed that a convention is a solution looking for a problem.[10]

The IMI 2016 International Mediation and ADR Survey gathered statistics from 813 respondents[11] providing insights of stakeholders regarding Mediation and Appropriate Dispute Resolution Awareness globally. A majority of all stakeholders except mediators and educators stated that the enforcement of mediation outcomes is extremely important.[12] This was the first

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[5] *Survey on the Enforceability of Mediated Settlement*, IMI, https://www.imimediation.org/research/surveys/survey-enforceability-mediated-settlement/ (last visited Mar. 24, 2019); *see also* SING. REF. BK., David S. Weiss & Michael R. Griffith, *Report on International Mediation and Enforcement Mechanisms*, 20 CARDOZO J. CONFLICT RESOL. (2019) [hereinafter IDR REPORT].

[6] *Global Pound*, IMI, https://www.imimediation.org/research/gpc/ (last visited Mar. 24, 2019); *see also* GLOBAL POUND CONFERENCE SERIES: GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES (2017), Global-Data-Trends-and-Regional-Differences.pdf [hereinafter GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES].

[7] Respondents included in-house counsel, private practitioners, arbitrators, academics, experts, institutional staff, and third-party funders.

[8] *See* WHITE & CASE SURVEY, *supra* note 2, at 31.

[9] *Id.*

[10] *Id.* at 32.

[11] Respondents included users, advisors, service providers, educators, students, and government/non-governmental organization (NGO) stakeholders and mediators. Respondents also represented 67 countries speaking 49 different languages. *See* IMI SURVEY, *supra* note 4, at 5 (discussing further details).

[12] *See* IMI SURVEY, *supra* note 4, at 25.

time regional disparity was uncovered on the importance of enforcement of mediation settlements. Enforcement of mediations constituted the lowest level of extreme importance in North America and Australia/NZ, compared to higher levels in other regions.[13] This result may reflect a greater experience with the mediation process in North America and Australia/NZ and support of mediation through judicial enforcement of settlement agreements.

The Report on International Mediation and Enforcement Mechanisms: Issued by the IDR of the NJCU School of Business sought responses particularly from users about the effect of a convention on their attitudes towards mediation of cross-border disputes. Users/respondents answered (80%) that they would be more likely to include a mediation clause into their agreements if there was a global mechanism to enforce cross-border mediated settlements.[14] Similarly, users (84%) responded that they were more likely to increase their use of mediation to resolve cross-border disputes if there was a mechanism to enforce settlements secured through mediation.

The final survey was accomplished under the umbrella of Global Pound Conference events. Between March 2016 and June 2017, 28 such events were held in 24 countries with more than 3,000[15] participants. The same 20 questions were posed at each event to attendees who voted their opinions before discussing the different views. Towards the end of the series, there was an opportunity for interested persons not able to physically attend an event to participate in an on-line survey covering the same questions. Approximately 750 people participated in this on-line survey.

Participants were divided into 5 categories[16]: 1) Parties that are end-users of dispute resolution, generally in-house counsel and executives (15%); 2) Advisors, private practice lawyers, and other external consultants (25%); 3) Adjudicative Providers such as judges, arbitrators, and their supporting institutions (13%); 4) Non-Adjudicative Providers such as mediators, conciliators, and their supporting institutions (32%); 5) Influencers such as academics, government officers, and policy makers (15%). The category was self-selected by the respondents after being asked in which pocket they spend most of their time.

The twenty questions were divided into 4 categories: 1) Access to Justice & Dispute Resolution Systems: What do users want, need, and expect?; 2) How is the market currently addressing parties' wants, needs, and expectations?; 3) How can dispute resolution be improved? Overcoming obstacles and challenges; 4) Promoting better access to justice: What action items should be considered and by whom?[17]

Two questions provided insight into business interest for a convention. First, Session 3 Question 3 asked which areas would improve commercial dispute resolution? The global results reflecting all events and on-line voting reflect that the adoption of a convention would most improve commercial dispute resolution. This was the first choice for all stakeholders (over 50% for each of the stakeholder groups) except mediation providers who selected use of protocols. The second choice selected is the use of protocols promoting mediation before litigation or similar adjudicative processes. Here, mediation providers selected adoption of a convention as their second choice. Clearly the adoption of a convention was seen as a priority to improve commercial dispute resolution. When looking at local results, in 15 events including the on-line reporting, users selected adoption of a convention as their first choice. In 10 events users included the

[13] *Id.*
[14] *See* IDR REPORT, *supra* note 5, at 14.
[15] *See* GLOBAL DATA TRENDS AND REGIONAL DIFFERENCES, *supra* note 6, at 2.
[16] *See id.* at 6.
[17] *See id.* at 7.

adoption of a convention in their top 3 choices.[18] Second, Session 4 Question 3 asked where policy makers should focus their attention to promote better access to justice for those involved in commercial disputes. Users and advisors believe that policy makers should focus their attention on a convention and legislation in their top 3 choices in 22 events including the on-line voting.

Two questions provided interest about how mediation will be used in the future and who is best positioned to bring about change. First, Session 3 Question 2 asked what processes and tools should be prioritized to improve the future of commercial dispute resolution. Overwhelmingly, the responses in all events indicated an interest in combining binding and non-binding processes. This result evidences that mediation is gaining support not only as a stand-alone process but also in case management approaches. As the data is analyzed, it is clear that users have the most interest in combining processes. They are willing to test the timing to meet the needs of the individual case and are flexible about integrating mediation whether as a preliminary step to other adjudicative processes or at key milestones as a matter moves through the dispute resolution spectrum.[19] Surely, a convention will compliment this increased use in mediation processes by strengthening enforcement of settlements without having to rely on arbitration or litigation. Second, Session 3 Question 5 asked which stakeholders have the potential to be most influential in bringing about change in commercial dispute resolution. Governments and ministries of justice, as well as courts and adjudicators, are seen as having a pivotal role in influencing future change. However, in terms of sustaining change, respondents rely on in-house counsel, advisors, and parties. Here is where regional and cultural differences in approach may have a hand in change. In Asia, roll-up responses reflect the importance of governments and ministries of justice having a primary role in creating change. In North America and other parts of the world, courts' active promotion of mediation through court annexed programs, including the establishment of court ADR programs, are driving greater use of mediation and enforcement of pre-dispute resolution agreements.

III. How did the Working Group II Process Unfold?

For many who participated as delegates or observers, the Working Group II deliberations proceeded very much like a multi-party mediation. The Chair of each session served as the lead mediator, framing questions, feeding back commentary by delegations and observers by reframing and synthesizing, summarizing conclusions and next steps, and providing homework during breaks between sessions. The member state delegations might be seen as the mediation parties. When discussions started, the member state delegations included arbitrators in their ranks. It quickly became clear that mediation experts were also needed so the composition of the delegations either changed or were expanded to include them. The mediation experts in each of the delegations and the observer groups served as co-mediators, especially during consultation breaks. When the Working Group was in session, convening all delegates, it served as a joint session with the consultation breaks operating as private caucuses. The Secretariat was the Chair's expert arm. They provided information on previous deliberations or rules and decisions as well as drafting

[18] In two events, adoption of a Convention was the fourth choice and in two events no users responded to this question.

[19] IMI, the College of Commercial Arbitrators, and the Straus Institute for Dispute Resolution, Pepperdine School of Law established a Mixed Mode Task Force to develop practical guidance for mixed mode processes including ethical considerations. *See Mixed Mode Task Force*, IMI, https://www.imimediation.org/about-imi/who-are-imi/mixed-mode-task-force/ (last visited Mar. 24, 2019).

advice to reduce internal conflict among previously adopted UNCITRAL Conventions. During and between sessions, educational programs were conducted to ensure a constant flow of information supporting decision-making. Between sessions, member state delegations conferred with their ministries of justice and governments because outcomes would ultimately have to be considered for adoption by them. It was up to the member delegations to explain deliberations and decisions as well as bring concerns back to the next Working Group session. In the end the Secretariat provided advice as to a way forward by recommending the adoption of both a convention and uniform law. As in any mediation involving governments or boards of directors, it is not up to the member state delegations to convince the member states to adopt the Convention or model law. Here's where the real work starts.

IV. WHAT IMPACT WILL THE CONVENTION HAVE ON THE PRACTICE OF MEDIATION GLOBALLY?

In 2014, a comment was published in the Kluwer Arbitration Blog opining that mediation growth has stalled.[20] While the comment was published to provide rationale for the Global Pound Conference, the reasoning is equally relevant to the impact the Convention will have on the practice of mediation globally. While mediation is established in a number of countries there is still an opportunity for huge expansion. The surveys described herein all focus on cross-border commercial dispute resolution, where a convention would have a greater impact rather than disputes that are local or national in nature. When these surveys were launched mediation was almost never used in investor-state cases, international trade disputes, class actions, or other cross-border commercial disputes. Mediation is available under international arbitration rules but too often parties don't take advantage of the process.

The Queen Mary/White and Case study found it was inconclusive whether the adoption of a convention would have an impact on the future growth of mediation. But as stated above, 54% of respondents replied that a convention on the enforcement of mediation settlements would encourage them to use mediation more frequently. The IDR survey reported that users were more likely to include pre-dispute clauses and use mediation for cross-border disputes if a convention for enforcement of mediation settlements was available. The Global Pound Conference series results were the strongest in naming a convention a priority to improve dispute resolution of commercial disputes in the future. These results foreshadow a future increase in the use of mediation for cross-border commercial disputes.

One area where we already have seen interest is in the use of mediation to resolve investor-state disputes. Since 2014, IMI has been working with the investor-state community to advance the use of mediation through training and rulemaking conducted by its Investor-State Task Force.[21] This work includes delivering training to interested parties and mediators, developing standards, and commenting on rule making and protocols offered by the International Centre for the Settlement of Investment Disputes, the Energy Charter Secretariat, UNCITRAL, the European Union, and others. A convention will only push interest and action further.

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[20] *See* Deborah Masucci, *Time for Another Big Bang in Alternative Dispute Resolution: The World Needs a Global Pound Conference*, KLUWER MEDIATION BLOG (Feb. 18, 2014), http://mediationblog.kluwerarbitration.com/2014/02/18/time-for-another-big-bang-in-alternative-dispute-resolution-the-world-needs-a-global-pound-conference/.

[21] *See Investor-State Mediation Task Force*, IMI, https://www.imimediation.org/about-imi/who-are-imi/ism-tf/ (last visited Mar. 24, 2019).

However, a convention alone is not the final answer. Since its establishment in 2007, IMI has promoted global standards for mediation practice. Part and parcel of these standards is ensuring the quality of mediators and the practice of mediation through certification and quality control. This infrastructure needs to be reinforced to ensure confidence and trust.

While a convention is seen as the priority to improve commercial dispute resolution in the future, certification systems[22] (29%) and quality control (28%) were high on the list of options that respondents sought. However, certification has been resisted. Proponents of certification believe it is a process to ensure quality by providing objective, measurable criteria for the performance of mediation. Opponents believe certification is unnecessary because the market self-regulates when users select mediators who they or someone they respect trusts mediators with a proven track record.

To begin with, there needs to be clarification of terms.[23] An individual who takes a mediation course receives a diploma acknowledging that the person understood the course material. The real test comes as the person secures case appointments. After receiving a diploma, the person may or may not be eligible to be placed on provider rosters. Inclusion on a roster is a form of attestation that the person has what it takes to be a mediator. The information provided to parties considering mediators on a list is basically biographical information. Feedback about the mediator's style or process skills or other expertise is shared by word of mouth. Being certified, however, should be the highest form of acknowledgement for mediators who are experienced and have secured feedback from people who experienced the mediator's performance firsthand. IMI and the Singapore International Mediation Institute[24] publish feedback digests consolidating the feedback so future users can have access to the information. The digests are compiled by independent reviewers and are publicly available at no cost.

Certification standards include criteria covering knowledge, training, and performance that establish quality. A Code of Ethics followed by certified mediators ensures professionalism and engenders trust.

The expansion of mediation that is expected from a convention will reinforce the need for a mediator quality assurance system and a mechanism to share information about the performance and competency of mediators to resolve complex cases especially involving cross-border or investor-state disputes.

V. CONCLUSION

The results are in. There is interest in and a need for the Convention for the Enforcement of Mediated Settlements. More work is necessary and will be undertaken through education and training so that potential users will understand the benefits of mediation and tear down the impediments to the effective use of the process. A signing ceremony was held on August 7, 2019 in Singapore[25]. Substantial support for the convention was shown with 46 countries signing the document during the proceedings. Now member states must ratify the Convention to ensure

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[22] *See* Deborah Masucci, *Moving Mediation Practice Forward—Is It Time for Certification?*, N.Y. DISP. RESOL. LAW., Spring 2019, at 40–42 (discussing the pros and cons to certification).

[23] *See* Thierry Garby, *What is a Good Mediator?*, CORP. MEDIATION J. (2018).

[24] For more information, see SINGAPORE INTERNATIONAL MEDIATION INSTITUTE, http://www.simi.org.sg/ (last visited Mar. 24, 2019).

[25] See https://www.imimediation.org/2019/08/07/singapore-convention-signed/
For a list of countries signing the convention in Singapore.

meaningful implementation and use. At least three member states must ratify for the convention to activate. The big bang generating interest in mediation has commenced. Now let's see it accelerate.

Change is Here: ADR and the NY Courts – The New Presumptive ADR Program

Daniel F. Kolb, Esq.
Davis Polk & Wardwell

Hon. Vito C. Caruso
Deputy Chief Administrative Judge for Courts Outside New York City

Hon. George J. Silver
Deputy Chief Administrative Judge for New York City Courts

Lisa Courtney, Esq.
Statewide Alternative Dispute Resolution Coordinator for the New York State Unified Court System

Lisa M. Denig, Esq.
Special Counsel for ADR Initiatives in New York City

Hon. Joel R. Kullas
Alternative Dispute Resolution Coordinator for the 3rd, 4th, 9th, and 10th Judicial Districts

Bridget M. O'Connell, Esq.
Alternative Dispute Resolution Coordinator for the 5th, 6th, 7th, and 8th Judicial Districts

The State of Our Judiciary 2018

Chief Judge Janet DiFiore

New York State Unified Court System

Court of Appeals Hall

Tuesday, February 6

The State of Our Judiciary 2018

JANET DIFIORE
CHIEF JUDGE OF THE COURT OF APPEALS
CHIEF JUDGE OF THE STATE OF NEW YORK

NEW YORK STATE UNIFIED COURT SYSTEM
COURT OF APPEALS HALL
ALBANY, NEW YORK
TUESDAY, FEBRUARY 6

Janet DiFiore
Chief Judge of the State of New York
Chief Judge of the Court of Appeals

Lawrence K. Marks
Chief Administrative Judge of the State of New York

ASSOCIATE JUDGES OF THE COURT OF APPEALS

Jenny Rivera

Leslie E. Stein

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Paul G. Feinman

PRESIDING JUSTICES OF THE APPELLATE DIVISION

Rolando T. Acosta
First Department

Alan D. Scheinkman
Second Department

Elizabeth A. Garry
Third Department

Gerald J. Whalen
Fourth Department

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The State of Our Judiciary 2018

I. Introduction

Welcome to Court of Appeals Hall and the 2018 State of Our Judiciary.

For more than 30 years, my predecessors in this office – Chief Judges Jonathan Lippman, Judith Kaye and Sol Wachtler – have used this annual address to update the public and our partners in government on the priorities of the Judiciary and the challenges we face in administering justice.

In this State of Our Judiciary Address, I will have the pleasure of summarizing for you the considerable progress we have made to improve our court system; the identified areas of concern where we are working hard to overcome difficult challenges; and the many reforms we have implemented to address what I believe to be a most important goal for us: building a dynamic and flexible court system capable of responding promptly and effectively to the changing dynamics of our caseloads.

Indeed, the delivery of justice must keep pace with the needs of our modern society if we are to maintain public trust in the rule of law and the people's confidence that our courts remain, in the words of our first President, "the firmest pillar of good government."

II. The Excellence Initiative: A Progress Report

At my investiture as Chief Judge in February of 2016, I announced the Excellence Initiative. By now, you are all aware of – and many of you are actively engaged in – our systemwide campaign to promote efficient court operations and support high quality judicial decision-making and court services. Our overarching goal is simple, and it goes to the very heart of our constitutional obligation – to fairly and promptly adjudicate every case that comes before us.

As you will hear today, we are making real progress to improve promptness and productivity and the overall quality of justice in every corner of our State. Our court leaders, our trial and appellate judges and our court staff are working hard, and with a strong sense of purpose, to carry out their responsibilities and build a foundation of excellence to support our ability to

deliver fair and effective justice outcomes to the litigants who appear before us. Thanks to their individual and collective efforts, the state of our Judiciary continues to grow stronger with each passing day.

So after almost two years of sustained, intensely-focused attention on court operations, I am pleased to report the following: outside New York City our caseloads are being resolved more efficiently and promptly, and our backlogs are shrinking rapidly; in New York City, we have made significant progress in many of our highest volume courts, and our leadership team has made operational changes to set the stage for further improvement in those courts where we need to do better. More broadly, we are poised to introduce important systemic reforms to make our entire court system fairer, more efficient and more accessible.

Let me begin with our criminal courts, where justice delayed harms everyone – crime victims waiting for justice to be done, prosecutors who watch cases grow stale as witnesses move away and memories fade, and defendants, presumed innocent under the law, who far too often languish in jail because they can't make bail, while their families suffer the consequences and society bears the heavy costs of their incarceration.

A. MISDEMEANORS

Last year, the lead item in the State of Our Judiciary was the problem of delays in adjudicating misdemeanor cases in the New York City Criminal Court. I pledged that we would move aggressively to change this dynamic by managing cases more actively, eliminating unproductive appearances and wasteful adjournments, and increasing trial capacity.

Our focus has been trained on resolving the oldest cases in our inventory by re-working court processes and reassigning judges to expand our trial capacity. I am pleased to report that we have made excellent progress in reducing the misdemeanor inventory throughout the City. Since the Excellence Initiative was launched, we have reduced the number of our oldest misdemeanor cases by 80% in Manhattan; 71% in Bronx County; and 61% Citywide.

And we have made meaningful progress outside the City as well, with a 28% reduction in the number of misdemeanors pending over standards and goals in our City and District Courts statewide.

Thank you to Supervising Judge George Grasso in Bronx County, and Judge Tamiko Amaker – the Supervising Judge in New York County until last December – now our Administrative Judge of the New York City Criminal Court, and to the many District and City Court Judges who have dedicated themselves to clearing backlogs in their courts outside the City.

B. FELONY CASES

We have also made noteworthy progress in reducing backlogs in our felony cases. Outside New York City, the number of felony cases over standards and goals has been reduced by 53% overall since we started the Excellence Initiative, with the 9th Judicial District achieving an extraordinary 91% reduction, together with impressive reductions of 77% in the 7th; 65% in Suffolk County; and 56% in the 4th – all but eliminating the backlogs in those areas.

Thank you to our leadership team: Judge Alan Scheinkman in the 9th – our new Presiding Justice of the Appellate Division, Second Department; Judge Craig Doran in the 7th; Judge Randy Hinrichs in Suffolk; and Judge Vito Caruso in the 4th.

In New York City, eliminating our felony backlogs has been more challenging, due largely to the sheer volume of cases in those courts. Nonetheless, we are making encouraging inroads. In Bronx County, the number of felony cases pending over standards and goals is down by 28% since the start of the Excellence Initiative; Queens County is down by 15%; and in Kings County that number is down by 16% in just the last year. Thank you to Administrative Judges Robert Torres, Joseph Zayas and Matthew D'Emic.

In 2018, we are determined to aggressively build on this progress, change what has become a culture of delay in too many jurisdictions, and accelerate our momentum Citywide, including in Richmond County, under our newest Administrative Judge, Desmond Green, and in Manhattan, where Administrative Judge Ellen Biben has been reorganizing operations and working with District Attorney Cyrus Vance and the defense bar to foster earlier case dispositions – more on that topic later.

C. SUPREME COURT CIVIL CASES

On the civil side, court congestion and delay make litigation more expensive, which limits access to justice for working families, people of modest means and small business owners. Delay harms people seeking redress for their injuries in tort actions (the largest segment of our civil caseload), matrimonial litigants, and so many others who often feel compelled to forego meritorious claims, accept lower settlements or even enter into disadvantageous settlements just to avoid or put an end to the personal and financial burdens of litigation. Delay in the civil courts harms our economy as well, adding to the costs and uncertainty of doing business in our State, and creating an unwelcome climate for investment, economic growth and job creation.

For these reasons, we have made it a very high priority to speed the civil litigation process and eliminate backlogs and delays. I am pleased to report that we are making progress.

Outside New York City, the number of cases pending over standards and goals has been reduced by 69% in Nassau, by 57% in the 3rd Judicial District, 49% in the 5th, and 37% for foreclosures alone in the 8th. This has been accomplished largely because our Administrative Judges

in those Districts – Judges Thomas Adams, Thomas Breslin, James Tormey and Paula Feroleto, and their trial judges – are focused on proactive case management and using their authority and skills to move cases through the system with speed and purpose. This same approach has enabled the New York State Court of Claims, under the leadership of Presiding Judge Richard Sise, to substantially reduce the backlog of prisoner claims.

We have also made strides in much of the City, with reductions of 36% and 30% respectively in Kings and Queens Counties under the leadership of Administrative Judges Lawrence Knipel and Jeremy Weinstein. And in Queens, a county with 2.3 million residents, when we separate our foreclosure docket, only 6% of the civil cases are over standards and goals. That is among the very best in the State, and proof positive that high case volume and court efficiency are not mutually exclusive terms. Kudos to Judge Weinstein and the judges and their staffs in Queens County.

As you will hear later, Judge George Silver, our new Deputy Chief Administrative Judge for the New York City Courts, has brought with his appointment energetic leadership and smart, creative ideas designed to move our enormous New York City civil caseloads with more speed, less expense and, above all, enhanced quality.

D. FAMILY COURT

The Family Court is one of the most impactful courts in our system given the nature of the work done there to assist children and families in crisis. The Family Court outside New York City continues to keep its eye on the ball, with less than 5% of its total pending caseload over standards and goals. That is extraordinary.

In New York City, following a number of highly publicized tragedies, we have experienced an increase of over 50% in the filing of neglect and abuse cases over the last two years. These are among the most serious and complex cases adjudicated in the Family Court. Notwithstanding this dramatic jump in child protective filings, the overall number of cases pending over standards and goals is down 4% from the start of the Excellence Initiative.

That is not happenstance, but a reflection of the capacity we are developing to respond and adapt to changing conditions and trends through innovative leadership that is focused, proactive and willing to "change it up" when necessary, and of front line judges who understand and feel the sense of urgency which attends their work.

Thank you to Administrative Judge Jeannette Ruiz and our Family Court Judges and staff for responding to difficult challenges in thoughtful, prompt and effective ways.

* * *

Across the board, in every court, we are determined to develop a management culture that spots emerging trends and responds to changing dynamics in smart, flexible, appropriate and efficient ways. Simply repeating the same process, year after year, decade after decade, is not acceptable. We have the experience, the talent and the skill to do better – to be proactive in our management; bold in our approach to problems; and untethered to past practices and structures that no longer serve us well in meeting the needs of our litigants.

As you have just heard, the numbers are encouraging. The progress achieved to date proves that smart, agile operational and management support for our Judges is the key to their ability to perform their constitutional responsibilities effectively, efficiently, and in ways every New Yorker would expect.

We know we have a lot more work to do, and a long way to go, and as I said last year, we will not be dancing in the end zone until we achieve all of our goals. But I am supremely confident that our sustained commitment to a more muscular, proactive management philosophy will lead us to operational and decisional excellence.

Today, I am also pleased to inform you of some of the forward-looking initiatives we have introduced under the banner of our Excellence Initiative.

III. Criminal Justice

Criminal justice reform is an absolute imperative for our courts on every level – from the quality of our decision-making, to the fairness and accuracy of the processes by which we do our work, to the elimination of an unacceptable culture of delay and procrastination that has evolved in some of our jurisdictions.

Let's begin with the process, because any substantive reforms adopted in New York must be supported by a system that operates with maximum effectiveness and efficiency.

Outside New York City, our criminal court operations, as I noted earlier, are performing well. Inside the City, we face severe challenges given the enormous size of our caseloads. We know we have to think differently about how to balance our obligation to ensure speedy justice while achieving fair and just dispositions consistent with due process of law. And every player in the system – judges, prosecutors, members of the defense bar, institutional defense providers, and every City agency key to efficiency – must do better.

On any given day, almost 9,000 men and women are being held on Rikers Island. Too many of them are being held on low-level felony or misdemeanor charges, unable to make bail. Many pose no real threat to public safety. This is fundamentally contrary to the original design of

our American criminal justice system – in which liberty is supposed to be the norm and pretrial detention a carefully limited exception. Moreover, the cost of incarcerating all these people strains the public fisc, to say nothing of the enormous indirect costs to our society when people lose jobs, homes and custody of children.

Clearly, we cannot continue down the same path we have followed for decades – not if we believe in the ideal of a criminal justice system where every person accused of a crime, whether rich or poor, is presumed innocent and guaranteed a fair and speedy process leading to a just outcome.

And so we welcome the proposed reforms recently announced by Governor Andrew Cuomo to overhaul our antiquated bail and speedy trial laws, and we look forward to working with the Governor, the Legislature and the entire criminal justice community to devise common sense solutions that will produce a more equitable and effective criminal justice system for our State.

The time for proactive change has come. We cannot simply stand by – content in the false confidence that we are doing all we can – processing case-by-case. We have to rethink and reorganize the way we are doing business. And there are ways to responsibly do that, without compromising either defendants' rights or public safety.

A. SUPERIOR COURT INFORMATIONS (SCIS)

When I spoke earlier about the greater success we have had in processing criminal cases outside New York City, some of you may have been wondering why that is. Volume, of course, is a major factor, with the City hearing 43% of the State's criminal cases, but another factor is the very smart and responsible way in which felony cases are resolved on a regular basis outside the City through the use of Superior Court Informations or "SCIs," whereby defendants waive their right to prosecution by indictment, as allowed by our Constitution. With SCIs, prosecutors engage in early case assessment and, critically, provide defendants with early, expanded discovery, giving them the opportunity to make intelligent, informed decisions about whether to plead guilty or put the People to their proof at trial.

There are a great many cases which, by the nature of their facts, can be resolved expeditiously, without the need for numerous appearances stretching out over many months and sometimes years. And the benefits of SCIs are obvious, allowing prosecutors, defenders and courts to conserve limited resources while giving defendants – who should be the focus of the process – the opportunity to obtain fair dispositions that enable them to pay their debt to society and start the rehabilitation process.

SCIs are significantly underutilized in New York City. The average time to dispose of a case by indictment in the City is 277 days, while the average time to dispose of a case by SCI is 120 days. In Westchester County, which I am very familiar with, the use of SCIs has been an enormous factor in reducing the total number of felony cases pending over standards and goals to a single-digit number.

I am pleased to report that this past December we boosted our judicial capacity in New York County – and in recent days in Kings and Bronx Counties as well – in order to pilot the increased use of SCIs. We are encouraged by the fact that the number of SCI dispositions in New York County rose by 50% in the pilot's first month.

We are grateful for the support and thoughtful commitment of District Attorneys Darcel Clark, Eric Gonzalez and Cyrus Vance, each of whom has pledged to identify cases in which prosecution by SCI, and early discovery, are appropriate. We are grateful for the support and participation of the defense bar and our judges and staff, all of whom have committed to earnestly support the pilot in order to promote the imperatives of speedier justice, a fairer process for the accused, more efficient use of limited resources, and fewer defendants in pretrial detention in Rikers and local jail facilities.

Criminal justice reform has many moving parts, and this is an important one.

B. ATTORNEY SCHEDULING CONFLICT SOFTWARE

Unproductive and wasteful court appearances are a source of frustration for every judge and participant in the criminal justice process. We are reducing the frequency with which hearings and trials must be adjourned and rescheduled due to scheduling conflicts on the part of defense counsel, whose heavy caseloads often require them to be in three places at once. Earlier this year, we installed new software in New York City that automatically displays when and where individual attorneys are scheduled to appear in court. This new case management tool will allow judges and court staff to schedule future trials and court dates without running into conflicts that create frustrating delays.

C. CENTRALIZED ARRAIGNMENTS

In the last year, we have succeeded in implementing a significant legislative reform that will ensure that the right to counsel, one of our most cherished constitutional guarantees, extends to the arraignment of defendants on criminal charges.

To facilitate the presence of counsel at off-hour and weekend arraignments, we have piloted four new programs upstate – in Broome, Oneida, Onondaga and Washington Counties – counties where counsel at first appearance has in the past been difficult to ensure. By reworking

our processes, we are making sure that the State is in compliance with its constitutional obligation to provide effective assistance of counsel while at the same time striving to accommodate legitimate concerns over the financial and logistical burdens that compliance creates for Town and Village Courts, prosecutors, public defenders and county governments.

Deputy Chief Administrative Judge Michael Coccoma and our Administrative Judges in the 4th, 5th and 6th Judicial Districts – Vito Caruso, James Tormey, who has been especially helpful, and Molly Fitzgerald – deserve credit and thanks for the plans they put together to optimize countywide resources and ensure that judges, defense attorneys and law enforcement personnel are all available and present at arraignment proceedings – evenings and weekends, in one central location – so that defendants can receive constitutionally guaranteed legal representation.

The most satisfying aspect of this initiative is that the presence of counsel at arraignment is reducing the number of cases in which bail is set. Again, in appropriate cases, responsibly releasing defendants back to their communities is less disruptive to defendants and their families, and in the end saves taxpayer dollars.

In light of our success with these four pilots, we have requested funding in our Budget to support our plan to establish additional Centralized Arraignment Parts this year – in Ontario, Warren, Otsego and Livingston Counties.

D. INDIGENT CRIMINAL DEFENSE

A fair criminal justice system requires a strong adversarial system, and I am proud that all three branches of government in New York State are working together to support our State Office of Indigent Legal Services as it seeks to extend the key terms of the Hurrell-Harring settlement – counsel at arraignment, caseload caps for attorneys, and improvements in the quality of representation – to each of our 62 counties. As Chair of the Board of Indigent Legal Services, I can assure you that Bill Leahy, our Executive Director, and his dedicated staff, are well on their way to ensuring that the funding authorized by Governor Cuomo and the Legislature is used as envisioned – to set the national standard for a properly-funded, high-quality public defense system.

E. THE JUSTICE TASK FORCE

Continuing with the theme of improving the fairness, effectiveness and accuracy of our criminal justice system, I want to focus on the work of the New York State Justice Task Force, which is dedicated to criminal justice reform and led by former Court of Appeals Judge Carmen Beauchamp Ciparick and Acting Supreme Court Justice Mark Dwyer. The Task Force has already generated an extraordinary body of reforms addressing the systemic causes of wrongful convictions, including expansion of the DNA Databank, greater access to post-conviction DNA

testing by defendants, legislation requiring videotaping of custodial interrogations, improvement of identification procedures used by police and prosecutors, and admission of photographic identifications into evidence.

This past November, the Administrative Board of the Courts adopted a new rule that requires judges presiding over criminal trials to issue standing orders advising prosecutors and defense counsel of their professional responsibilities. The order addresses the prosecution's obligation to disclose exculpatory information, and defense counsel's obligation to provide constitutionally effective assistance of counsel, including what that obligation actually entails.

The order, colloquially referred to as the "Brady Order," addresses two identified causes of wrongful convictions: Brady violations and ineffective assistance of counsel. It is the first of its kind in any criminal court in the nation, and I want to thank Barry Scheck and Peter Neufeld of the Innocence Project for their wise counsel and support in helping us to achieve this significant reform.

Additional recommendations recently made by the Task Force – regarding attorney discipline and the proper use and understanding of the term "misconduct" to distinguish between good faith error and intentional wrongdoing, the circumstances under which lawyers and judges have an ethical duty to report attorney misconduct, and implementation of enhanced training of disciplinary authorities to properly investigate attorney misconduct in the criminal context – are now under review and, where appropriate, will be converted into practice.

I want to thank the Task Force's Co-Chairs; the highly-skilled and dedicated Task Force members; Counsel Angela Burgess, a busy partner at Davis Polk & Wardwell who always, at every turn, provides sound advice to the Task Force; and, of course, Davis Polk & Wardwell for its outstanding and generous pro bono and administrative support.

IV. The Opioid Crisis

I think everyone assembled here would agree that justice must be tempered by compassion and a thoughtful approach to the societal problems reflected in our court dockets. This is especially true for the many New Yorkers who have fallen victim to the tragic and frightening consequences of the opioid epidemic. Here in New York State we are adjusting our court processes to reflect our belief that justice without compassion can be unacceptably cruel.

According to the latest numbers from the Centers for Disease Control and Prevention, over 64,000 people died from drug overdoses in the United States in 2016, more than the number of American lives lost during the entirety of the Vietnam War.

A. BUFFALO OPIOID INTERVENTION COURT

In response, we have opened our first Opioid Intervention Court – the first of its kind in the nation – in the City of Buffalo, a City hit hard by this national public health crisis.

In this court, charged offenders identified as high risk for opioid overdose are immediately linked to intensive treatment. Within 24 hours of arrest, consenting participants represented by counsel are placed in a medication-assisted treatment program. That treatment regimen is followed by up to 90 days of daily court monitoring, with the legal process held in abeyance. What makes the Opioid Intervention Court so unique, in addition to its treatment protocol, is that the treatment plan is prioritized above prosecution, even more so than in other problem solving courts, with the legal process being flipped in order to save lives.

I want to publicly acknowledge the work and commitment of the Presiding Judge of the Buffalo Court, Craig Hannah, a remarkable individual, perfectly suited to lead this Court, the Erie County District Attorney, John Flynn, who agreed to suspend prosecution during treatment to achieve the end result we all hope for – a disposition that supports sobriety, public safety and the well being of our communities, and Project Director Jeff Smith, who took the lead role in developing the Opioid Court model and has worked tirelessly to foster its effectiveness.

Since opening last May 1st in a jurisdiction that experienced the overdose deaths of dozens of defendants over the course of several years, the Court has experienced just a single overdose death among its 204 participants. Extraordinary.

While the Court's original mandate was to treat 225 people over a three-year period, it is now on track to triple its original goal, overseeing anywhere between 45 and 60 active participants at any given time.

Recognizing that this Court holds great promise for the rest of the State, we asked the New York State District Attorneys Association to reach out to the defense bar and the treatment community to formulate a Statewide Opioid Action Plan that incorporates the latest knowledge and best practices in this field to guide our courts, the broader justice system and the treatment community in fashioning more effective responses for defendants caught up in the deadly cycle of opioid abuse.

B. BRONX CRIMINAL COURT OVERDOSE AVOIDANCE AND RECOVERY TRACK (OAR)

Inside New York City, in Bronx County, where 261 people died from opioid overdose in 2016 – with the final numbers likely to be higher for 2017 – District Attorney Darcel Clark, in partnership with Bronx County Criminal Court Supervising Judge George Grasso, Bronx

Community Solutions, the defense bar, and treatment providers have adopted the Bronx version of an Opioid Treatment Court – a specialized case track called OAR – the Overdose Avoidance and Recovery Track – for misdemeanor offenders at high risk of opioid overdose.

District Attorney Clark, like District Attorney Flynn in Buffalo, has wisely determined to suspend prosecution of cases at arraignment for accused persons who enter treatment immediately and agree to waive speedy trial and motion practice. The protocol adopted in Bronx County highly incentivizes treatment as the District Attorney has agreed, where no new arrests occur while the case is pending, and upon completion of treatment, to dismiss the case and have the record sealed.

We look forward to expanding the OAR approach to the rest of New York City. I have asked Judge Grasso to coordinate this effort and to work with our Administrative Judges, District Attorneys, defense bar and the treatment community to institutionalize the OAR approach Citywide. Judge Grasso has already begun his work, and we look forward to reporting on our efforts to stem the rising tide of opioid cases.

C. STATEWIDE NARCAN TRAINING FOR COURT OFFICERS

The final piece of our Opioid initiative rests on the shoulders of our well-trained, highly-skilled and compassionate New York State Court Officers who last year received the training required to administer "Narcan," the critical antidote drug that miraculously -- and instantaneously -- reverses an opioid overdose.

Our training investment has already paid off. In just a few months, Court Officers have saved the lives of four people overdosing on opioids in and around our courthouses. Thank you, Chief Michael Magliano, Chief Joseph Baccellieri, and all our uniformed Court Officers who do an outstanding job, day in and day out, serving and protecting the millions of people who enter our courthouses every year. You make us all proud, and we are grateful for the safe environment you provide.

I take great pride in leading a court system that is responding to the complex societal problems reflected in our caseloads through innovative approaches like the Buffalo and Bronx Opioid Courts. And I want to thank Judge Sherry Klein Heitler, our Chief of Policy and Planning, and her staff, for the work they are doing statewide to make sure we are a court system capable of meeting the unique needs of every class of litigant.

V. The Future of the New York City Housing Court

High on our list of reform priorities is the future of the New York City Housing Court. Last year, mindful of the fact that New York City is experiencing its highest levels of homelessness since the Great Depression, and that the City has enacted the Universal Access to Legal Services Law to provide legal assistance to low-income tenants facing eviction, I announced at the State of Our Judiciary the formation of the Commission on the Future of the New York City Housing Court, co-chaired by Appellate Division Justice Peter Tom and Supreme Court Justice Joan Lobis.

As fate would have it -- and somewhat ironically -- after delivering that State of Our Judiciary Address, as we were driving away from the Bronx Hall of Justice up the Grand Concourse past 166th Street, I saw a large crowd of people standing in the cold on the sidewalk outside of a building. I asked Officer Sam Torres, who was accompanying me that day, if he knew what was going on. He quietly said to me: "Judge, that's your Bronx Housing Court."

Needless to say, that sobering image is the very reason why I am so grateful to Justices Tom and Lobis and the Commission members for promptly getting to work and providing us with recommendations that are insightful, practical and meaningful.

Not surprisingly, the Commission found that the New York City Housing Court is one of the busiest, most overburdened courts in the nation. And as you might imagine, the litigants in this court are overwhelmingly people of modest means, frightened of losing their homes, or frustrated by living conditions that threaten the health and well being of their families. Landlords, too, come to Housing Court with legitimate issues and concerns about losing their properties and livelihoods, and falling into financial difficulty.

The Commission's report comes at a critical time in the Housing Court's history, with the new legislation expected to greatly reduce the enormous volume of unrepresented tenants who appear in that court every day -- in person -- to respond to notices of eviction and other petitions. This welcome change simultaneously presents us with the opportunity to improve the delivery of justice, and the challenge of making sure our already overcrowded dockets do not become more unwieldy and slow moving in the future.

Fortunately, the Commission's recommendations provide the roadmap we need to strengthen Housing Court operations and improve the efficiency and quality of the litigation experience. And we are wasting no time in implementing the Commission's excellent recommendations. Chief Administrative Judge Marks will personally lead a group of high-level judges and court managers responsible for implementing the recommended changes, including Judge Anthony Cannataro, our new Administrative Judge of the New York City Civil Court (who will also undertake a broader review of Civil Court operations). This implementation group will

follow through on major operational changes, adoption of court rules and legal forms, relocation and redesign of facilities, access to justice enhancements, and expanded technology, ADR and court security.

I want to thank the Commission for providing a strong vision and excellent direction for the future of the New York City Housing Court.

* * *

The Excellence Initiative is about much more than standards and goals. Ultimately, it is about decisional excellence – supporting the ability of judges to make fair, timely and wise decisions, and the ability of our courts to deliver high quality, cost-effective justice services.

The state of our society is reflected in our court dockets. And whether it is criminal justice reform, Rikers Island, homelessness, foreclosures, opioid abuse, or an alarming increase in child abuse and neglect cases – it is our responsibility to respond.

I know first-hand that our judges and court personnel are highly motivated to respond. That is the energy, commitment and vision that fuels our Excellence Initiative as we work at every level of the justice system to meet the challenges of delivering justice in a complex, fast-changing society.

VI. Families and Children

A. IMPLEMENTATION OF RAISE THE AGE LEGISLATION

We have trained our focus on children whose lives intersect with the justice system as we implement the new "Raise the Age" legislation. Going forward, we anticipate that approximately 18,000 16- and 17-year olds will be diverted from the criminal courts to our family courts. We are pleased and excited that New York is finally putting the focus where it should be – on helping young people stay on track for productive lives.

We will be ready and prepared for a smooth transition from criminal to family court, mindful of the complex operational and legal hurdles we must address around the provision of legal counsel, appropriate housing of children who must be detained, training of judges and court staff, as well as new data delivery protocols essential to managing this sensitive caseload.

All of these issues are being carefully examined by our Administrative Judges and nonjudicial managers across the State. We are relying on the implementation plan and protocols being developed by our committee of Criminal and Family Court Judges and managers, under the leadership of Deputy Chief Administrative Judges Edwina Mendelson and Michael Coccoma, who have been working closely with judges; staff; the State Office of Children and Family Services;

the State Division of Criminal Justice Services; State and local departments of social services; the Mayor's Office of Criminal Justice; corrections and probation; District Attorneys; counties and their county attorneys; the defense bar; and attorneys for children.

B. MENTORING PROGRAM IN THE NEW YORK CITY FAMILY COURT

For every child – rich or poor; a child lucky to live in a stable environment; or a child, by chance, living in a less than desirable environment – a meaningful relationship with a strong mentor can make all the difference in the world.

I am so pleased and proud to announce that we have partnered with the New York State Mentoring Program to match young people aging out of the foster care system with inspirational adult mentors who can help them develop the confidence and self-esteem they need to make positive life choices and succeed in the adult world. Experience has shown that committed and competent role models can help children overcome enormous personal, economic and social disadvantages. Under the unique New York State Mentoring Program model, vetted mentors meet one-on-one with their mentees on a weekly basis in a supervised environment to establish that special bond and interest that can make the great difference in a child's life.

I want to thank the founder of the New York State Mentoring Program, Matilda Raffa Cuomo, for recognizing and promoting the power and value of mentoring in the lives of children, and for her commitment to providing safe mentoring services to children in our Family Courts. Thank you, Mrs. Cuomo, New York State Mentoring, Judge Jeannette Ruiz – for getting this program off the ground, and Judge Andra Ackerman, for planting the seed.

C. COMMISSION ON PARENTAL LEGAL REPRESENTATION

We are also focused on supporting the well being of children by supporting the legal needs of their parents. New York's parental representation system has suffered from many of the same systemic deficiencies that once afflicted our indigent criminal defense system, including excessive attorney caseloads, inadequate training, and insufficient funding for support staff and services.

I have asked the former Presiding Justice of the Appellate Division, Third Department – Karen Peters – to lead a new Commission on Parental Legal Representation to examine the current state of mandated Family Court representation and determine how best to ensure the future delivery of quality, cost-effective parental representation.

Judge Peters' broad experience, including as a former Family Court Judge, will be invaluable to leading the work of the Commission. She and the judges, legal service providers, child welfare experts, and county and state officials on the Commission will work with the Office

of Indigent Legal Services – particularly Director of Quality Enhancement, Angela Burton – to build upon the groundwork being done across the State to improve the quality of parental legal representation.

D. FAMILY COURT – PAPERLESS FAMILY COURT

It is imperative that our courts make smarter use of technology to support the complex, substantive work they perform. I am pleased to say that our New York City Family Court – with over 200,000 new case filings each year – is leading the way in this regard, having recently become the largest paperless court in the State, and one of the largest in the country.

The benefits of going all digital in newly-filed cases are obvious. It improves efficiency and accessibility, streamlines case commencement, allows parties to view and print signed orders and petitions remotely, and facilitates efficient management of the court's staggering caseloads.

Thank you to Chief Clerk George Cafasso; Deputy Chief Clerk Michael McLoughlin; and Chip Mount and Sheng Guo from our Division of Technology.

I, too, sat as a Judge in the Family Court, and I know personally what an important difference we can make in the lives of so many families and young people who come before us. To all our hard working judges and staff in the Family Courts – thank you.

E. BILINGUAL ORDERS OF PROTECTION

In recognition of the amazing diversity of our communities throughout the State, and our responsibility to ensure access to justice for all, we launched a pilot program enabling judges to issue orders of protection in both English and the language of the petitioner. Last year, the Legislature endorsed and codified our pilot program and authorized its expansion. Since its start in March 2015, judges have issued about 25,000 bilingual orders of protection, in Spanish, Russian, Chinese and Arabic, in our Family, Criminal, Integrated Domestic Violence and Matrimonial courts. By the end of 2020, orders of protection will be available, statewide, in the ten languages most frequently spoken here in New York.

I want to thank Judge Deborah Kaplan, recently appointed to serve as the Administrative Judge of the New York County Supreme Court, Civil Term, and who was our Statewide Coordinating Judge for Family Violence Cases, for the excellent job she did leading the work of that office.

VII. Civil Justice

A. NEW CIVIL PRACTICE RULES

Our Commercial Division of State Supreme Court has built a reputation for excellence and earned the respect of court and business leaders around the globe. The Commercial Division has led the way in adopting innovative reforms to streamline civil litigation, improve efficiency, and reduce litigation costs, including: limits on interrogatories and depositions, quicker resolutions of discovery disputes, time limits on trials, and direct testimony by affidavit.

There is no reason to keep our successes confined to the Commercial Division. I have asked our Advisory Committee on Civil Practice to evaluate the Commercial Division rules and amendments, and recommend which of them should be adopted broadly throughout our civil courts. The process is underway and the Committee will submit its report and recommendations to us by May 1st.

B. PILOT PROGRAM: FAST-TRACKING INSURANCE CASES

Anyone reviewing our civil docket would immediately recognize the high percentage of cases involving major insurance company defendants. For many reasons, these cases have taken an inordinate amount of time to resolve. The litigants in these cases need their matters resolved promptly, and our Deputy Chief Administrative Judge for the Courts inside New York City has responded by setting up four pilot programs that have been a smashing success, consistently settling between 60% and 100% of calendared cases in New York, Kings, Bronx and Richmond Counties.

The program differs from prior efforts involving major insurance carriers because the assigned judges are intervening at an earlier stage, before significant time and resources have been expended on discovery and trial preparation. Cases that ordinarily would drag through our system for years are now being resolved within a year of filing. The pilot has been so successful that additional carriers and high-volume litigants have asked to participate. As you would expect, we are expanding the program.

I think Judge Silver would be the first to agree that this is not about rewriting the code. It's about understanding the charge, and thinking outside the limitations and constraints of past, dated protocols and practices. Thank you, Judge Silver, the judges and staff in the pilot parts, and all of the participants.

Thoughtful approaches like this one, and our demonstrated willingness to try new ideas and implement new practices, reflect our commitment to deliver high-quality services to the people who come to our courthouses in search of justice.

C. NEW YORK CITY SMALL CLAIMS COURT.

The New York City Small Claims Court is where tens of thousands of individuals and small business owners appear each year – typically without a lawyer – to resolve disputes under $5000. It is truly the "People's Court." While the issues may not be as complex as those heard in our other civil courts, they are critical to the people who appear in Small Claims Court every day. By making some fundamental adjustments to our operations, including expanding our staffing levels and hours of operation, we have reduced the average time between the filing of a claim and the first court appearance by more than half, resulting in timely and improved services for the litigants in this court.

VIII. Access to Justice

Our commitment to the prompt adjudication of cases and controversies goes hand in hand with our commitment to meaningful access to justice. Our Permanent Commission on Access to Justice, led by Helaine Barnett, has been a catalyst behind New York's status as a national leader in addressing the civil legal needs of low-income people.

A. A STRATEGIC ACTION PLAN FOR NEW YORK

This year, thanks to the wisdom and commitment of Governor Cuomo and the Legislature, we anticipate that $100 million dollars will again be included in our Budget for civil legal services funding. This funding is absolutely critical to our efforts, but we have learned that money alone – without a plan – cannot close the justice gap.

We have been careful, strategic and smart in our approach to legal services funding. Going forward, I want to assure the Governor, the Legislature, New York State taxpayers, members of the legal services community, and every New York lawyer, general counsel, law student and law school that has demonstrated the moral vision and generosity necessary to help close the justice gap, that we are well on our way to devising a Strategic Action Plan for our State that will integrate all of the resources and services at our disposal into an efficient and effective delivery system that avoids duplication and potential waste and fills existing gaps in services.

My role is to lead us to the place where we are leveraging, to the maximum extent, every private and taxpayer dollar and every hour of lawyer pro bono service that has been dedicated to our civil legal service efforts.

Our Strategic Action Plan for New York State, led by Chair Barnett and the Commission, and funded by a grant from the National Center for State Courts, is underway – featuring the launch of a pilot project in Suffolk County focused on developing a technology platform and

community resource model that together will significantly enhance access to justice at the local level. The Suffolk Pilot will spawn local strategic plans around the State, with the goal of knitting those plans together into an overall statewide network that makes the most effective use of all available resources. This is a high priority for us, and we look forward to working with our partners throughout the State to implement the Action Plan.

Thank you to Helaine Barnett, members of the Commission, Judge Hinrichs and all the stakeholders from Suffolk County who are providing the blueprint for us to take statewide.

B. STATEWIDE OFFICE FOR JUSTICE INITIATIVES

Access to justice is advanced in many different ways and through countless worthy initiatives across the justice system. And, here, I would like to acknowledge our Deputy Chief Administrative Judge in charge of Justice Initiatives, Judge Edwina Mendelson. Judge Mendelson and her staff have a broad portfolio of initiatives to promote access to justice from within the court system, including court-based programs that provide pro bono legal and informational assistance to litigants as well as a wealth of web-based resources that reach well over a million people a year.

Judge Mendelson's mission crosses every court – criminal, civil, family and housing – as she works to eliminate access to justice barriers and ensure that the two million New Yorkers who are fluent in 150 different languages are able to participate meaningfully in court proceedings, and that no person is denied meaningful access to the courts because of a disability.

IX. Pursuing Excellence

A. BRINGING THE EXCELLENCE INITIATIVE TO SURROGATE'S COURT

Timeliness and efficiency are priorities in all of our courts, and especially so in our Surrogate's Courts, where surviving family members or minors and the developmentally disabled in need of guardianship should not be exposed to unnecessary delay.

As we undertook to examine the way we have been conducting business in the Surrogate's Court, our first challenge was to identify the number and types of cases pending, and the ages of those cases. The Surrogate's Court Clerks and our IT staff got to work and started the process of collecting detailed caseload data. They are now preparing the statistical reports necessary to track caseloads, measure court performance, and implement the operational changes and adjustments necessary to expedite and thereby improve our services.

Effective this Spring, for the first time, standards and goals will be in place for Surrogate's Court proceedings. And thanks to new case management software and dashboards, we are tracking our caseloads, measuring our performance, and better managing our work in every area of this important court's services.

I want to thank the Surrogate's Court Judges Association, led by Oneida County Surrogate Louis P. Gigliotti, for being so helpful and receptive to this effort.

B. APPELLATE JUSTICE

This address would not be complete without recognizing our terrific Appellate Division, led by Presiding Justices Rolando Acosta, Alan Scheinkman, Elizabeth Garry and Gerald Whelan – all of whom are constantly striving to achieve excellence in their courts.

Last year, we began the effort to develop a uniform set of rules to harmonize appellate practice across the State in key areas such as service and filing procedures, general motion practice, and methods of perfecting an appeal. Under the direction of the Presiding Justices, the Chief Clerks of each of the four Departments – Susanna Rojas, April Agostino, Robert Mayberger, and Mark Bennett, who was preceded by Fran Cafarell – worked closely with OCA Counsel, John McConnell, to draft joint rules. The rules were issued for public comment over the Summer, amended to incorporate the excellent commentary received, and I am pleased to inform you today, have been approved by the Administrative Board. They will take effect on September 15, 2018. There is no question in my mind that the new uniform rules will have a positive impact on New York appellate practice.

The four Departments have also adopted joint e-filing rules, to take effect shortly, on March 1st. Kudos to the Presiding Justices, including the recently retired Presiding Justices in the Second and Third Departments – Randall Eng and Karen Peters and their excellent staffs – for bringing the convenience and savings of e-filing to our appellate courts.

And since we all recognize that transparency is a most important step in building public confidence and respect for our courts, we are proud to showcase the live streaming of oral arguments from each of the four Departments and the Court of Appeals. Enabling the public to watch our work from internet-connected devices, and digitally archiving our proceedings, is a wonderful way for everyone to see our appellate process at work.

C. GUIDE TO NEW YORK STATE EVIDENCE

In July 2016, I established the New York Evidence Committee, co-chaired by former Court of Appeals Judge Susan Read and retired Nassau County Supreme Court Justice William Donnino, with Albany Law Professor, Michael Hutter, serving as Counsel. I charged the Committee

with developing a definitive Guide to New York Evidence in response to the fact that New York is one of the very few states in the nation not to have a statutory code of evidence. In fact, our law of evidence is scattered in many different statutes, judicial decisions and court rules.

The Committee has already published three installments of the Guide, – General Provisions, Relevance, Hearsay, and later this month, Impeachment and Other Witness Rules. While several more chapters remain to be completed, there is no doubt that the ultimate product – a single, accessible guide to New York's law of evidence – will be of enormous value to the Bench and Bar in our State. It is also an important component of our Excellence Initiative, reflecting our commitment to provide a strong foundation for decisional excellence.

Along with my judicial colleagues and the entire legal profession, I look forward to future chapters and the eventual completion of the Guide to New York Evidence. I want to thank the Co-Chairs and Committee members for their commitment to this important effort.

D. TRAINING FOR EXCELLENCE

Judicial education and training lie at the core of excellence and productivity, enabling judges to stay current on developments in the law, science and technology, and countless other fields affecting the delivery of justice. This is why we have re-introduced our annual Summer Judicial Seminars, enhanced the curriculum at our annual New Judges program, convened new Appellate Training Seminars for both judges and court attorneys, and integrated principles of effective case management into the training curriculum for judges and nonjudicial managers.

I want to thank the Dean of the Judicial Institute, Judge Juanita Bing Newton, and her staff, for the extraordinary job they do to ensure a modern and robust training regimen for judges, court attorneys and court clerks.

E. JUDICIAL TASK FORCE ON THE NEW YORK STATE CONSTITUTION

In our pursuit of excellence, we have often experienced frustration with barriers that hinder our progress. We are supposed to be a "unified" court system, but the reality is that we have eleven separate trial courts with many outdated jurisdictional restrictions that prevent us from properly and efficiently managing our people and resources.

Neither the federal courts nor any other state court system labor under the same kinds of archaic restrictions. In fact, Article III of the United States Constitution, which totals fewer than 400 words, states very simply: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." By contrast, Article VI – our Judiciary Article in the New York State Constitution – contains over 16,000 words spread over 37 sections, and dictates details of our existence best decided by the Legislature or Court Administration.

Amending the Judiciary Article to modernize our organizational structure is a top concern for us, as it should be for every elected official who cares about court efficiency and the considerable savings which can be achieved. We are not deterred by last year's "thumbs down" vote on a Con Con. Yes, I saw all the lawn signs and bumper stickers and heard the radio ads, but it was crystal clear that the voters were not at all focused on the Judiciary Article of the Constitution. We are determined to continue moving forward and working with the members of our Judicial Task Force to develop and propose practical constitutional amendments that can be achieved through the legislative and referendum process.

I want to thank the Task Force members, a uniquely qualified group of individuals, for their service. I encourage those of you who have reached out to our members to continue to do so and inform them of your views, ideas and experiences. We look forward to developing our plan, informed by the Task Force's recommendations, and presenting it to the Legislature for action.

F. TASK FORCE ON LEGAL ASSISTANCE RELATED TO HURRICANES HARVEY, IRMA AND MARIA

In bringing this State of Our Judiciary address to a close, I want to turn, for a moment, to matters external to our courts yet integral to who we are as a caring legal profession.

Last Summer, as we watched the news coverage of Hurricanes Harvey, Irma and Maria in Texas, Florida and Puerto Rico, we all grieved for our fellow Americans. Not surprisingly, one could literally feel the sense of urgency developing in our New York legal community to respond to these disasters and assist in every way in which our training and experience as lawyers and court administrators would allow.

In very short order – literally over the course of a morning and a few simple phone calls – the New York State Task Force on Legal Assistance Related to Hurricanes was established, and as events unfolded, it quickly expanded from Harvey to encompass Irma and Maria. Under the leadership of John Kiernan, President of the New York City Bar Association and a partner at Debevoise & Plimpton, and Sharon Katz, Special Counsel for Pro Bono at Davis Polk & Wardwell, the lawyers and court officials on the Task Force moved with lightning speed to mobilize and coordinate pro bono efforts to assist the victims of these natural disasters with a staggering number of legal matters, especially FEMA applications and appeals.

On behalf of the Judiciary and the entire legal profession, I want to publicly thank the Task Force and the many lawyers, bar associations, legal service providers and law schools – too numerous to mention here, though the New York City and Puerto Rican Bar Associations deserve special mention – who responded so quickly and selflessly to alleviate the suffering of their fellow Americans by establishing clinics for displaced victims; arranging for placements of pro bono

representation; training volunteer lawyers; marshaling support from legal service providers and law firms outside the affected areas; raising and donating charitable funds to disaster relief groups; and providing expert consultation on FEMA and other legal disaster relief issues.

This is what we do as lawyers. And, I can assure you, the assistance we are all providing is critical and very much appreciated. I recently received a letter from the Chief Judge of Puerto Rico, Maite Oronoz Rodriquez, thanking us for our assistance and donation of needed technology equipment installed in courthouses throughout the Island – essential, in her words, "not only to reestablish judicial activity, but to help the community with legal aid and hurricane relief."

X. Conclusion

Last year, I concluded the State of Our Judiciary with a story about the beautiful clock hanging in the lobby of the Manhattan Criminal Court building at 100 Centre Street.

Our experience with repairing that clock – after years of being frozen in time – has come to symbolize who we are as a court system. As you have heard today, the judges and staff of the New York State courts have been working diligently over the last year to fix what's broken and to build and maintain a well-functioning court system. To them I say – the road to excellence is long and arduous, but the destination is worth the hardest effort.

I am grateful to all of my colleagues here at the Court of Appeals; our trial and appellate judges, and staff, for your hard work on the front lines; Chief Administrative Judge Marks; the Presiding Justices of the Appellate Division; Deputy Chief Administrative Judges Mendelson, Coccoma and Silver; our team of Administrative and Supervising Judges; Executive Director Ron Younkins and our non-judicial court managers; and our Public Safety leadership and Uniformed Court Officers – thank you all for leading the way as we work together to build a system that supports both operational and decisional excellence in every court throughout the State.

We can look back on the last two years with great pride and a sense of accomplishment. And while there is more to do, we look to the future with confidence and optimism, because we are poised and positioned to build upon everything we have achieved to date.

I look forward to working together with all of you as we strive for excellence.

Congratulations to you all. We have every good reason to be excited about the future of our Judiciary.

Thank you for your kind attention.

REPORT AND RECOMMENDATIONS BY THE PRESIDENT'S COMMITTEE FOR THE EFFICIENT RESOLUTION OF DISPUTES

JUNE 2018

NEW YORK CITY BAR ASSOCIATION
42 WEST 44TH STREET, NEW YORK, NY 10036

REPORT AND RECOMMENDATIONS BY THE PRESIDENT'S COMMITTEE FOR THE EFFICIENT RESOLUTION OF DISPUTES

I. INTRODUCTION

The main participants in litigation – the judges, clients and advocates – widely recognize that civil litigation often costs too much and takes too long. While the system for resolving disputes fosters the full discovery of facts to promote fair resolution, in too many cases the cost and duration of the litigation process competes powerfully with fairness in driving the terms of resolution. Litigation can be so expensive that unless the dispute involves a very significant principle or dollar amount or the dispute can be resolved on a dispositive motion, the cost of litigating to a decision is not affordable. For those who cannot afford to achieve a decision, access to justice may be effectively denied. Because courts are burdened by so many cases, the sheer volume of disputes often determines how judges can manage their cases.

These problems often arise because participants in the dispute resolution process take steps reflexively based on what they consider the accepted approach, without giving sufficient consideration to available steps that could be more cost and time efficient. This Report recommends that participants in litigation instead embrace changes in our litigation culture and in standard practice that would accelerate what has been a slow but steady evolution toward greater emphasis on efficiency and avoidance of unnecessary cost and delay. Even where parties are, for understandable reasons, committed to expensive and lengthy litigation, taking some or all of the recommended steps would significantly increase the cost effectiveness of the process.

To address the excessive cost and duration of dispute resolution, in 2017 the New York City Bar Association ("City Bar") formed a President's Committee for the Efficient Resolution of Disputes (the "Committee"), including representatives of several City Bar committees. Over the past 18 months, the Committee has gathered information, perspectives and wisdom from many of our City's and State's most thoughtful and engaged judges, judicial administrators, advocates, clients and neutrals. With those inputs, the Committee has developed specific recommendations for change in the dispute resolution process to increase efficiency and reduce cost, and a list of Best Practices for the Efficient and Cost-Effective Resolution of Disputes. We submit that seeking efficiency should become standard practice whether resolution is achieved through a negotiated or mediated settlement, through conventional litigation to a decision, or through arbitration or any other ADR method. In many civil matters, seeking greater efficiency is not just prudent but essential to assure that parties can have access to the justice our court system aims to provide.

Because of ingrained habits that have long been accepted, accomplishing the necessary changes called for by the Committee's recommendations and Best Practices will require a strong exercise of collective will by the bench and bar. To achieve the necessary changes, it will be essential that the judiciary use its authority, and that advocates engage cooperatively with adversaries to streamline the process and educate their clients on options for pursuing less expensive and faster resolution of their disputes. Bar associations will also need to exert leadership in urging participants in the dispute resolution process to understand and embrace the overall benefits of the proposed changes.

Because different civil practice areas and the differences between Federal and State courts will necessarily require varying changes in practice, each sensibly adapted to the circumstances, the City Bar and the Committee hope to work directly with the bench and bar to both promote and support change in specific areas of practice and the sharing of perspectives.

Members of the City Bar can and should play significant roles in promoting a collective will within the bench and bar in support of the recommended changes.

II. THE EVOLUTION OF THE LITIGATION PROCESS HAS LED TO EXCESSIVE COST AND DELAY

Our dispute resolution culture has long been driven by the admirable concept of reaching resolution based on full disclosure of facts rather than surprise. In the 1930s that idea, aimed at eliminating trials where gamesmanship could be a determining factor, led to adoption of the new Federal Rules of Civil Procedure. Those rules were designed to open discovery so that parties could either try or settle their cases with knowledge of all relevant facts. Over time New York and other states essentially replicated the relevant provisions of the Federal Rules. Under the rules, the filing of a complaint would set the parties and counsel onto a procedural path designed to put them in possession of the "relevant" facts, very broadly defined. Many parties and counsel expected that they could be on that path for years before a dispute was resolved; and they came to expect that various steps in the formal litigation process would be necessary before resolution. As a result, participants often did not focus on pursuing more efficient and cost effective steps to resolve their disputes, or on identifying and embracing ways the litigation process itself could be made more efficient.

As the concept of open discovery evolved, courts resisted early disposition of claims based on less than a "full" factual record. As disputes took more time to resolve, court dockets grew and the burdens of those dockets increasingly affected case management. Courts found that allowing the process to be self-executing meant less court time spent with each matter and a reduction in the burden of case management. But that also meant more expense and time spent by the parties.

Lawyers were trained to see pursuit of all facts and legal theories as a mark of professional diligence and excellence, leading them to pursue extensive discovery and claims, defenses and motions having only very limited prospects of providing a return for the effort. Often parties and counsel pursued aggressive and burdensome steps as accepted practice without carefully considering whether such an approach would likely result in net benefits. Technology,

first the copier and then e-discovery, led to exponential increases in the costs and burdens of discovery. Legal fees meanwhile grew at rates much faster than inflation.

In civil disputes it became common for parties to turn matters over to their lawyers and, even though the disputes could have significant effects on their business or personal interests, not to remain closely involved with the process as they would with their other matters. Parties and counsel, and often courts, considered settlement to be achievable only after the litigation process was significantly advanced, often to the eve of trial. Posturing by clients and counsel, the determination to inflict pain on the adversary, delay to make the opposition yearn for settlement, and avoidance of overtures to settle or streamline the dispute as signs of weakness all contributed to the avoidance of options for resolving disputes early. For large numbers of disputes the prohibitive cost of litigating to a final judgment frequently came to outweigh the merits as a primary factor affecting the terms of settlement.

Often lost as the process evolved was the goal of ensuring the affordability of a resolution based on the merits. Although both the Federal and New York State Court Rules begin with language emphasizing the objectives of "just," "speedy" and "inexpensive" resolution, in far too many cases such a result became unattainable. Pursuit of the formal litigation process was presumed to be in the best interests of the parties, but very often it denied parties access to justice because those same parties could not afford it.

III. EFFORTS TO ADDRESS THE PROBLEM

Reflecting the recognition by many that accepted litigation practice needs to be changed, important efforts have been made to make dispute resolution less expensive and time consuming. The American Bar Association, Federal Judicial Center, and American College of Trial Lawyers, along with the City Bar and others, have issued reports emphasizing the excessive cost and delay in litigation, and recommending changes. Federal Rule changes, including the adoption of the seven-hour deposition rule and introduction of the concept of proportionality in discovery, are examples of rule-based efforts aimed at reducing cost and delay. Efforts in our state courts such as "Settlement Days" for insurance disputes and "Residential Foreclosure Days" in real estate, and direct involvement by federal and state court judges early in proceedings to encourage cost effective case management and resolution, have frequently brought benefits. Groups such as the Advisory Council for New York's Commercial Division have, together with the courts, sponsored helpful innovations aimed at greater efficiency. Positive steps have included: setting limits on the number of depositions and interrogatories, emphasizing options for accelerated procedures to reach trial (or "mini-trials" of discrete, potentially pivotal issues) with parties' agreement, requiring counsel to certify that they have discussed mediation and other forms of ADR with their clients, and introducing procedures for streamlining trial procedures.

Court systems and individual courts, including each of New York's federal district courts and several of New York State's courts, have adopted forms of court mandated or recommended mediation, including mediation early in cases before parties have spent large amounts on legal fees that could be used to bridge the gap between the parties. While there have been missteps, some of these programs have achieved striking success through settlement of a large percentage of cases with evident efficiency and significant reductions in cost.

Also, many judges, clients and counsel have undertaken the steps that we recommend below in order to promote efficiency. Those steps have included a significant increase in the practice of including dispute resolution clauses in contracts, often requiring high-level negotiations or mediation before a complaint is filed.

There is much to be admired in these efforts, and much can be learned from them. But a significantly enhanced commitment by the bench and bar is still needed to achieve a broad consensus in favor of changing our litigation culture to focus more intently on efficiency and access to justice.

IV. WHAT THE CITY BAR SHOULD DO

When our Committee met over the past year with judges, judicial administrators, advocates, clients and neutrals and heard their many helpful observations and suggestions, we regularly asked them what the City Bar should do. The two suggestions consistently offered were that the City Bar should (1) present strong recommendations for change to promote greater efficiency in resolving disputes; and (2) publish a list of Best Practices for Efficient and Cost-Effective Resolution of Disputes. Recognizing that taking such action to promote greater fairness and efficiency in the administration of our courts is consistent with the City Bar's history and mandate, this Report follows those recommendations. Our objective is to promote as standard practice a significantly enhanced commitment by courts, counsel and parties to efficiency. That would mean replacing current practice – often driven by reflexive, costly and sometimes purposefully burdensome posturing and steps – with a culture in which thoughtful decisions by both counsel and the parties as to the most cost efficient ways to reach a resolution become standard.

If judges, parties and counsel have the will and commitment to make the necessary changes, New York could be a leader and achieve more than other states have in promoting efficiency in litigation. Parties might consider such a change in favor of efficiency as a mark of distinction for New York and, as a result, be drawn more often to resolve disputes and conduct their business here.

V. PRINCIPAL RECOMMENDATIONS

To achieve such essential changes in accepted practice, we must temper the long accepted idea that full fact-gathering and the need to impose litigation burdens on adversaries should be principal drivers in the resolution of disputes. While full development and discovery of "truth" is better than surprise, a system focused on efficiency would be superior to the current system that frustrates the pursuit of resolution on the merits by imposing excessive cost and delay.

Inspired by recent changes in the Federal Rules and the Commercial Division Rules favoring proportionality in discovery, we believe that the concept of proportionality – keeping cost and time in proportion to what is at stake – should be a focus for efficient management and resolution of all aspects of the litigation process. Just as new rules are now aimed at eliminating

the burdens of excessive discovery, there should be a similar commitment to avoid unnecessary claims, defenses, motion practice and other procedures that increase cost and delay.

Limiting the scope and duration of the dispute resolution process should not be a step back from fair resolution on the merits of the parties' positions. Instead, it should direct participants in disputes toward the cost-effective and efficient pursuit of fair resolutions - whether through decisions or through settlements. While expeditious, relatively low cost resolution cannot be achieved in all disputes, it can be achieved in many that are today caught up in a formal litigation process too burdensome to be effective. The goal should not be completing all or any specific part of the formal process but, instead, achieving either a sensible and mutually acceptable negotiated settlement or an affordable decision. It will in many – likely most – cases be in the parties' economic self-interest to treat efficiency and proportionality as goals that will promote, not detract from, resolution on the merits.

To achieve the necessary efficiency, we recommend that as a matter of accepted practice the participants in the dispute resolution process regularly take the steps set out below. We believe that it would also be beneficial to include the recommended steps in training law students as to what should be standard practice in our litigation culture.

A. Manage Disputes Efficiently from the Outset

At the outset of a matter, even before a complaint has been filed, rather than just plunging into the adversarial process and seeing where it may take the parties, counsel should instead proactively consider and discuss with their clients the most efficient potential approaches to a favorable and affordable resolution. Early objective consideration of the strengths and weaknesses of the parties' positions, the prospects for ultimate success, the likely course and expected cost of litigating to a decision and the possible options for pursuing a more cost effective resolution (whether by settlement, determination by a court or by achieving a decision through an alternative method) should be undertaken in virtually every case. The instinct to treat single-minded efforts to defeat the adversary as the exclusive approach until the dispute is thought to have fully ripened should be resisted from the outset. Civil disputes should instead be treated as problems to be solved and/or as commercial risks to be evaluated and managed.

There is ample evidence of the value of early objective evaluation of claims and defenses as compared to deferring rigorous evaluation until the completion of discovery and motion practice. The strengths and weaknesses of each party's position, and forces apart from the merits that may influence the terms of a resolution, are often readily discernible at the outset. Counsel's evaluation of these factors often does not significantly change as facts are later developed or discovered at substantial cost.

The presence of requirements in many commercial contracts that parties negotiate before litigating reflects a recognition of the potential value of such early discussions that should apply equally when parties have not agreed to such processes in advance. Whether based on a contractual provision or not, thoughtful early evaluation can often lead to beneficial pre-complaint negotiation or mediation in most if not all forms of civil disputes.

While many participants in disputes observe that the passage of time can encourage parties to settle, the cost associated with time passing can skew the results, allocate to litigation expense funds better used to achieve a settlement, and result in a denial of access to justice.

B. Consider the Benefits of Early Negotiation and Mediation

With the objective of keeping costs in proportion to the nature and scale of the dispute, counsel and the parties should as soon as practicable engage in discussions to explore the possible options for resolution. If early settlement is not achievable before a complaint is filed, or shortly thereafter, the parties and their counsel should – as standard practice – work together to manage the process of resolving the dispute with efficiency and proportionality as priorities. Especially when parties have ongoing business relationships or frequent litigation disputes with each other, they should cooperate in trying to develop time and cost-efficient methods for resolving such matters. One party's proposals for greater efficiency should not inspire the other party's instinctive opposition. Reasonable cooperation in sensible management of the controversy will often produce better results for the parties than adversarial conduct.

In addition to early negotiation, counsel and clients should consider the potential advantages of an early, well-conducted mediation. Mediation should not be seen as an intrusion on fact-gathering or on efforts to prevail outright but, instead, as a constructive step toward a sensible end to the dispute. Counsel and parties who believe they cannot be ready for mediation – or negotiations – until the litigation process has run all or much of its course often find that a well-conducted mediation can facilitate cost-effective fact gathering and bring the parties to a resolution much earlier than they expected.

Parties and counsel can avoid significant unnecessary cost by agreeing with a mediator – or on their own – to exchange the important information they need informally. While voluntary early informal exchanges of limited essential information may seem counter-intuitive for many advocates steeped in our adversarial litigation culture, the cost of such exchanges is often much less than the cost of fighting over production and gathering the same facts through the formal litigation process. Often reflexively holding such facts back or objecting to their production until they inevitably must be produced in discovery will serve no purpose and significantly increase expense. By contrast, parties who keep document requests focused and reasonable through exchanges overseen by a mediator – or on their own – will often best serve their clients by avoiding unnecessary motion practice and needless expense. While in some cases deferring such exchanges will be in the best interests of the parties and, for some parties, may be affordable, there will be many cases where that is not so. Our system needs to be geared to make dispute resolution affordable in those cases.

Because mediations require skilled mediators, if mediation is to be an important factor in changing the litigation culture, administrators of court-annexed mediation programs and dispute resolution providers will need to take significant steps to assure that capable mediators are available in sufficient numbers.

To increase the number of effective mediators, it should become accepted practice – encouraged by the courts – for advocates to serve regularly as mediators throughout their careers. Among other things, that would increase advocate experience with the mediation process and awareness of the benefits of early case evaluation and the informal exchange of facts.

More frequent early evaluation and negotiation that prompts early resolution of cases would, as an important collateral benefit, free more court resources for attention to matters best resolved through litigation to a decision. Many matters that should, for good reasons, be more fully litigated currently move through the system slowly because of crowded dockets and resulting triage-style case management. Accelerated movement of those cases through the process should, among other things, make achievement of necessary decisions affordable. For matters where advocates and clients make thoughtful decisions to continue with the formal litigation process, an orientation toward efficiency and proportionality can be very beneficial.

C. Counsel Should View Efficient Management of Disputes as a Primary Professional Responsibility

Embracing an obligation to avoid excessive cost and delay, counsel should more readily accept that it will not always be their duty to pursue *every* fact or develop *every* argument. Instead, professional excellence should be found in the sensible management of the matter toward a "just, speedy and inexpensive" result. Strategies of delay or imposition of burden on adversaries are unethical (*see* New York Rules of Professional Conduct 3.2 and Comment 1), and should be viewed as carrying substantial risk of imposing extra cost on all parties without a corresponding benefit to any party. Courts should help to prevent successful application of such strategies.

A zealous advocate should act in the client's interest, and that should mean efficiently seeking a good result in the circumstances.

D. Courts Should Be Proactive in Encouraging Efficiency and Proportionality

To bring about the necessary changes to reduce cost and delay, the judiciary should take an even stronger hand than in the past – through active oversight of disputes, experimentation with new approaches to efficient resolution, revision of rules as needed, and explicit pursuit of less expensive and earlier settlements or decisions. Rather than keeping hands off and allowing the process to be self-executing, courts should actively engage in promoting the negotiated resolution of disputes and their efficient management to affordable decision. Judges known to be effective in such efforts have earned justified renown.

Impressive settlement rates in jurisdictions where court-mandated mediation has worked reflect the potential to achieve significant system-wide increases in efficiency through mediation, whether court mandated or by agreement of the parties. Rules such as Federal Rule 26(f), requiring that opposing counsel confer early, and NYS Commercial Division Rules 10 and 11, requiring advocates to certify at the initial case conference and thereafter that they have discussed ADR options with their clients, should be enforced. Just eliminating the reflexive

view that an early proposal to pursue early negotiations will be taken as weakness will advance cost and time efficient resolution in many cases.

Courts should use their rule making authority to promote affordable decisions without unnecessary or inefficient steps. The federal court rule limiting depositions to seven hours illustrates what the judiciary can do. Criticized initially as an unworkable constraint on fact-gathering, the rule has caused lawyers to focus on what is and is not necessary, without impeding access to justice. Such assessments as to what is really necessary should become an essential element of cultural change favoring greater efficiency.

So too, presumptively limiting the number of depositions and interrogatories and adopting discovery limits based on proportionality, as in New York's Commercial Division and Federal Rules, are significant steps that warrant judicial reinforcement and extension to other parts of the court system. Directing that essential factual information be produced quickly without argument is yet another way the judiciary can help counsel and the parties achieve a better understanding of how to be efficient.

Courts can also promote less costly and faster resolution of disputes by deciding dispositive motions early and, if unable fairly to resolve a dispute by deciding such a motion, by resolving as many legal issues as possible so that the parties can better focus their litigation efforts or settle with an outcome influenced by the court's input. Taking into account the low statistical probability of a trial, courts should view their analyses of dispositive motions as likely to be the parties' only opportunity to receive judicial input as to the merits. If, as is often the case, cost and other burdens make "full" fact gathering and trial unlikely, delaying the court's decision will not promote a fair resolution based on the merits.

Courts should also do more to discourage motions and other litigation tactics that unnecessarily delay resolution or make litigation more burdensome. Counsel should be discouraged from taking steps that have little or no reasonable prospect of advancing efficient resolution of the litigation, and from proposing approaches to case management that will make obtaining a decision unaffordable. Courts should use such efficiency-oriented techniques as required pre-motion letters to the court and/or court conferences to help reduce the number of unnecessary motions, and should consider proposing processes for accelerated resolution of limited factual issues when resolution of those issues may permit a final decision.

The City Bar and its President's Committee for the Efficient Resolution of Disputes look forward to working with the judiciary and issuing additional reports focused on necessary changes in particular areas of practice.

VI. BEST PRACTICES FOR THE EFFICIENT AND COST-EFFECTIVE RESOLUTION OF CIVIL LITIGATION IN NEW YORK

Just as the City Bar's previous reports on the importance of civility and the enhancement of diversity have provided important guidance to professionals, the Best Practices set out below should guide the conduct of participants in pursuing the resolution of civil disputes in New York.

The Best Practices are not intended to replace existing court or bar standards but are, instead, consistent with those standards. Thus, for example, a mandate that counsel seek to keep the cost and duration of disputes in proportion to the stakes is consistent with the ethical mandate that counsel act in the clients' interest.

1. Recognizing that efficient resolution of a matter may not require taking all the steps in the formal litigation process, the courts, parties and counsel should from the outset work to keep the cost and time of resolving disputes, whether by settlement or by decision, proportionate to the nature and scale of the matters at issue, and to avoid unnecessary cost and delay.

2. Parties and counsel should, early in the litigation process (if possible before a complaint is filed), objectively evaluate the merits of all parties' positions and the likely course and cost of litigation, so that they can manage their disputes efficiently and, when appropriate, sensibly pursue settlement.

3. Counsel should consider themselves professionally responsible for crafting, discussing with clients and pursuing with adversaries and courts approaches to disputes that offer the best prospects for efficient and affordable resolution.

4. Parties should not regard litigation as primarily a contest left to counsel with instructions to pursue victory, but should instead remain actively involved, treating civil disputes as a form of risk or opportunity to be evaluated and managed to achieve an appropriate and affordable result.

5. Beginning early in a litigation and continuing thereafter, courts should, where practical, proactively manage the dispute to promote a fair, efficient and affordable decision or settlement.

6. Courts should adopt rules and practices that feature inquiry of counsel and other oversight of the litigation process to foster achievement of effective settlements or decisions at a cost and in a time frame proportionate to the nature and scale of the dispute.

7. Courts should support – and in appropriate circumstances mandate – mediation as a vehicle for promoting more efficient case management and less expensive and faster resolution.

8. Courts should discourage and Counsel should avoid claims, defenses, motions, requests for discovery, appeals of non-dispositive decisions and other litigation steps or strategies that unnecessarily delay proceedings and burden parties.

9. Judges should decide dispositive motions as early as practicable, and decide as much of a motion as possible when they are not able to resolve the dispute entirely.

10. If the parties choose arbitration or another ADR method as a mechanism for dispute resolution, they should take advantage of the potential for efficiency that such a process can offer when compared with formal court-directed litigation.

June 2018

PRESIDENTS COMMITTEE FOR THE EFFICIENT RESOLUTION OF DISPUTES*

MEMBERS**

Erin Gleason Alvarez, Co-Chair
erin@gleasonadr.com
(646) 653-2374

Daniel F. Kolb, Co-Chair
daniel.kolb@davispolk.com
(212) 450-4394

Michael Cardozo
Louis A. Craco
Hon. Carolyn Demarest (Ret.)
Darryl Gibbs
Michael Graff
Adam Halper
Stephen Hochman
Paul Huck
Chris Stern Hyman
Richard I. Janvey
Beth L. Kaufman
Alfreida Kenny
John S. Kiernan***
Adrienne Koch
Nancy Kramer
Michael A. Lampert
Jennifer Lupo
Dana MacGrath
Richard L. Mattiaccio
Jonathan Montcalm
Mark Morril
Rebecca Price
William Sparks
Hon. Elizabeth Stong

* The President's Committee for Efficient Resolution of Disputes (the "Committee") is comprised of members of a number of City Bar standing committees, including the Alternative Dispute Resolution Committee, Arbitration Committee, Cooperative & Condominium Law Committee, Council on Judicial Administration, Council on the Profession, In-House Counsel Committee, In-House/Outside Litigation Counsel Working Group, International Commercial Disputes Committee, Litigation Committee, and State Courts of Superior Jurisdiction Committee. Members include lawyers in private practice, arbitrators and mediators, retired judges, and in-house counsel.

** The Committee's members are serving in their individual, personal capacities. They are not representing any organization or employer and nothing in this report should be attributed to an organization or employer with which a committee member was or is affiliated. Further, although the committee voted overwhelmingly in support of issuing this report, it should not be assumed that every member of the committee supports every recommendation as articulated in this report.

*** City Bar President (May 15, 2016 – May 15, 2018)

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

August 27, 2019

The Honorable Janet DiFiore
Court of Appeals of the State of New York
20 Eagle Street
Albany, NY 12207

The Honorable Lawrence K. Marks
Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: Presumptive ADR Initiative of the New York State Courts

Dear Chief Judge DiFiore and Chief Administrative Judge Marks:

On behalf of the Executive Committee of the Dispute Resolution Section ("Section") of the New York State Bar Association ("NYSBA"), I write to offer the Section's considered suggestions and recommendations regarding the New York State Unified Court Systems' Presumptive ADR Initiative, which was announced on May 14, 2019.

The Section was founded over 10 years ago and has members in every Judicial District. Among other activities, the Section serves to promote the responsible development and practice of dispute resolution in the State; further the education of the bench and bar so as to enhance the proficiency of practitioners and neutrals and increase the knowledge and availability of party-selected solutions; and provide service to the courts and the general public about various dispute resolution processes. Our areas of focus and expertise include procedures applicable to alternative dispute resolution ("ADR"), competence of arbitrators and mediators, and legal issues relating to arbitration, mediation, and other forms of ADR.

Introduction

The February 2019 Interim Report and Recommendations of the Chief Judge's Advisory Committee on ADR ("Advisory Committee") and the statements set forth in the May 14, 2019 press release set out a bold vision for change in the New York Courts. We embrace that vision and will do all we can to help implement it, promptly and effectively. Toward that end, we provide suggestions below that may aid in creating a robust, efficient, and successful presumptive mediation program in the New York State courts. We look forward to working with the Advisory Committee, the Office of Court Administration ("OCA"), and other local, county, and specialty bar associations, as part of an ongoing conversation as the program unfolds.

While "Presumptive ADR" will include options other than mediation, this letter is limited to providing comments on the implementation of presumptive mediation in the New York State courts.

General

In our view, there is no subject matter area in which civil cases do not settle, and no particular subject matter areas have ever been shown to be inappropriate for mediation. Therefore, none should be excluded from the presumptive program. Screening mechanisms should be in place to protect parties where there are issues of domestic violence,[1] and limited opt-out provisions can be created to address other unique circumstances.

We also believe there is no need to re-invent the wheel. Rules for presumptive court-annexed mediation programs already exist, in and outside of New York, that can serve as models and can, with relative ease, be modified to fit particular courts in New York State. Further, many courts collect data, and the best approaches from diverse court programs can be drawn upon to create robust data collection of broad scope.

We further suggest that the program should be re-visited regularly to allow for feedback and modification. Regular review and feedback from attorneys, parties, panel mediators, the judiciary, and administrators will only make the program more successful.

What is Needed for Program Success

1. Competent, Well-Trained Mediators

Competent, well-trained mediators are essential to a successful mediation program. To participate in a court-annexed program, mediators should have a minimum of 40 hours training, which would include significant role play opportunities.

To begin, we suggest that all mediation training programs where role-playing is a core part of the curriculum and CLE credits are provided should be accepted, at a minimum, to qualify someone for the court mediation panels, not just those that have specifically been approved under Part 146. Successful completion of a law school mediation clinic program should be accepted as covering the initial minimum 40 hours of training. We recommend that mediators already on existing Federal Court mediation panels, New York State Commercial Division panels, and any other established New York State court panels be waived onto the new State Court panels, subject to the limitation that, if a panel-listed mediator has not actively served on the panel in the prior two years, such a mediator need not be waived into the program.

Although it will be up to the Court to determine what expertise may be required for particular areas, we note that skill in mediation process is at least as important as particular subject matter knowledge in helping to resolve cases.[2] Some court-annexed mediation programs have provided

[1] We recommend such cases be sent to mediation only if (1) there is a preliminary screening of the case, (2) the parties agree, and (3) the court approves.

[2] *See, e.g.*, Section 6 of the standards for court-annexed mediation programs from the Center for Dispute Settlement, The Institute of Judicial Administration: https://s3.amazonaws.com/aboutrsi/594428b132c16660b4360f46/NationalStandardsADR.pdf.

training in certain subject matter areas for mediators who have then mediated cases in those areas with great success.[3] We suggest there is no one-size-fits-all model for mediator competency and prerequisites. Many members of the Section serve as mediators with Community Dispute Resolution Centers ("CDRCs"), State and Federal Courts, AAA, JAMS, etc. and are successful at resolving a wide variety of cases. NYSBA, through the Section, already sponsors mediation training programs, and such programs could be expanded to include subject matter areas where needed.

The CDRCs often provide mediation services in the Small Claims Court and other courts of limited jurisdiction. It is anticipated and recommended that they continue to do so. Mediators for the courts in which the CDRCs provide mediators should be required to meet the requisite training described above and any other additional training or subject matter experience that the Administrative Judges for those courts deem necessary. While training programs established by a particular CDRC may be accredited to provide that training, participation in the particular CDRC training program should not be required to mediate in those courts.

Non-Attorney Mediators: Provisions should be made for non-attorneys participating in court-annexed programs. Non-attorney mediators have effectively been used by CDRCs, and continued participation by CDRCs will be essential for successful implementation of presumptive mediation programs. The same training requirements for attorney mediators should apply to non-attorney mediators. We recommend that non-attorneys who have successfully mediated with a CDRC and completed the relevant training for such programs also be waived onto the appropriate presumptive court mediation program.

2. Mediation CLE

We agree completely with the Interim Report's emphasis on educating stakeholders on the value of ADR. We therefore propose that CLE programs about presumptive mediation, and mediation more generally, be widely offered. All attorneys should be encouraged to attend these CLE, especially over the next 2-4 years until presumptive mediation has become a normalized part of the court process. The CLE programs can be broad-based and address, for example, not only the new court-annexed programs, but also basic skills for mediators and advocates, or mediation in specific subject matter areas. We also suggest that consideration be given as to whether certain programs should count toward satisfying the training requirements for new mediators. It would be helpful to include at least 30 minutes addressing the new court presumptive programs.

3. Informing Parties

Parties in lawsuits are also stakeholders – perhaps the most important stakeholders – in our system. Therefore, we recommend that attorneys be required to advise their clients on information about mediation and other relevant court-annexed mediation programs. The transmission of such

[3] The Southern District of New York provided training for employment cases, ADEA cases, FLSA cases and § 1983 cases to mediators on its mediation panel. The success rate for mediations in those areas is typically 50% or more. *See* S.D.N.Y. Mediation Program Annual Report (Jan. 1, 2016-Dec. 31, 2016), available at www.nysd.uscourts.gov/docs/mediation/Annual_Reports/2016/Annual%20Report.2016.Final%20Draft.pdf.

information will be essential to inform the public of the new programs, an objective previously identified by the Advisory Committee.

We also suggest that a line be added to a form Preliminary Conference Order (or other similar such document where one exists) whereby attorneys would affirm that they have advised their clients of the available court-annexed programs and discussed those programs with them.

Further, we recommend that a short notice be created, explaining mediation and other relevant court-annexed dispute resolution programs, which can be distributed to *pro se* litigants when filing their initial pleadings with the court. For convenience, the notice could also be available on-line.

4. Mediator Compensation

Mediators should be paid for their work as are court personnel, judges, litigators, and others who have significant roles in our justice system. Payment models are increasingly common in state and federal court mediation programs.[4] Although payment does not always guarantee quality, programs of the scope envisioned here cannot possibly provide high-quality, broad-based service over time if mediators are not properly compensated. The failure properly to compensate mediators may also make it difficult for many skilled mediators to accept more than a few cases a year, especially for newly-admitted attorneys, those practicing in smaller firms, or those in a solo practice. Even lawyers who work in larger law firms may find themselves restricted in serving as mediators on a *pro bono* basis except in limited circumstances. Further, it may suggest to some participants that the court does not place a real value on mediation. In sum, we believe it is important to encourage practices, such as compensation, that support the professionalizing of the mediation field.

In general, as funding presently does not exist for mediators to be paid by the courts, mediators should be paid by the parties with fees equally shared.[5] This model has worked wherever it has been used. It is unrealistic at present for mediators to be paid in Small Claims Court matters, and mediating in Small Claims Court can serve as useful training for new mediators. CDRCs generally provide mediation services for free and presumably will continue to do so, at least initially. Mediators who participate in those programs should be given *pro bono*/CLE/CE credits for that work.

[4] In New York's Federal District Courts, the Western, Northern, and Eastern District mediation programs all require that mediators be paid. Only the Southern District still retains a court-annexed mediation program where mediators are unpaid for their work. New Jersey State Courts provide for two free hours of mediation allocated equally between preparation and the first mediation session, and which shall be at no cost to the parties. *See* New Jersey Court Rules 1:40-4(b), available at https://www.njcourts.gov/attorneys/assets/rules/r1-40.pdf; Disclosure Concerning Continuation of Mediation and Mediation Preparation, available at https://njcourts.gov/forms/11183_med_disclose.pdf?c=D0G.

[5] As the use of mediation becomes more prevalent in our courts, which should result in greater efficiency and cost reductions, consideration might later be given to court funding of mediator compensation, in whole or in part.

State, local, and county bar associations should work with the Administrative Judges of the various courts in each jurisdiction to set compensation rates for mediators that are appropriate for the court and jurisdiction.[6]

We believe that if a certain amount of uncompensated time is to be provided, it should not exceed 90 minutes, in addition to one pre-mediation telephone conference with the mediator lasting no longer than one hour. In Supreme Court, the parties should be required to spend at least three hours in mediation.[7]

We recommend that the rules should provide for *pro bono* mediation where the parties meet developed standards of need. Parties ineligible for *pro bono* mediation but who cannot afford their share of the hourly rate can be afforded the opportunity to apply for a reduced fee. As hourly fees will be split among the parties, given the benefits of mediation, mediator cost should not impose too great a burden, especially in contrast to the fees most parties will be paying litigating counsel and given the benefits of mediation.

Pro Bono Work: All attorneys on court mediation panels should be encouraged to do some *pro bono* related mediation work in cases involving low-income parties so that no party is denied the ability to participate in the program.[8] *Pro bono*-related mediation work can include doing a certain number of *pro bono* mediations per year and/or serving as appointed counsel for *pro se* or indigent litigants for the limited purposes of the mediation. The Southern District of New York currently has a program under which counsel are appointed for such limited purpose. We believe that mediators should receive CLE credit for this *pro bono* work (which may require some modification of the current CLE rules).

5. Mediator Selection and Initiation of the Mediation

The Section's views on mediator selection in the context of court-annexed programs was set forth previously in, among other places, a letter dated September 14, 2018 that was sent in response to OCA's request for public comments on a proposed amendment to Rule 3 of the Rules of the Commercial Division (22 NYCRR § 202.70[g], Rule 3[a]), which sought to insert the following language: "Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending." In that letter, we supported the proposed amendment and reiterated our prior view that efforts to make court-annexed mediation more successful would be enhanced if the parties were first given the opportunity to agree on a mediator, instead of having the Court make a selection in the first instance. Proponents of

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[6] The rules of the Commercial Division for the Supreme Court, New York County provide that mediators assigned from the Panel are compensated by the parties at the rate of $400 per hour, beginning after three hours of mediation, although there is no compensation for any preparation preceding the mediation. Panel mediators chosen by the parties are compensated by the parties at the rate of $450 per hour, commencing from the outset of the first mediation session.

[7] If less than three hours may be required in some courts, the amount of uncompensated mediation time should also be reduced.

[8] We note that many court-annexed mediation programs require that panel mediators do some *pro bono*-related mediation work.

this selection method are of the view that mediation programs will be more favorably received by the users and generate a greater rate of resolution if the parties have the chance to select the mediator from the inception of the matter's referral to mediation. The proposed amendment was subsequently adopted.

We also observe that an alternate selection method – whereby the Court appoints the mediator from a court-approved panel in the first instance, with the parties then having the right within, for example, fourteen days of that appointment to select their own mediator (who may or may not already be on the panel) – is being practiced by other courts in New York, including the Commercial Division of Suffolk County,[9] as well as in New Jersey's state-wide court-annexed mediation program. This alternative method would still allow for party choice in the selection of mediators. It might facilitate the scalability of programs by automatically drawing on a larger pool of available mediators, and can help bring new mediators, including less experienced mediators and mediators of diverse backgrounds, into the field.

Whichever methodology is adopted, we recommend that mediators be required expeditiously to perform a conflicts check, confirm their availability to conduct the mediation, and facilitate contact with the parties. Thereafter, depending upon the program and/or the nature of the dispute, the parties can make a written submission to the mediator prior to the mediation, either as a requirement of the program or upon request by the mediator.[10]

Many judicial districts in the state cover large geographical areas and, therefore, might require parties to travel a significant distance to attend a mediation. There also may be fewer mediators to choose from in some judicial districts than in others. Under such circumstances and perhaps others, we suggest consideration be given to conducting mediations by videoconferencing.

Given the power imbalances that can exist where some parties appear unrepresented at a mediation, we suggest that consideration also be given as to whether, in certain courts, some initial judicial review of a case is appropriate before it is sent to mediation. In addition, in certain but not all situations, it may be advisable to have a settlement reached in mediation in such cases be reduced to writing and submitted to the court for review and approval to ensure that unrepresented parties understand the terms of the settlement and agreed to them of their own free will.

We also suggest that all mediation training programs include training of mediators for cases in which not all parties are represented by counsel and in which no parties are represented.

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[9] *See* Suffolk County Supreme Court Commercial Division Mediation Program at 2-3, available at https://www.nycourts.gov/courts/comdiv/PDFs/Suffolk_ADR_Protocols.pdf ("Along with the Order of Reference, the Referring Justice shall include the contact information for the mediator appointed by the Court. . . . If the parties and/or counsel object to the mediator appointed, they must notify the Court within fifteen (15) days or the objection is waived.").

[10] Rule 10 of the General Rules and Procedures of the Alternative Dispute Resolution Program of the Commercial Division, Supreme Court, New York County establishes effective procedures for the initiation of the mediation after the mediator is appointed. We recommend that this rule be considered for adoption state-wide.

6. Presumptive Disclosure

We suggest that the rules specify that counsel and parties will discuss with the mediator what disclosure, if any, is needed before a mediation session is held. The focus of such disclosure should be on obtaining information needed to engage in a meaningful mediation process. Protocols could also be developed as to what pre-mediation disclosure may be required in certain cases (*e.g.*, the exchange of medical records in personal injury matters). Members of relevant NYSBA sections and committees can also be consulted to help develop rules regarding what disclosure may be required in specific subject matter areas.

7. Opting Out

Opting out of mediation participation should be permitted in limited circumstances with the burden being on the party seeking to opt out to show "good cause." The Western District of New York rule on opting out provides a good model. Among other things, that rule states that "Opting Out Motions shall be granted only for 'good cause' shown. Inconvenience, travel costs, attorney fees, or other costs shall not constitute 'good cause.' A party seeking relief from ADR must set forth the reasons why ADR has no reasonable chance of being productive." Judges can *sua sponte* exempt a case from the mediation requirement.[11]

8. Confidentiality and Mediator Immunity

Rules 8 and 9 of the General Rules and Procedures of the Alternative Dispute Resolution Program of the Commercial Division, Supreme Court, New York County, provide for, respectively, confidentiality and immunity for mediators. We believe that both are necessary requirements for a successful mediation program, that these rules should be adopted state-wide, and that they be distributed, in writing, to the participants at the commencement of a mediation. In addition, wherever possible, protection under Section 17 of the Public Officers Law should also be extended to mediators on court-annexed panels.

9. Data and Program Review

Collecting data on program outcomes is critical for program analysis and ensuring quality, and should be automated to the extent possible. For example, the Northern District of New York automatically updates its mediation data daily. That update does not include as broad a range of data as some other court-annexed mediation programs, but it shows that at least some automatic data collection and dissemination can be done, and once done, can provide useful information with little burden on court staff.

All courts maintain electronic case information. Therefore, program data should at a minimum be able to generate reports (1) as to cases resolved at a mediation session, and for any period up to 150

[11] The full Western District's ADR Plan is available here: https://www.nywd.uscourts.gov/sites/nywd/files/ADR%20Committee%20--%20Amended%20ADR%20Plan%20Effective%20Date%205-11-2018%20.pdf.

days after the last mediation session and are (2) subject matter specific. Because the underlying data already exists electronically, this should be a relatively straightforward programming issue – one that other courts have previously resolved and implemented. Encouragement of data collection should be done in a manner that does not violate, and preserves, the confidentiality of the mediation process and of mediated settlement agreements.

We suggest that each court issue an annual report with relevant data for the prior year and a discussion of where the program has succeeded and where improvements are necessary. Feedback should be gathered from mediators and mediation participants. Again, this is something other court-annexed mediation programs do, and their means and methods can be drawn upon to establish how it can be most easily done in the New York State courts.

Mediators should be required to expeditiously report to the Court the status of the mediation and the outcome when the mediation is completed.[12] Courts are encouraged to solicit feedback from participants in mediation as to their satisfaction with the proceeding and with the mediator, as well as recommendations for how to improve the process.

10. Rule Implementation

We understand that OCA is working on developing rules for court-annexed ADR programs and look forward to reviewing and commenting on any proposed state-wide or district-wide rules in a manner that will assist in their timely implementation.[13]

11. Bar Association Assistance

Among other things, NYSBA and its various sections and committees can help implement this program by: (1) setting-up and staffing both training programs and the CLE programs referenced above; (2) providing additional mediation training outside of the New York City metropolitan area; (3) providing mediation training to court personnel; (4) providing mentoring opportunities for inexperienced mediators, including co-mediation and observation opportunities prior to appointment to court panels; (5) offering panels of mediators who qualify for service in court mediation programs; (6) developing disclosure protocols in particular subject matters as described above; (7) working with the Administrative Judges in their consideration of whether specific subject matter experience or knowledge is desirable for mediators in their particular courts and, if so, determining what that should be; (7) doing outreach to groups to announce the new programs, explain why they are being established, and suggest how participants can make them effective; and (8) developing procedures to solicit litigant and attorney feedback and recommendations for improvement, as described above.

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[12] As a matter of good mediation practice, mediators often reach out to the parties after a mediation has reached an impasse and the court has been advised that the mediation has concluded. Mediators should be encouraged to do so and to advise the Court if the parties and the mediator agree to continue the mediation.

[13] We also believe that the court-annexed mediation rules for New Jersey and the Western and Northern Districts of New York are simple yet thorough and should be consulted for possible guidance.

We thank you for your time and consideration in allowing us to provide you with these comments. We applaud the efforts of the Advisory Committee and firmly believe, as do the courts, that ADR, and mediation in particular, is an integral part of providing effective, high-quality, prompt, and efficient administration of justice. The Section stands ready to assist in this initiative in any way the Advisory Committee and OCA believe useful.

Respectfully submitted,

Theodore K. Cheng
Chair
NYSBA Dispute Resolution Section

cc: The Honorable George J. Silver
The Honorable Vito C. Caruso
The Honorable Edwina G. Mendelson
The Honorable Thomas A. Breslin
The Honorable Felix J. Catena
The Honorable Molly Reynolds Fitzgerald
The Honorable Craig J. Doran
The Honorable Paul L. Feroleto
The Honorable Kathie E. Davison
The Honorable Norman St. George
The Honorable C. Randall Hinrichs
The Honorable Richard E. Sise
Lisa M. Denig
The Honorable Joel R. Kullas
Bridget M. O'Connell
Lisa M. Courtney

DRS Form: NYS Unified Court System's ADR Initiative

Start of Block: Default Question Block

DRS Form: NYS Unified Court System's ADR Initiative Mediator Self-Identification Form

1. Please include the following:

- O Name (First and Last): (1) _____
- O Business entity (if any): (2) _____
- O Business address: (3) _____
- O Preferred phone number: (4) _____
- O Preferred e-mail address: (5) _____
- O If you maintain a website or webpage, provide the URL for it: (6) _____
- O How many years have you been practicing law? (7) _____
- O In what year were you admitted to the NY bar? (8) _____

1a. Are you in good standing with the NY Bar?

- O Yes (1)
- O No (2)

2. What practice area specialization(s) do you consider yourself to possess?

_____

_____

_____

_____

_____

3. How many years have you served as a mediator?

O 1-5 (1)

O 6-10 (2)

O 11-15 (3)

O 16-20 (4)

O 20+ (5)

4. How many matters have you mediated over the above time?

O 1-5 (1)

O 6-10 (2)

O 11-15 (3)

O 16-20 (4)

O 20+ (5)

5. What kinds of matters have you generally mediated over the above time?

_____

6. List all mediation trainings taken and include the years, trainers, and/or programs.
Priority will be given to applicants who have taken 40 hours of mediation training under Part 146 of the Rules of the Chief Administrative Judge (i.e., 24 hours in initial mediation training and 16 hours in additional and subject matter specific mediation techniques, such as commercial or matrimonial) or an equivalent mediation training (e.g., training through a law school mediation clinic, training through Community Dispute Resolution Centers Program).

_____

_____

_____

_____

_____

7. Identify (by court or administering organization) all U.S. mediation rosters or panels to which you have been admitted and for which you are currently in good standing

_____

_____

_____

_____

_____

8. Are you certified to mediate through a Community Dispute Resolution Center?

O Yes (1)

O No (2)

If yes, which one(s)?

_____

9. Indicate which language(s) other than English you speak, and whether you have mediated in that language.

	Speak (1)	Have mediated in this language (2)
Chinese - Mandarin (1)	☐	☐
Chinese - Cantonese (2)	☐	☐
French (3)	☐	☐
French Creole (4)	☐	☐
Gujarati (5)	☐	☐
German (6)	☐	☐
Hindi (7)	☐	☐
Italian (8)	☐	☐
Japanese (9)	☐	☐
Hebrew (10)	☐	☐
Korean (11)	☐	☐
Russian (12)	☐	☐
Spanish (13)	☐	☐
Spanish Creole (14)	☐	☐

Urdu (15)	☐	☐
Yiddish (16)	☐	☐
Other (please specify below) (17)	☐	☐

9a. Please use the space below to indicate which other languages you speak and whether you have mediated in that language.

_____

_____

_____

_____

_____

10. Indicate all New York counties in which you would be available to mediate:

- [ ] Albany County (1)
- [ ] Allegany County (2)
- [ ] Bronx County (3)
- [ ] Broome County (4)
- [ ] Cattaraugus County (5)
- [ ] Cayuga County (6)
- [ ] Chautauqua County (7)
- [ ] Chemung County (8)
- [ ] Chenango County (9)
- [ ] Clinton County (10)
- [ ] Columbia County (11)
- [ ] Cortland County (12)
- [ ] Delaware County (13)
- [ ] Dutchess County (14)
- [ ] Erie County (15)
- [ ] Essex County (16)
- [ ] Franklin County (17)
- [ ] Fulton County (18)

- [ ] Genesee County (19)
- [ ] Greene County (20)
- [ ] Hamilton County (21)
- [ ] Herkimer County (22)
- [ ] Jefferson County (23)
- [ ] Kings County (24)
- [ ] Lewis County (25)
- [ ] Livingston County (26)
- [ ] Madison County (27)
- [ ] Monroe County (28)
- [ ] Montgomery County (29)
- [ ] Nassau County (30)
- [ ] New York County (31)
- [ ] Niagara County (32)
- [ ] Oneida County (33)
- [ ] Onondaga County (34)
- [ ] Ontario County (35)
- [ ] Orange County (36)

- [ ] Orleans County (37)
- [ ] Oswego County (38)
- [ ] Otsego County (39)
- [ ] Putnam County (40)
- [ ] Queens County (41)
- [ ] Rensselaer County (42)
- [ ] Richmond County (43)
- [ ] Rockland County (44)
- [ ] Saratoga County (45)
- [ ] Schenectady County (46)
- [ ] Schoharie County (47)
- [ ] Schuyler County (48)
- [ ] Seneca County (49)
- [ ] St. Lawrence County (50)
- [ ] Steuben County (51)
- [ ] Suffolk County (52)
- [ ] Sullivan County (53)
- [ ] Tioga County (54)

- [ ] Tompkins County (55)
- [ ] Ulster County (56)
- [ ] Warren County (57)
- [ ] Washington County (58)
- [ ] Wayne County (59)
- [ ] Westchester County (60)
- [ ] Wyoming County (61)
- [ ] Yates County (62)

11. Indicate court/case types for which you seek to mediate.

_____

_____

_____

_____

_____

12. Is there any more information you would like the NYS Unified Court System to know?

_____

_____

_____

_____

_____

PRESS RELEASE

New York State
Unified Court System

Hon. Lawrence K. Marks
Chief Administrative Judge

Contact:
Lucian Chalfen, Public Information Director
Arlene Hackel, Deputy Director
(212) 428-2500

www.nycourts.gov/press

Date: April 20, 2018

New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice

New York – Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks today announced a plan to revitalize the court system's commitment to Alternative Dispute Resolution, building upon the framework of the courts' existing statewide programs. The new plan will promote the goals of the Chief Judge's Excellence Initiative by helping to eliminate case backlogs and enhancing the quality of justice.

Alternative dispute resolution (ADR), comprising mediation, arbitration, neutral evaluation and collaborative law, among other approaches, has proven a meaningful, efficient and cost-effective way to resolve disputes in appropriate cases. It is generally confidential, less formal and less stressful than traditional court proceedings. ADR, and particularly mediation, can provide parties with greater opportunities to be more fully heard. ADR can also help parties gain insight into the strengths and weaknesses of their case in deciding whether to proceed with litigation.

The court system, through its ADR Office, collaborates with trial courts and Community Dispute Resolution Centers to offer parties access to free or reduced-fee ADR services in a wide range of disputes, from small claims to family matters to complex business disputes. The office also conducts ADR trainings, approves trainers and training programs, and supports courts in maintaining rosters of ADR practitioners, among other responsibilities.

Typically, parties are referred to these services by the judge handling the case, with ADR services provided by trained volunteer mediators on court rosters, or by court staff, depending on the program. While the court system's ADR Program has grown over the years, with thousands of New Yorkers obtaining referrals to and benefiting from ADR services, ADR continues to be an underutilized mechanism for resolving disputes and moving cases forward in the civil justice process.

The initiative launched today will work to expand the use of ADR within the courts, with a focus on early resolution of civil disputes, provided they are deemed suitable for the ADR process. To assist in and guide this statewide undertaking, Judge DiFiore and Judge Marks today also announced the formation of an Advisory Committee on ADR, led by John S. Kiernan, a senior litigation partner at Debevoise & Plimpton LLC and outgoing president of the New York City Bar Association. This expert group of judges, lawyers, ADR practitioners and academics will examine the services currently accessible within the court system and make recommendations for improvement and expansion.

Among the existing programs is an early mediation pilot in New York County targeting certain contractual disputes that follows the "presumptive ADR" model (with a choice to opt out of the program in appropriate cases), in which parties must participate in mediation or some other form of ADR before the case can proceed in court. This ADR model, which does not require a judge's referral and has been successfully implemented in other jurisdictions, will be expanded to other courts and categories of cases.

The Advisory Committee will evaluate ADR practices and programs in place in courts around the country in its efforts to help fortify the court system's existing ADR programs, extend the range of ADR services, and facilitate the utilization of mediation and other forms of alternative dispute resolution in civil legal matters, where suitable.

"Though not a substitute for the court process, alternative dispute resolution, if used appropriately, can serve as a supplement to an effective, efficient civil justice system. We have made steady progress in bringing alternative dispute resolution into the mainstream, yet we must do more if it is to become an integral part of our court culture and civil justice process. I am thankful to the outstanding chair of our new Advisory Committee on ADR, John Kiernan, the advisory group's distinguished members, and the hardworking staff of the court system's ADR

Office, for their dedication toward these goals, which are critical to advancing the delivery and quality of justice in New York," said Chief Judge DiFiore.

"Mediation, along with other forms of ADR, has high rates of success, allowing parties to focus on the issues of their dispute and helping preserve relationships, among cost-saving and other benefits. A valuable case-management tool, ADR must play a greater role in the court system's efforts to expedite cases and enhance access to justice. The initiative announced today will lead to expansion of ADR in the Supreme Court, lower civil courts, Family Court and Surrogate's Courts. I look forward to working with the committee and the court system's ADR Office toward that end, as we strive to maximize the efficiency of court operations and better serve the justice needs of New Yorkers," said Chief Administrative Judge Marks.

"Litigation of civil disputes often costs too much and takes too long to be affordable by the parties, and inefficiency in resolution of disputes contributes to overburdened court dockets that place enormous demands on limited judicial system resources. The new Advisory Committee, focusing on possible alternative mechanisms for resolving civil disputes that are less expensive and faster than conventional litigation, will strive to enhance access to affordable justice, and save parties and courts time and money in achieving settlements or decisions, consistent with the Chief Judge's Excellence Initiative," said John Kiernan.

The roster of the new Advisory Committee on ADR follows.

Advisory Committee on ADR

Chair
John Kiernan
President, New York City Bar Association
Senior Litigation Partner, Debevoise & Plimpton LLC

Members
Simeon H. Baum
President, Resolve Mediation Services, Inc.

Sasha A. Carbone
Associate General Counsel, American Arbitration Association

Alexandra Carter
Professor and Director, Edson Queiroz Foundation Mediation Program, Columbia Law School

Hon. Anthony Cannataro
Administrative Judge, New York City Civil Court

Hon. Michael Coccoma
Deputy Chief Administrative Judge, Courts Outside New York City

Hon. Andrew A. Crecca
Supervising Judge, Matrimonial Matters, Suffolk County

Antoinette Delruelle
Senior Staff Attorney, Mediation Project

Hon. Paula Feroleto
Administrative Judge, Eighth Judicial District

Adrienne Holder
Attorney-in-Charge, Civil Practice, Legal Aid Society

Elena Karabatos
President-Elect, Nassau County Bar Association
Partner, Schlissel Ostrow Karabatos

Michele Kern-Rappy
Senior Settlement Coordinator, Supreme Court, New York County

Daniel Kolb
Senior Counsel, Davis Polk & Wardwell

Lela Porter Love
Director, Kukin Program for Conflict Resolution, Benjamin N. Cardozo School of Law

Hon. Rita Mella
Surrogate, New York County

Hon. Edwina Mendelson
Deputy Chief Administrative Judge for Justice Initiatives

Charles J. Moxley, Jr.
Principal, Moxley ADR LLC

Rebecca Price
Director, ADR Program, U.S. District Court for the Southern District of New York

Sarah Rudgers-Tysz
Executive Director, Mediation Matters

Hon. Brandon Sall
Surrogate, Westchester County

Paul Sarkozi
Partner, Tannenbaum Helpern Syracuse & Hirschtritt LLP

Hon. Saliann Scarpulla
Supreme Court, New York County, Commercial Division

Hon. Jeffrey S. Sunshine
Supervising Judge, Matrimonial Matters, Kings County

Daniel M. Weitz
Director, Professional and Court Services, New York State Office of Court Administration

Adviser
Lisa Courtney
Statewide ADR Coordinator, New York State Office of Court Administration

# # #

IV. CIVIL JUSTICE

A. ALTERNATIVE DISPUTE RESOLUTION

Turning back to our civil dockets, one of the main ways to streamline litigation and make our courts more affordable is to increase opportunities for settlement through Alternative Dispute Resolution options such as mediation and arbitration. After we announced the Excellence Initiative, many practitioners and bar associations, as well as our own trial and administrative judges, suggested that our court system was not taking sufficient advantage of ADR compared to the federal courts and other state court systems. They pointed out that mediation and arbitration have a proven track record of resolving a high percentage of civil cases, and of narrowing disputed issues, thereby reducing litigation cost and delay.

Last April, we responded by creating an ADR Advisory Committee populated with leading judges, practitioners, ADR professionals and academics who volunteered to serve under the very able leadership of John Kiernan, an experienced litigator and immediate past-president of the New York City Bar Association. The Committee got to work and now urges our court system to adopt presumptive early mediation as a standard component of our case management process for identified types of disputes known to be promising candidates for mediation. We are embracing that concept and will move toward a system in which, unless appropriate exceptions apply, most civil cases will be automatically presumed eligible for early referral to court-sponsored mediation.

Through our Office of ADR Programs, and guided by the Committee's expertise, our Administrative Judges will work hand-in-hand with local bar associations to expand the number of mediation programs in the New York State courts. At the same time, we will develop statewide rules to guide local program implementation, provide training for judges, attorneys and neutrals and appoint local ADR coordinators in our courts.

Our past experience with court-sponsored ADR programs has been positive, featuring high settlement rates and strong user satisfaction levels among participating litigants and lawyers:

- In New York County Supreme Court, a pilot program requiring early mediation of contract disputes under $500,000 has achieved a 60% settlement rate.

- In Erie County, former Court of Appeals Judge, Eugene Pigott, upon his return to the Supreme Court trial bench, started an early mediation program using court approved volunteers which achieved a 65% settlement rate in 800 referred civil, tort and estate matters in 2018.

- Our upstate child permanency mediation program has achieved a 73% resolution rate, and a similar program for custody and visitation cases in the New York City Family Court has a 70% resolution rate.

- Our Community Dispute Resolution Centers, operating in all 62 counties, mediate about 30,000 cases a year, including landlord-tenant, small claims and child custody and visitation matters, with a 74% settlement rate, averaging 25 days from first contact to settlement.

The time is right to provide litigants and lawyers with a broader range of options to resolve disputes without the high monetary and emotional costs of conventional litigation. We consider this vision of ADR to be an integral part of our Excellence Initiative, and we are excited to work with the Bar to make it a reality.

B. COMMERCIAL DIVISION

Recognizing that New York State is the commercial and financial capital of the world, we have long been committed to resolving complex business disputes in a world-class forum -- the

Commercial Division of our Supreme Court. Last September, Judge Marks and I both addressed the Standing International Forum of Commercial Courts, a group of 100 judicial leaders from 35 countries who came to New York City to exchange ideas and learn from our state and federal judiciaries how they can promote the just and efficient resolution of commercial disputes in their home countries.

The Commercial Division has been a leader in adopting new procedures to streamline discovery and reduce litigation costs, which led me to ask our Advisory Committee on Civil Practice to evaluate the reforms implemented in the Commercial Division and recommend which of them should be adopted more broadly in our civil courts. The Committee recommended a range of procedural and discovery reforms which were posted for public comment, and the Administrative Board of the Courts, which I chair with our four Presiding Justices, is reviewing the commentary. We will be making decisions on the proposals this Spring.

Finally, in recognition of the economic resurgence taking place in the Bronx, reflected in the number of commercial cases filed in Bronx Supreme Civil, we will be expanding the Commercial Division to Bronx County, effective April 1, 2019. Bar to make it a reality.

Summary of NY City Bar President's Committee Initiatives

Potential steps in support of Court Annexed Mediation and other ADR programs initiated by the Chief Judge and based on recommendations from her ADR Advisory Committee chaired by John Kiernan

Potential steps in support of the extension of rules encouraging efficiency in the Commercial Division to other Courts in the State

In coordination with the Federal Courts Committee and possibly other City Bar Committees, planning for meetings for Members of the Bar and Clients with Judges in the Eastern and Southern Districts to discuss efficient case management. Also, ongoing discussions with Federal Court Judges Castel, Stong and Levy and possibly other judges interested in and committed to efficiency in the litigation process

Boot Camp held at the City Bar for In house counsel

Planning for Podcasts

Possible Preparation of Brochure to be provided to the Bench and Bar stressing the Best Practices and overall benefits and approach to promoting efficiency

Consideration of City Bar Year Dedicated to Efficiency in Dispute Resolution

Arbitration Committee CLE program emphasizing how arbitrators can and should be efficient in the management of disputes

Ongoing meetings and exchange of ideas as to the promotion of efficiency with Efficiency Subcommittee of the Judicial Counsel

Meeting and continuing exchange of ideas as to the promotion of efficiency with the ADR Committee

Meeting and continuing exchange of ideas with respect to the promotion of efficiency with the Federal Courts Committee and its Subcommittee on Efficiency

Development of list of specific suggestions as to ways to enhance efficiency by members of City Bar Committees

Proposal that Efficiency in Dispute Resolution become one of the City Bar's basic offerings for new counsel

Proposal that those calling the City Bar for a referral of counsel be asked if they would like assistance in getting a mediator

Proposal that a question be included on the Bar exam stressing efficiency in the Best Interests of clients

Discussion of efficiency as an important part of the Law School curriculum with Law School Deans in meetings this spring

Possible outreach to and coordination with the Federal Judicial Center with respect to initiatives as to efficiency in litigation

Possible outreach to law firm leaders, including Brad Karp, with respect to promotion within the firms of efficiency in dispute resolution.

Possible CLE Programs organized and Co-Sponsored by multiple City Bar Committees focused on key topics such as Proportionality

Promoting increased training in negotiation for litigators

Emphasis on increased training in efficient management and coordination of the exchange of facts, including documents, to support an efficient litigation process. That could include managed approaches to e-discovery, tiered discovery, a requirement that relevant document production be immediate in specified cases, such as 1983 Claims, and immediate production of insurance policies

Encouraging advocates with at least ten years' experience to begin service as mediators both to enhance their litigation skills and gain experience in effectively resolving disputes

Promote discussion of the benefits of early mediation and early meetings of Parties and Counsel and early case conferences to explore settlement and/or a shared commitment to efficiency and cost effectiveness in the process

Meetings with other Court Committees

Fostering a Successful New York Presumptive ADR Program

Laura A. Kaster, Esq.
Laura A. Kaster, LLC

Robert E. Margulies, Esq.
Schumann Hanlon Margulies, LLC

Rebecca Price, Esq.
Director, ADR Program United States District Court, Southern District of NY

Jonathan Rosenthal, Esq.
Director of the Maryland Judiciary's Mediation & Conflict Resolution Office (MACRO)

Hon. Jeffery S. Sunshine
Justice, Supreme Court of Kings County, NY

Mediator Evaluation Program: Introduction

The Mediation Program for the U.S. District Court for the Southern District of New York has developed a program for ongoing assessment and skills development of panel mediators.

GOALS:

The goals of the program are to: 1) generate a picture of a mediator's strengths and weaknesses both for the mediator's own development and to assist the Mediation Program in determining whether or not the mediator should continue to serve on the panel; 2) support mediators in self-reflective practice; 3) enhance collegiality and sense of community among mediators; and 4) assist the Mediation Program in identifying specific topics for further training and skills enhancement.

EVALUATION PROCESS:

Evaluations will be conducted by mediators who have been trained in the evaluation protocol and in giving constructive feedback. After the evaluation, evaluators will recommend that the mediator should a) continue to mediate for the Court or b) not continue to mediate for the Court. Mediators who receive a "should not continue to mediate" recommendation will be offered the opportunity to participate in the observation/mentoring process that is now mandatory for potential new panel mediators; they will have six months to observe at least three other SDNY mediations, participate in any training offered by the Court, and will be invited to participate in a second evaluation with another evaluator. Mediators who choose not to participate in the evaluation program, who do not pass the initial evaluation and choose not to participate in the observation/mentoring process, or who do not pass a second evaluation, will be removed from the panel. Depending on the needs of the program, mediators who do particularly well in the evaluation may be offered the opportunity to be trained as an evaluator for other panel mediators.

WHEN WILL MEDIATORS BE EVALUATED?

To remain in good standing on the SDNY mediation panel, all panel mediators will participate in an evaluation approximately every four years. Mediators who joined the panel after 2014 will be evaluated approximately four years after the mentor mediation which resulted in their addition to the panel. All mediators who joined the panel prior to 2014 will be evaluated over time, based on the availability of evaluators, and will have subsequent evaluations four years from the date of their initial evaluation.

CONFIDENTIALITY OF PROCESS:

The Mediator Evaluation program has been developed for the benefit of SDNY panel mediators and to enhance the overall effectiveness of the Mediation Program. The success of the evaluation process is

dependent on the full and complete participation by both mediators and evaluators, including candor and openness during feedback conversations. To that end, evaluators and mediators will not share any information, communications, or written materials related to the evaluation with anyone outside of the Mediation Program. In particular, mediator evaluations may not be used as letters of reference or to provide any information to other ADR programs. Any information, communications, or materials related to the evaluation process may be shared with the mediator being evaluated at that mediator's request.

TIMELINE:

1. Mediator accepts a case and evaluator clears conflicts and is assigned.
2. Mediation Office confirms attendance of evaluator with mediation participants.
3. Evaluator/mediator commence pre-mediation process (contacting each other and the participants for scheduling of pre-mediation calls and initial mediation session, reading of pre-mediation submissions).
4. First in-person mediation session.
5. Evaluator completes competencies form.
6. Mediator and evaluator have debrief discussion.
7. Process checklist, final recommendation, and competencies forms submitted to Mediation Program within 48 hours of feedback discussion, and to the mediator if requested.
8. Mediation Program discusses conclusions with mediator and plans next steps.

Role and Expectations of Evaluators

All evaluators for the program have extensive mediation experience and have received an orientation to the process and goals of this program. Evaluators will be assigned before the mediator makes initial contact with the participants. Each evaluator will observe a particular case from the pre-mediation communications through the initial session and, using a form provided by the Mediation Program, will assess the mediator's core mediation competencies. The evaluator will not mediate the case and will endeavor to be as unobtrusive as possible in the presence of parties and lawyers. However, at the request of the mediator, made out of the presence and hearing of parties and counsel, the evaluator may provide limited suggestions or advice to the mediator. The evaluator will sign the confidentiality agreement.

PRE-SESSION PARTICIPATION

The evaluator will speak with the mediator prior to the mediator's contact with counsel in order to review the mediator's planned pre-mediation activities and to coordinate scheduling. Where possible, the evaluator should "observe" all mediator contact with counsel and/or the parties prior to the mediation. When pre-mediation sessions are conducted by telephone, the mediator will conference in the evaluator before the call begins so the evaluator can listen without contributing to the pre-mediation call. In instances where pre-mediation process is extensive, the evaluator will "observe" enough of the communications to be able to make an assessment as to the mediator's demonstration of competencies related to this phase. The evaluator will review all written submissions to the mediator prior to the first session.

PARTICIPATION IN THE FIRST MEDIATION SESSION

During the mediation session, the evaluator will strive to be in the presence of the mediator at all times. As noted above, the evaluator will not participate in or intervene in the mediation process in any way, or communicate with counsel or the parties beyond simple neutral pleasantries.

PARTICIPATION AFTER THE FIRST SESSION

Although it is not required, where possible, the evaluator will continue the evaluation by observing post-session activities of the mediator, including, for example, follow-up telephone calls and scheduling and holding additional mediation sessions.

FEEDBACK MEETING AND SUBMISSION OF FORMS

At the conclusion of the initial mediation session the evaluator will meet with the mediator to share and discuss the results of the evaluation, provide constructive feedback, and encourage positive, neutral, and critical self-reflection by the mediator. The evaluator may choose whether to share the actual evaluation form or to simply use the form as a guide for the conversation. This feedback meeting should begin with the evaluator asking the mediator to reflect on what was done well and what could have been done better in that particular mediation, using the competencies form as a guide to ask about

specific interventions. The focus of the feedback meeting should be the mediator's performance, not the specifics of the case. In the event that the mediation continues past one session, or other information is received such as the participant feedback forms, subsequent feedback meetings may take place. Mediation Program staff may participate in the feedback meeting or in post-process discussions with the mediator or evaluator.

The evaluator will not discuss the mediator's strengths and weaknesses or any contents of the evaluation form with anyone outside of the Mediation Program. Nothing contained within the evaluation form may be used for any purpose other than the Mediator Evaluation Program.

Within 48 hours of the feedback meeting the evaluator will submit the evaluation forms to the Mediation Office. Failure to submit the evaluation forms may result in removal from the list of evaluators.

Mediator Evaluation Program: Process Checklist

☐ Cleared conflicts for this evaluation mediation.

☐ Understanding that the goal of this process is to assess a fellow mediator's strengths and weaknesses, have spoken with mediator to determine the extent of my participation during any mediation communications.

☐ Reviewed the evaluation forms and competencies tool in advance of any mediation communications.

☐ To the best of my abilities, made myself available for pre-mediation communications and the initial mediation session.

☐ Signed confidentiality form.

☐ Filled out the evaluation forms.

☐ Discussed evaluation conclusions with mediator. (Please note: final determinations regarding a mediator's status on the panel are made by the Mediation Office.)

☐ Submitted this form, the final evaluation form, and competencies form to the Mediation Office within 48 hours of the post-mediation discussion.

☐ I departed from the guidelines above for the following reasons:

Mediator Evaluation Program: Final Recommendation

I _____observed mediator _____ on the following dates_____.

Understanding that any final decision as to a mediator's continued service on the SDNY panel rests with the Mediation Program, based on this observation, I make the following recommendations about this mediator.

☐ This mediator should continue to mediate because he/she demonstrated competencies discussed in the attached form. In particular:

☐ This mediator should not continue to mediate now because he/she needs to develop the following competencies:

This mediator will be offered the opportunity, within 12 months from the date of this form, to observe at least 3 other mediations coordinated by the SDNY Mediation Program then to complete another evaluation mediation. During this 12 month period the mediator may participate in any training or professional development offered by the SDNY Mediation Program.

☐ I recommend this mediator as an evaluator for the program. (Explain briefly.)

☐ I have discussed my recommendations with the mediator.

☐ At his/her request I have provided a copy of the evaluation forms to the mediator.

Date:

_____
: Evaluator

Mediator Evaluation Program: Competencies Form

This form is intended to provide guidelines for the assessment of skills, interventions, and competencies associated with mediators using a variety of styles and approaches to mediation. It is not expected that the mediator will necessarily use or reflect all of the identified skills, interventions, and competencies in any particular mediation. This form is a crucial aspect of the evaluation process and we ask that you take time to read and complete it before speaking with the mediator. Where possible, please include specific examples of a mediator's comments and/or conduct to illustrate your evaluation of individual sections/interventions.

In order to protect the confidentiality interests of the participants, do not use the names of the parties or the lawyers. Also be sure not to provide information that might identify any of the participants.

Mediator:_____
Evaluator:_____
Dates of Observation:_____

In each section below, please 1) check all interventions/skills demonstrated by the mediator, 2) provide an overall rating for that section, and 3) use comments to provide examples of particular strengths and weaknesses. If a particular section or skill could not be accomplished or demonstrated due to circumstances beyond the mediator's control please give no rating for that section and explain the circumstances.

1. Pre-mediation Calls with Counsel:

Contacted parties to schedule call promptly after notice of selection by: phone ☐ e-mail ☐ other ☐

Greet participants; endeavor to set positive, friendly, cooperative tone ☐

Ask if participants have mediated before; explain, summarize, invite input about the process ☐

Explain confidentiality and confidentiality agreement ☐

Confirm identity of persons who will attend, including those with settlement authority ☐

Ask status of case and discovery ☐

Discuss initial statements in joint session ☐

Established interim steps (e.g. limited discovery, content/deadlines for mediation statements) ☐

Overall Assessment of Pre-Mediation Calls ___

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

2. Mediator's Opening Statement:

Greet participants; establish friendly, cooperative tone ☐

Facilitate introductions ☐

Explain process, role of mediator, role of counsel, confidentiality ☐

Have everyone sign confidentiality agreement ☐

Revisit discussion about initial statements ☐

Overall Assessment of Opening Statement ___

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

3. Joint Session:

Listens attentively without interrupting ☐

Manages interruptions that threaten the process, if appropriate ☐

Asks clarifying questions ☐

Encourages active participation of parties ☐

Develops with participants an agenda of issues to be addressed ☐

Uses active listening techniques (e.g. reflection, summary, reframing) ☐

Overall Assessment of Joint Session ___

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

4. Explores Facts/Interests, Develops Options/Transmits Settlement Proposals:

Utilizes caucus effectively ☐

Engages parties; encourages them to participate actively ☐

Ascertains participants' interests ☐

Asks open-ended questions ☐

Maintains control of process while allowing participants to shape details ☐

Helps participants evaluate strengths and weaknesses of their case ☐

Facilitates creative problem-solving, where possible ☐

Helps formulate and adjust settlement proposals ☐

Encourages reality testing of options and proposals ☐

Assists in defining next steps whether or not agreement is reached ☐

Overall Assessment of Above Skills ___

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

5. Personal Attributes:

Stays calm, positive, and patient ☐

Puts participants at ease ☐

Listens attentively without interrupting ☐

Facilitates interaction between parties, including difficult conversations ☐

Responds appropriately to expressions of emotion ☐

Shows empathy ☐

Makes effort to build trust and confidence of the parties in the mediator and the process ☐

Overall Assessment of Personal Attributes ___

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

6. Adherence to Ethical Standards:

Demonstrates impartiality ☐

Maintains confidentiality ☐

Supports self-determination of participants ☐

Understands conflicts/recusal ☐

Demonstrates requisite subject matter expertise ☐

Overall Assessment of Ethics Standards ___

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

7. Overall, was the mediator effective? (Y/N):____

Why or why not?

8. Please describe the mediator's level of engagement with the feedback process (e.g. did the mediator display insight into his/her mediation practice, was the mediator open to comments from the evaluator, etc.)

9. Please describe any consultation between the evaluator and mediator throughout the mediation process:

10. How can this evaluation process and/or form be improved?

NOTES:

SUBMIT

MODEL TOOLS FOR MEDIATOR PEER REVIEW

INCLUDES MODEL POLICY, OBSERVATION FORM AND SELF-REFLECTION TOOL

RESOLUTION SYSTEMS INSTITUTE

RSI

RSI Peer Review Tools

These tools were originally developed, through the generous funding of the Illinois Bar Foundation, for the Kane County Child Protection Mediation Program, which utilizes a co-mediation model to serve families of children who are in the foster care system. The tools, as presented here, have been adapted for general use by any mediation program.

Included are:

- A **Peer Review Policy**, which sets forth goals, procedures and expectations for the program and its mediators
- A **Mediator Observation Tool**, which provides a rubric for peer observers to assess the relative strengths of and challenges encountered by the mediator
- A **Self-Reflection Tool**, which gives the mediator a reference to evaluate and reflect on their performance following the mediation session

RSI

MEDIATION PROGRAM PEER REVIEW PROCESS

PROJECT GOALS

The peer review process serves several objectives:

1. The process *ensures that participants are receiving quality mediation services*. Given the disproportionate level of poverty, lack of education and other indicators consistent with inability to access legal services present in the served population, it is imperative that these mediation services be of the highest quality. Conducting peer review provides a view of the mediators' performance and allows the Program and the Court to take corrective action where necessary.

2. The process *fosters the growth of mediator skills.* Discussing and dissecting their tactics and decision-making allows a mediator to gain awareness of their patterns, finding strengths to leverage and weaknesses to shore up. In completing a self-assessment after the mediation session, the mediator gains a new perspective on the experience, removed from the intensity of the mediation table. Information gained from peer review will inform the Program as to what topics can be covered in subsequent continuing education sessions.

3. The process *galvanizes the mediator community.* Through observing and reflecting with one another, the mediators will build rapport and camaraderie. By being able to candidly assess one another, the mediators will grow more comfortable with one another, which will in turn allow them to work better when they are paired during mediation. New ideas may flourish, and the program, the court and the community will be better for it.

RSI

PEER REVIEW PROCEDURE

The goal of peer review is for every mediator to be reviewed, be approved, and, in turn, become an observer. Each mediator will be observed no less than once per year, provided caseload and staffing allows.

To begin that process, the mediators will attend a training session for mediators that will prepare them to take on the role of observers. Such training should focus on strengthening the active listening skills of the Peer Observers and improve their ability to give constructive feedback to the Mediator.

In order to participate in the Peer Review process, **which is a requirement for continued participation in the program,** a mediator must review, sign and return this policy statement to the Program Administrator.

Prior to the Mediation Session

1. When the Program Administrator determines that it is a mediator's turn to be peer reviewed, the Administrator will select a Peer Observer.
2. After the Peer Observer confirms their availability, the Program Administrator will notify the mediator that they will be observed.
3. Before the mediation session, the Peer Observer will check in with the Mediators and Program Administrator to determine logistics, including seating arrangements during joint session and caucuses.
4. The Program Administrator will coordinate with the Peer Observer to ensure they have the appropriate documents to observe the mediation session.

During the Mediation Session

1. During the Mediators' Opening Statement, the Mediator shall reference the Agreement to Mediate and obtain all participants' permission to be observed. If there is an objection to observation, the Peer Observer shall be dismissed. The Program Administrator will reschedule the Mediator to be observed, providing a Peer Observer is available. The Peer Observer need not be the same one.
2. The mediation will proceed as normal, with the Peer Observer watching the entirety of the session, employing the skills learned in their Observation Training and the procedures and expectations set forth in this document.
3. The Peer Observer will not participate in the mediation they are observing.

RSI

After the Mediation Session

1. Following the session, the Mediators and the Peer Observer will discuss the skills and knowledge used during mediation. They may ask questions of one another so that they can better understand the other's perspective. While the Peer Observer may refer to the observation tool as a reference during the debrief, it is not intended as a report to the Mediator or anyone else and it will not be provided to the Mediator for review.
2. Within 24 hours after the debrief session, the Peer Observer will report to the Program Administrator on the Mediator's performance. This reporting should focus on mediator performance and not the particulars of the case.
3. Following review of the Mediator's performance, which will include both the feedback from the Peer Observer as well as the Participant Surveys, the Program Administrator will make a determination regarding the Mediator's performance. If the Mediator is meeting expectations, the Program Administrator will convey that determination to the Mediator and no further action will be taken.
4. If the Program Administrator determines that some additional action is needed, the Program Administrator will convey that determination to the mediator. That action may include a private meeting with the Program Administrator; attending certain continuing education trainings to be provided by the Program or requiring the Mediator to observe additional mediation sessions.
5. In cases of egregious or repeated serious misconduct, **the Program Administrator may recommend to the Court that the Mediator be removed from the roster.**
6. The final decision of continued inclusion on the roster of approved mediators rests with the Chief Judge.

Mediation Observation Form

Mediator observed _____

Observer _____ **Date** _____

The purpose of this form is to give you a place to take notes while you observe a mediator. Prompts are included to jog your thinking about mediator behaviors. Feel free to write outside the boxes, check off items, etc. Once the observation process is complete, you will hand this in to the office and they will destroy it. It will not be shared with the mediator.

Instructions to Observer

Use "Stages" to track what the mediator does at each step in the process. If something out of the ordinary happened, use page 4 to write about it. If you need more room for notes about the joint sessions or separate meetings, use pages 5-7.

STAGES

Welcoming	✓
Mediator establishes a safe, welcoming environment for all participants	

Mediator Orientation			✓
Mediator covers all necessary items and sets the tone for the mediation			
Introductions: self, co-mediator, participants	Confidentiality and exceptions to it: • New allegations of abuse/neglect • Threats - serious imminent harm • Mandated reporters • Agreement will go to court	Reporting to court: • If agreement reached, terms will be reported to court • If no agreement, that fact will be reported to the court	
Purpose of mediation			
Mediators' role		Disclose any relationships	
Voluntariness		Sign Agreement to Mediate	
Neutrality		Questions?	

Keep the following in mind as you observe the mediation:

Functions effectively as co-mediator
Maintains safe setting
Generally understands subject matter of dispute
Able to work through mediation stages
Uses appropriate language, e.g., doesn't talk down to parties and isn't too erudite
Operates within ethical parameters, e.g.: o Self-determination o Confidentiality o Neutrality o Voluntariness
Uses effective mediation techniques e.g.: o Listening o Reflecting emotions o Clarifying the agenda o Reality testing

Joint Session – 1	✓
Mediator assists participants in surfacing issues that need to be discussed	

Identifying issues/Setting agenda	✓
Mediator assists participants in setting agenda for the mediation session	

Joint Session – 2	✓
Mediator assists parties in working on items on the agenda	

See last page for more space for joint session notes.

Caucus – 1	✓
Mediator explains purpose of caucus clearly to parties,	
Mediator calls for caucus at appropriate times	
Mediator reiterates confidentiality policy	
Mediator checks in with the party or parties to see how they are feeling	
Mediator is able to surface new issues that did not arise during joint session and/or further explore ideas that did	
Mediator is able to build rapport while maintaining neutrality	

See penultimate page for more space for separate meeting notes.

Reaching or not Reaching Agreement	✓
Mediator assists parties in deciding what they can agree on.	
Helps parties memorializes agreed points in a manner that is clear and represents the participants' intentions.	

Concluding Mediation	✓
Mediator compliments participants, makes sure they know what happened in mediation (to extent possible), informs them of next steps and safely sends them on their way	

OCCASIONAL BUMPS IN THE ROAD

Every mediation is different and presents unique challenges. Use the space below to note how the mediator you are observing responded to any unusually difficult situations. Examples might include, emotional outbursts, lack of party capacity, or threats of violence.

MORE JOINT SESSION NOTES

Joint Session – #	✓

Joint Session – #	✓

Joint Session – #	✓

Joint Session – #	✓

MORE CAUCUS NOTES

Caucus – #	✓

Caucus – #	✓

Caucus – #	✓

Caucus – #	✓

RSI

Mediator Self-Reflection Tool

This tool is meant to help you continue to develop as a mediator by reflecting on your mediations. It is for your private use and will not be collected by the program. To protect confidentiality, do not include any identifying information about the parties and when filled out, do not share this tool with others.

Start by giving yourself a quick review of how well you did the items listed below using this scale:

4 = did it very well 3 = did it okay 2 = did it poorly 1 = didn't do it NA = Not Applicable

Guiding the mediation process	Self-review: _____
Using separate and joint sessions effectively	Self-review: _____
Reflecting and working with emotions	Self-review: _____
Identifying needs and interests	Self-review: _____
Encouraging communication	Self-review: _____
Generating new ideas, options	Self-review: _____
Encouraging progress, overcoming obstacles	Self-review: _____
Communicating respect and empathy	Self-review: _____
Remaining neutral and coming across as neutral	Self-review: _____
Supporting party self-determination	Self-review: _____

Next, reflect on the following prompts.

Things you did particularly well in this mediation

_____

_____

_____

_____

_____

Things you would do differently next time

_____

_____

_____

_____

_____

What did the parties need from you? (Answer only about what is legitimate in the mediation context.) How did you try to address those needs? Did it work? Why or why not?

_____

_____

_____

_____

_____

If this was a peer reviewed mediation, what was/was not helpful about your debrief with the observer?

_____

_____

_____

_____

_____

KINGS COUNTY PRESUMPTIVE MEDIATION PILOT

Introduction: Part 5F Hon. Rachel Adams, Part 5G Hon. Jeffrey Sunshine, and Part 5T Hon. Delores Thomas will be designated as presumptive matrimonial mediation parts. All new cases appearing for a P.C. after January 14, 2019 that are randomly assigned to parts 5F or 5G will be presumed eligible for mediation. All new cases appearing for a P.C. after May 18, 2019 that are randomly assigned to part 5T will be presumed eligible for mediation. Initial return dates for those cases in Part 5F will be Tuesday and in 5G and 5Twill be Thursday.

Mediation: The parties meet face-to-face in the same room with a mediator and talk about the concerns that brought them to court to resolve contested issues. The mediator is a trained neutral who conducts the mediation session. The mediator may be associated with a not-for-profit mediation service provider or an independent mediator whose credentials and qualifications have been reviewed and approved to work together with the Court in this program. A mediator is not a judge and will not decide issues if parties cannot agree. The mediation may take place in the courthouse, the mediator's office, or in the offices of a mediation center. If the mediation takes place in the court it will usually be in an assigned mediation conference room. Some mediations may take place with co-mediators or experienced mediators who are professor(s) accompanied by law students.

Mediation is voluntary, which means that parties can stop the process at any time; parties also do not have to agree to anything. Mediation is confidential with one of the exceptions being an allegation of child abuse or neglect. Anything said during mediation is not shared with the Judge.

Presumptive mediation means that all cases assigned to Parts 5F and 5G will be deemed eligible for mediation and may, at the Judges' discretion, be assigned to one mandated mediation session. Initial mediation sessions are at no cost to the parties for the mediator's services. A party or counsel may opt out of presumptive mediation by filing and signing a form on the date of the preliminary conference (PC), or an adjourned date of the PC, stating that they wish to not participate in mediation. If they wish to engage in mediation, a preliminary conference will be conducted taking into account expanded time frames to accommodate the mediation. If a mediator is available on site, then the mediation can occur before or after the preliminary conference.

Initial Screening: Screening for eligibility will be done by the Court with the assistance of the Court's Case Analyst Natasha Pasternack, LMSW, and NY Peace Institute, a not- for-profit Community Dispute Resolution Center. Not all cases will be deemed eligible for mediation. Eligibility may be denied based upon a host of factors, such as: past or present orders of protection, a power imbalance, past or present neglect or abuse petitions, complexity of issues, need for extensive discovery, or other factors determined by the Judge assigned.

Cases may be postponed for consideration of eligibility by the Judge pending determination of, or an agreement as to, interim issues of temporary child support, temporary maintenance, interim counsel fees or assignment of counsel (custody and visitation), or an attorney for the child(ren).

Mediators: The Court's Case Analyst will assign mediators to cases based upon availability of resources and any threshold income requirements of a particular mediation program. Parties and counsel at the PC shall execute a mediation initiation form (copy annexed) after the initial screening which will prompt the assignment of a mediator to the case.

If parties wish to select their own mediator, they may do so, but must notify the Court's Case Analyst within 5 court days of the name of the mediator and the date and time of the scheduled mediation. If the parties or counsel fail to provide the information the Case Analyst will designate a mediator.

Mediation Sessions and Scheduling: Counsel may attend the mediation with their clients. Counsel must provide notice to their adversary and to the assigned mediator if they plan on attending with their clients. Any additional mediation session is optional for the parties and not mandated by the Court. If parties opt to continue mediating beyond the initial session, they may arrange to mediate with the same mediator or engage a new mediator. If the parties and mediator want to continue to mediate beyond the initial mediation session, and the mediator charges a fee, the mediator must enter into a written agreement with the parties spelling out the payment details.

Parties must also contact the court-assigned mediator, if one has already been assigned, to cancel any scheduled session. If either party fails to attend the scheduled mediation or does not provide advance written notice to the mediator that they are not attending a scheduled mediation session, they may incur a fee from the mediator.

No mediation of financial ancillary issues may occur without the exchange of an affidavit of net worth and the prior year's tax returns with supporting W-2s, 1099, and K-1 forms (unless waived), which if they have not been provided as required by 22 NYCRR 202.16 at the PC must be completed and exchanged five days prior to the mediation, unless waived. While discovery should continue during the period of mediation, no depositions or financial experts need be retained or appointed until after the mediation, unless done so on consent or ordered by the Court.

All communications between the parties and the mediator about the dispute are excluded from court or any other proceedings including any disclosures made with a view towards settlement. However, when credible information concerning child abuse or neglect or serious threatened harm to anyone comes to the attention of the mediator, they are not required to adhere to the confidentiality restrictions.

Under this protocol a party may not call the mediator as a witness to testify in any other proceeding regarding any aspect of the mediation. The parties shall not require the production in court or in any other proceeding of any records or documents made by the mediator.

Where are We Going and How Do We Get There? -- The Future of ADR.

New York State Bar Association ADR Section
Annual Fall Meeting
Friday, October 25, 2019
New York Law School

Also called "What New York can learn from Maryland, and vice versa!"

Jonathan S. Rosenthal, Esq.
Director, Mediation and Conflict Resolution Office (MACRO)
Maryland Judiciary

The Maryland Judiciary Mediation and Conflict Resolution Office (MACRO)

We are part of the Administrative Office of the Courts (AOC)

Mission: to promote the availability, use, and quality of alternative dispute resolution (ADR) throughout Maryland.

The Maryland Judiciary Mediation and Conflict Resolution Office (MACRO)

We do this by:

- **Collaborating** with courts, ADR practitioner organizations, and other stakeholders to advance the field
- **Providing grants and technical assistance** to support court, community, school, and other ADR programs and projects
- Working to **improve the quality of mediation** services via the Maryland Program for Mediator Excellence (MPME)

The Maryland Judiciary Mediation and Conflict Resolution Office (MACRO)

And by:

- Supporting, conducting, and encouraging **research and evaluation** of ADR programs and processes
- **Raising public awareness** of ADR and supporting the appropriate use of ADR by people and groups experiencing conflict
- Providing **training and presentations** to courts, bar associations, and others on skill enhancement, professional growth, ethics, and public awareness

Availability

- Champion at the top
- Court rules
- Buy-in of judges
  - Training for judges and magistrates to help them understand what is happening behind closed doors, understand benefits, understand which cases might be best suited
  - Some judges take the training within 6 months to a year of retiring.
- Court staff who understand the process and can answer questions
  - We now provided mediation training for high level court staff and those administering mediation programs so they can better understand what's going on in the process

Maryland Court Rules

RULE 17-201. AUTHORITY TO ORDER ADR

(a) Generally. A circuit court may order a party and the party's attorney to participate in ADR but only in accordance with the Rules in this Chapter and in Chapter 100 of this Title.

(b) Referral Prohibited. The court may not enter an order of referral to ADR in a protective order action under Code, Family Law Article, Title 4, Subtitle 5, Domestic Violence.

(c) Mediation of Child Custody or Visitation Disputes.
Rule 9-205 governs the authority of a circuit court to order mediation of a dispute as to child custody or visitation, and the Rules in Title 17 do not apply to proceedings under that Rule except as otherwise provided in that Rule.

Maryland Court Rules

RULE 9-205. MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES

(b) Duty of Court.

(1) Promptly after an action subject to this Rule is at issue, the court shall determine whether:

(A) mediation of the dispute as to custody or visitation is appropriate and likely would be beneficial to the parties or the child; and

(B) a mediator possessing the qualifications set forth in section (c) of this Rule is available to mediate the dispute.

(2) If a party or a child represents to the court in good faith that there is a genuine issue of abuse, as defined in Code, Family Law Article, § 4-501, of the party or child, and that, as a result, mediation would be inappropriate, the court may not order mediation.

(3) If the court concludes that mediation is appropriate and likely to be beneficial to the parties or the child and that a qualified mediator is available, it shall enter an order requiring the parties to mediate the custody or visitation dispute. The order may stay some or all further proceedings in the action pending the mediation on terms and conditions set forth in the order.

Availability

- Champion at the top
- Court rules
- Buy-in of judges
  - Training for judges and magistrates to help them understand what is happening behind closed doors, understand benefits, understand which cases might be best suited
- Court staff who understand the process and can answer questions
  - We now provided mediation training for high level court staff and those administering mediation programs so they can better understand what's going on in the process

Use

- ☆Setting mediator qualifications
- ☆Identifying mediators and justice partners
  - ☆In-house
  - ☆Roster
- ☆Roster size
- ☆Case Management – moving cases to ADR/mediation

Use

- Consumer/attorney choice
  - Process
  - Timing
  - Mediator
- Scheduling the mediation session(s)
- Setting fees and other costs
- Paperwork and data collection
  - Mediator responsibilities
    - Developing processes that work
    - Upholding confidentiality

High Quality

- ☆Listening to stakeholder concerns
  - ☆Local advisory councils
- ☆Reviewing/observing practitioners
- ☆Continuing education requirements
- ☆Keeping up with research

High Quality

- Completing paperwork & data collection
- Survey forms
  - Practitioners
  - Litigants
  - Attorneys
- Using the data to improve programs

What questions do you have for me?

Statewide Evaluation of Court ADR

The Maryland Judiciary commissioned independent researchers to conduct the following studies as part of its long-term commitment to build alternative dispute resolution (ADR) programs in Maryland and to provide the highest quality ADR services to Marylanders. The research was led by the Administrative Office of the Courts and funded in part by a grant from the State Justice Institute.

Alternative Dispute Resolution Landscape: An Overview of ADR in the Maryland Court System. This report provides a comprehensive snap-shot of the court-affiliated ADR programs throughout Maryland, based on interviews of Court ADR Program Managers and courthouse staff conducted from July 2010 through January 2013.

- ADR Landscape

Criminal Court - Impact of Mediation on Criminal Misdemeanor Cases. This study examined the effect in terms of cost to the court system for cases which are referred to mediation compared to cases which are not referred to mediation. It also explores the effect on the participants regarding how the situation has worked out for them.

- Criminal Court Two-Page Summary
- Criminal Court Full Report

District Court Comparison - Impact of ADR on Responsibility, Empowerment, and Resolution. This study compared the attitudes and changes in attitudes of District Court litigants who went through ADR to an equivalent comparison group who went through the standard court process

- District Court Comparison Two-Page Summary
- District Court Comparison Full Report

District Court Strategies - What Works in District Court Day of Trial Mediation. This study examined the effect of mediator strategies (i.e. techniques) and program factors on case outcomes in day of trial mediations in the Maryland District Court.

- District Court Strategies Two-Page Summary
- District Court Strategies Full Report

Family - Effectiveness of Mediator Strategies in Custody Mediation. This study examined the effect of mediator strategies (i.e. techniques) in child custody cases in three Maryland circuit courts.

- Family Two-Page Summary
- Family Full Report

Collaborative Law: The Current and Prospective Use of Collaborative Law in Maryland. This report presents the emerging area of collaborative law through an examination of previous research in this area, and through interviews and surveys of court personnel and attorneys practicing collaborative law in Maryland.

- The Current and Prospective Use of Collaborative Law in Maryland (September 2013)

MARYLAND JUDICIARY
MEDIATION AND CONFLICT RESOLUTION OFFICE (MACRO)
Jonathan S. Rosenthal, Esq., Director
jonathan.rosenthal@mdcourts.gov

http://mdcourts.gov/courtoperations/adrprojects.html

Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution

Effectiveness of Mediator Strategies in Custody Mediation

Maryland court rules require judges to refer all contested child custody cases to attend mediation, except in situations of abuse. Statistical analysis of actual mediations revealed four groups of mediator strategies for study. **Mediators often use more than one set of strategies: the groupings described are strategies commonly used together. These are not labels for types of mediators.**

Reflecting Strategies:
- Reflecting emotions & interests
- Clarifying topics to work on
- Reflecting what participants say (LT)
- Open-ended questions (LT)

Reflect

The greater percentage of reflecting strategies used, the more likely it is that participants will:
- Say the other person listened & understood
- Become more able to work together
- Develop more personalized agreements

The less likely it is they will:
- Dismiss the other's perspective
- Reach an agreement

Long Term Results (LT)
Six months after mediation, the greater percentage of reflective strategies used, the more likely it is that participants will:
- Become more able to work together
- Prioritize their children's needs and consider the other parent's perspective

Directing Strategies:
- Introducing & enforcing guidelines
- Explaining one participant to another
- Advocating for one participant's ideas

Direct

The greater percentage of directing strategies used, the less likely it is that participants will:
- Report the mediator listened to them and respected them

Long Term Results (LT)
Twelve months after the mediation, the greater percentage of directive strategies used, the more likely it is that participants will:
- Return to court and file an adversarial motion and the more adversarial motions they are likely to file

Eliciting Strategies:
- Asking participants to think of solutions
- Summarizing solutions
- Asking how solutions might work for them

Elicit

The greater percentage of eliciting strategies used, the more likely it is that participants will:
- Reach an agreement
- Say the other person listened & understood
- Become clearer about their desires
- Say the underlying issues came out
- Become more able to work together

Telling Strategies:
- Sharing opinions
- Offering solutions
- Assessing legal options
- Introducing topics

Tell

This strategy was not statistically significant in any positive or negative outcomes.

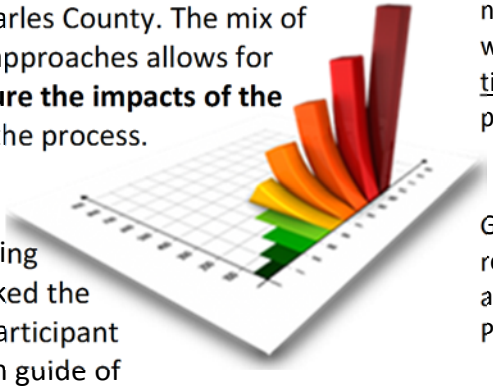
When Reflecting and Eliciting are combined:

Participants are more likely to: report a positive shift in their ability to work together, say that the other person listened and understands them better, indicate that the underlying issues came out, and **reach a personalized agreement**.

Full report: http://www.mdcourts.gov/courtoperations/adrprojects.html

Data Collection

Data for this study were collected in the Family Court mediation programs in Anne Arundel County, Baltimore County, and Charles County. The mix of programs and mediation approaches allows for enough diversity to **measure the impacts of the different component**s of the process.



Trained researchers observed 135 cases including 270 participants, and tracked the mediator strategies and participant behaviors using a common guide of 35 possible behaviors.

Many survey questions were asked of participants both before and after the mediation, to measure their change in attitude. Researchers also reviewed each court case file to examine the final parenting agreement, consent order or court decree relating to custody.

The Maryland Judiciary has a long-term commitment to building ADR programs in Maryland. The Administrative Office of the Courts commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders.

Additional Findings

In addition, this research found that participants who reported that they found the location of the mediation to be convenient were more likely to reach an agreement. This finding underlines the importance of holding mediation sessions in convenient locations.

Impact of Caucusing

The impact of caucusing is interesting in that it leads to positive reports about the mediator but negative outcomes for participants' ability to work together. The greater the percentage of time spent in caucus, the more likely the participants were to report the mediator respected them and did not take sides.

Greater percentage of time in caucus also resulted in the following changes in participants attitudes from *before to after the mediation*. Participants were

- More hopeless about the situation
- Less likely to believe they could work with the other participant
- Less likely to believe there are a range of options for resolution

What it Means

In family mediation, mediators can engage with parents in ways that support parents making their own decisions, by seeking to understand parents' values and by asking them about their ideas for possible outcomes. Alternatively, mediators can engage ways that assume parents need the mediators' ideas and suggestions.

Our research found that when mediators seek to understand parents and elicit their ideas, parents believe they can work together and make decisions for their family. The mediator strategies of eliciting parents' ideas are also the only strategies that were more likely to reach an agreement and consent order.

This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of Court ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by the Community Mediation Maryland, and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at: http://www.mdcourts.gov/courtoperations/adrprojects.html

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Impact of ADR on responsibility, empowerment, and resolution

This research is the only research in the country that compares the attitudes and changes in attitudes of participants who went through ADR to an equivalent comparison group who went through the standard court process. In this study, we measured: 1) attitude toward the other participant; 2) a sense of empowerment and having a voice in the process; 3) a sense of responsibility for the situation; 4) a belief that the conflict has been resolved; 5) satisfaction with the judicial system; and, 6) the likelihood of returning to court for an enforcement action in the subsequent 12 months. *This handout summarizes key points; the full report provides technical details and statistical equations.*

Short Term Outcomes

The study found several areas where ADR had a statistically significant impact on participants' experiences and attitudes, compared to participants who went through the standard court process.

Those who went to ADR, regardless of whether they reached an agreement in ADR, are more likely to report that:

1) They **could express themselves, their thoughts, and their concerns**.
2) All of the **underlying issues came out**.
3) The **issues were resolved**.
4) The issues were **completely resolved** rather than partially resolved.
5) They **acknowledged responsibility for the situation**

Short Term Shifts in Attitude

The study measured shifts in attitude from before to after and compared the shifts in treatment and control groups.

We found that participants who went through ADR are more likely than those who went through the standard court process:

1) To have **an increase in their rating of their level of responsibility** for the situation from before to after the intervention.
2) To **disagree more with the statement "the other people need to learn they are wrong" from before to after the process.**

Satisfaction with the Courts

The study measured how attitudes differed in satisfaction with the courts when an agreement was reached in ADR as opposed to in court.

Participants who developed a negotiated agreement in ADR were more likely to be satisfied with the judicial system than others, while participants who reached negotiated agreements on their own (without ADR) were not more likely to be satisfied with the judicial system than those without negotiated agreements

This seems to imply that the process of reaching an agreement **in ADR** is the factor that led to higher satisfaction, rather than just the process of having negotiated a settlement.

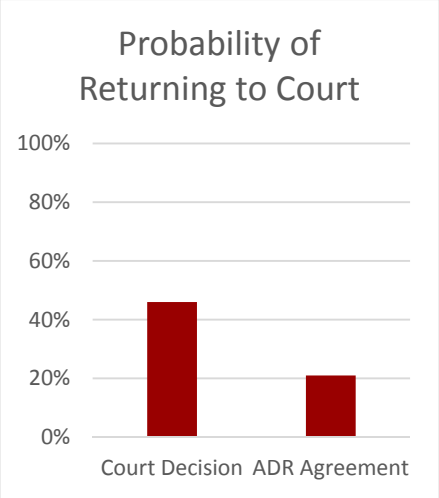
Long Term Shifts in Attitude

The present analysis finds the following in terms of the long-term impact of ADR on the self-reported outcomes we measure.

Participants who went through ADR are more likely than those who went through the court process to report:

1) An improved relationship and attitude toward the other participant measured from before the intervention (the ADR session or trial) to 3-6 months later.
2) The outcome was working.
3) Satisfaction with the outcome.
4) Satisfaction with the judicial system 3-6 months after the intervention.

Long-Term Costs to Court



The long-term analysis also indicates that cases that reached an agreement in ADR are less likely to return to court for an enforcement action in the 12 months following the intervention compared to cases that did not get an agreement in ADR (including those that reached an agreement on their own, ADR cases that did not get an agreement, and cases that got a verdict).

Reaching an agreement in ADR decreases the predicted probability of returning to court for an enforcement action. Cases that reached agreement in mediation are half as likely (21%) to return to court for enforcement actions compared to cases that reached a verdict (46%).

The Maryland Judiciary commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders, which includes ADR.

Demographics

This research also explored whether ADR had a different effect for different demographic groups. With a few exceptions which are detailed in the full report, ADR did not have a different impact on different demographic groups.

Data Collection

In any study that seeks to identify the impact of an intervention on a particular outcome, one needs to be certain that the two groups being compared are equivalent in all ways other than the intervention itself. We surveyed participants in cases agreeing to participate in ADR, and then suspended the ADR program and surveyed participants in similar cases who were never offered ADR. The researchers reviewed case characteristics, demographics, and pre-test attitudinal variables to identify differences between the groups. The groups were determined to be generally comparable. Characteristics that were identified to be different between the two groups were included in the regression analysis to account for any possible difference. (For details on this or any aspect of the research methodology, please see the larger research report.)

Our Process

To measure the impact of ADR on potential shifts in participants' attitudes and perspectives, we took into account that there are a range of factors that could affect these shifts and perspectives. Participants' roles in court (plaintiff or defendant), whether they are represented by an attorney, their general outlook before they got to court, the history of the relationship between the litigants, the history of the conflict, and the type of case can all have an effect on attitudes and perspectives. Our research methodology, called *regression analysis*, allows us to isolate the impact of ADR as opposed to other variables that may affect the outcome. By doing this, we can reach conclusions about the impact of ADR itself, confident that we are not inadvertently measuring one of these other factors.

One other unique aspect of this study is that we separate the impact of reaching an agreement from the impact of the ADR process. We look at people who got an agreement through ADR, and those who settled on their own. By doing this, **we are able to isolate the impact of the *process* of ADR**, separate from its effect on reaching an agreement.

This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by Community Mediation Maryland and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at:
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Updated 6/17

What Works in District Court Day of Trial Mediation: Effectiveness of Various Mediation Strategies on Short-Term and Long-Term Outcomes

Maryland court rules permit judges to order or refer civil cases in the District Court to mediation or a settlement conference. This study identifies the mediator strategies and program factors affecting case outcomes. Statistical analysis of actual mediations revealed four groups of mediator strategies for study. **Mediators often use more than one set of strategies: the groupings described are strategies commonly used together. These are not labels for types of mediators.**

Reflect

Reflecting Strategies:
- Reflecting emotions & interests

SHORT TERM: Reflecting strategies are positively associated with participants reporting:
- that the other person took responsibility and apologized
- an increase in self-efficacy (belief in one's ability to talk and make a difference)
- an increase from before ADR to after ADR in their sense that the court cares

LONG TERM: This strategy was not statistically significant in any positive or negative outcomes.

Elicit

Eliciting Strategies:
- Asking participants to suggest solutions
- Summarizing solutions that have been offered
- Asking participants how those solutions might work for them

SHORT TERM: Eliciting participant solutions was positively associated with participants reporting that:
- they listened & understood each other & jointly controlled the outcome
- the other person took responsibility and apologized

Eliciting was positively associated with reaching an agreement in ADR.
Eliciting participant solutions was negatively associated with participants reporting ADR practitioner:
- controlled the outcome
- pressured them into solutions and prevented issues from coming out

LONG TERM: Participants were more likely to report a change in their approach to conflict and were less likely to return to court for an enforcement action.

Offering / Tell

Offering Strategies:
- Offering opinions
- Advocating for their own solutions
- Offering legal analysis *(long term only)*

SHORT TERM: This strategy was not statistically significant in any positive or negative outcomes.

LONG TERM: The more offering strategies are used, the less participants report:
- The outcome was working
- They were satisfied with the outcome
- They would recommend ADR
- They changed their approach to conflict

Caucus

Caucusing is the practice of meeting with the participants on each side of the case separately and privately.

SHORT TERM:
The greater the percentage of time participants spend in caucus, the *more likely* participants report:
- the ADR practitioner: controlled the outcome, pressured them into solutions, and prevented issues from coming out.
- an increase in a sense of powerlessness, an increase in the belief that conflict is negative, and an increase in the desire to better understand the other participant.

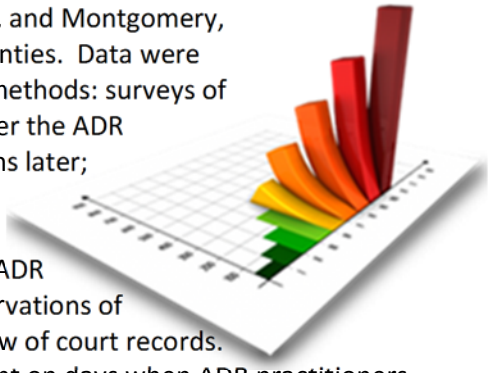
The greater the percentage of time in caucus, the *less likely* the participants report:
- they were satisfied with the process and outcome, and the issues were resolved with a fair and implementable outcome.

LONG TERM: The greater the percentage of time participants spend in caucus, the *less likely* participants report:
- consideration of the other person,
- self-efficacy (belief in one's ability to talk and make a difference), and
- a sense that the court cares about resolving conflict from before the ADR session to several months later.

Long-term analysis finds that greater the percentage of time participants spend in caucus, the more likely the case will return to court in the 12 months after mediation for an enforcement action.

Data Collection

Data for this study were collected in the District Court Day of Trial programs in Baltimore City, and Montgomery, Calvert, and Wicomico Counties. Data were collected through several methods: surveys of participants before and after the ADR session as well as six months later; surveys of the ADR practitioners; behavior coding of participants and ADR practitioners through observations of the ADR process; and review of court records.



Researchers were present on days when ADR practitioners were scheduled to appear for a court docket. Once the ADR practitioner received a case referral and solicited the parties' agreement to participate in ADR, researchers requested the parties consent to participate in the research study. In all four counties, pre-intervention questionnaires were given before the ADR process. Next, researchers observed the ADR process and coded the behaviors of the ADR practitioners and the participants. At the conclusion of the process, participants were escorted back to the courtroom to either record their settlement or proceed with their trial. At the conclusion of the court process, post-intervention questionnaires were given.

Three months following the ADR process, researchers called participants to conduct a follow-up interview. Finally, 12 months after the court date, researchers reviewed the electronic court records of each observed case to determine if the parties had required further intervention by the court. When the electronic record was not clear, researchers reviewed the original case file at the Clerk's office.

Analysis

This two page flier simplifies a rigorous study which used a variety of statistical tools to determine the results. A detailed discussion of the data collection instruments and analysis tools can be found in the full report; see below for more information.

Returning to Court

More likely to return to court:

Caucus: Cases in which a greater percentage of time was spent in caucus are more likely to return to court.

Less likely to return to court:

Eliciting: Cases in which ADR Practitioners used more eliciting strategies are less likely to return to court.

Mediation experience: Cases in which the ADR practitioner had greater ADR experience in the previous 12 months are less likely to return to court.

Racial Match

Having at least one ADR practitioner at the table match the race of the responding participant was **positively** associated with participants reporting that they listened and understood each other in the ADR session and jointly controlled the outcome, and an increase in a sense of self-efficacy (belief in one's ability to talk and make a difference) and an increase in the sense that the court cares from before to after the ADR session.

The Maryland Judiciary has a long-term commitment to building ADR programs in Maryland. The Administrative Office of the Courts commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders.

This research, commissioned by the **Maryland Judiciary**, is part of its Statewide Evaluation of ADR. The project was led by the Administrative Office of the Courts, and funded in part by a grant from the State Justice Institute. Salisbury University and the University of Maryland worked on the statewide study under memoranda of understanding with AOC. The research for this portion of the study was conducted by Community Mediation Maryland and the Bosserman Center for Conflict Resolution at Salisbury University. Lorig Charkoudian, PhD, served as lead researcher. Additional information about the research methods, data collection tools, and statistical analyses, and the full study can be found in the full report at: http://www.mdcourts.gov/courtoperations/adrprojects.html

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Maryland Judiciary Statewide Evaluation of Alternative Dispute Resolution

Impact of Mediation on Criminal Misdemeanor Cases

This is the first study of its kind that compares mediated and non-mediated criminal misdemeanor cases with such great attention to creating a comparison group. This report explores the impacts in terms of cost to the court system for cases which are referred to mediation compared to cases which are not referred to mediation. It also explores the impact on the participants regarding how the situation has worked out for them. *This handout summarizes a multidimensional study that includes sophisticated data collection instruments and analysis tools. Information on accessing the full report can be found on the back of this flier.*

Short Term Outcomes

The study found that mediation had a statistically significant impact in reducing the likelihood of:

- judicial action
- jury trial prayer
- supervised probation or jail-time

Mediated cases were five times less likely to result in judicial action, five times less likely to result in jury trial prayed, and ten times less likely to result in supervised probation or jail-time.

Long Term Outcomes

Mediated cases were almost five times less likely to return to criminal court in the subsequent 12 months than those that were not mediated.

Mediation did not have a statistically significant impact on:

- individuals finding themselves in civil court in the subsequent 12 months

Participant Follow-Up

Participating in the mediation has a positive and significant impact on participants reporting several months after the intervention that:

- the outcome is working
- the issues have been resolved
- they are satisfied with this process

This reinforces the findings on case outcomes, and generally points to long term resolution.

Overall, participant reports and case level analysis reinforce each other and indicate that **mediation resolves issues** with outcomes that work in the long term and keep cases from returning to court with subsequent criminal charges. **Mediation results in the use of fewer court and law enforcement resources in the short and long term.**

DATA COLLECTION

The data for this study were collected from two Maryland counties: Washington and Frederick. Washington County and Frederick County are adjacent, and share similar geographic and demographic characteristics. These similarities led researchers to be confident that the two groups being compared were equivalent enough in ways other than the intervention itself. This allowed researchers to properly assess the impact of mediation. The Washington County State Attorney's Office (SAO) refers some criminal cases to mediation prior to a trial date and these cases served in the mediation (treatment) group. The Frederick County SAO does not offer mediation for criminal cases, and therefore those cases were used in the non-mediation (comparison) group.

The mediation group cases were identified from cases referred to mediation by the Washington County SAO. Researchers were then present for all mediation sessions they could attend, and cases were included in the data when mediation participants consented to inclusion in the study.

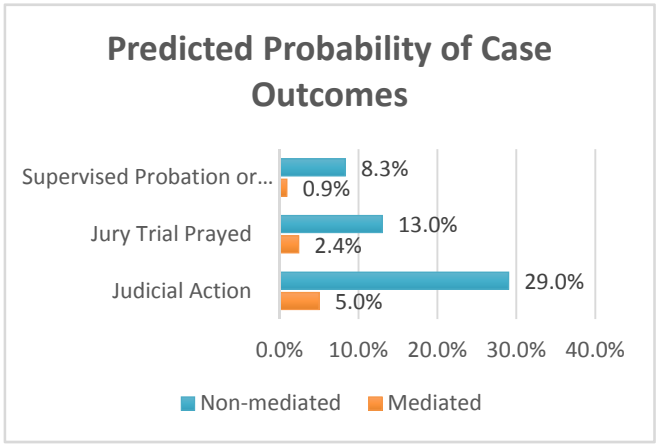
Non-mediation group cases from Frederick County were selected by researchers based on mediation referral criteria gathered from interviews with the Washington County SAO. This resulted in a group of cases that would have likely been referred to mediation had the option been available.

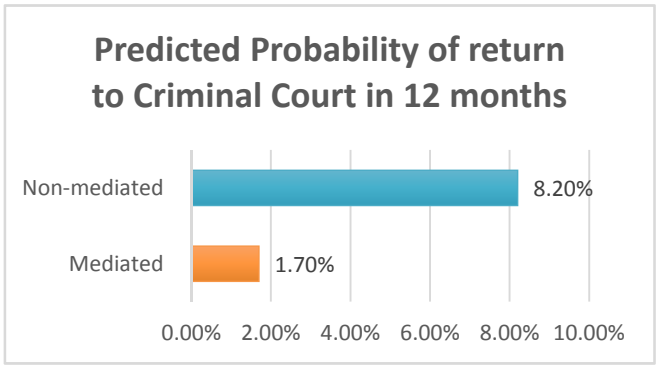
The Maryland Judiciary commissioned this study to be conducted by independent researchers in its ongoing effort to provide the highest quality service to Marylanders, which includes ADR.

PROCESS & ANALYSIS

The research methodology included the use of propensity score matching to consider possible selection bias and ensure cases being compared were essentially equivalent according to the variables measured. Additionally, the methodology used logistic regression analysis to isolate the effect of mediation and consider other factors that may influence the outcome.

As illustrated in the graphs below, the study found that mediated cases had far lower predicted probabilities for both continuing with court procedures or actions and returning to criminal court within a year than cases that were not mediated. These predicted probabilities were calculated after taking into consideration the many other factors that may affect these outcomes.





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Class Climate	Baltimore County Circuit Court Alternative Dispute Resolution Office	SCANTRON

MEDIATION PARTICIPANT SURVEY - CIVIL

Mark as shown: ☐ ☒ ☐ ☐ ☐ Please use a ball-point pen or a thin felt tip. This form will be processed automatically.

Correction: ☐ ■ ☐ ☒ ☐ Black out the wrong answer and put an X in the correct box.

To improve our program, these results may be shared with the mediator in the future; however, your name will remain **confidential**. Thank you for your feedback.

1. Please evaluate the mediator and process. Mark *one* response for each statement.

		Strongly Disagree	Disagree	Neither	Agree	Strongly Agree	N/A
1.1	The mediation process was clearly explained.	☐	☐	☐	☐	☐	☐
1.2	I had enough time to say what I wanted to say.	☐	☐	☐	☐	☐	☐
1.3	The mediator(s) understood what I said I needed.	☐	☐	☐	☐	☐	☐
1.4	The mediator(s) helped me think about different ways to resolve our issues.	☐	☐	☐	☐	☐	☐
1.5	I felt heard by the other participant(s).	☐	☐	☐	☐	☐	☐
1.6	I understand the other participants' views better now than I did before the session.	☐	☐	☐	☐	☐	☐
1.7	We discussed all issues that brought us to mediation.	☐	☐	☐	☐	☐	☐
1.8	The mediator(s) did not favor any party.	☐	☐	☐	☐	☐	☐
1.9	I felt pressured by the mediator(s) to reach an agreement.	☐	☐	☐	☐	☐	☐
1.10	The mediator(s) were good listener(s).	☐	☐	☐	☐	☐	☐
1.11	The mediator(s) helped clarify issues.	☐	☐	☐	☐	☐	☐
1.12	The mediator(s) were respectful to me.	☐	☐	☐	☐	☐	☐
1.13	The mediator(s) told me what I should agree to.	☐	☐	☐	☐	☐	☐
1.14	If the mediator(s) met with me/my side separately (caucus), it was helpful.	☐	☐	☐	☐	☐	☐
1.15	If an agreement was reached, it met my needs.	☐	☐	☐	☐	☐	☐
1.16	If an agreement was written, I understood it.	☐	☐	☐	☐	☐	☐
1.17	The mediator(s) helped me consider whether the agreement was realistic for me.	☐	☐	☐	☐	☐	☐
1.18	I will be able to communicate better with the other party because of mediation.	☐	☐	☐	☐	☐	☐
1.19	I would suggest mediation to others.	☐	☐	☐	☐	☐	☐
1.20	I am glad mediation services are available.	☐	☐	☐	☐	☐	☐
1.21	Overall, I was satisfied with this mediation session.	☐	☐	☐	☐	☐	☐

Please complete side two of this form.

DRAFT

Class Climate	Baltimore County Circuit Court Alternative Dispute Resolution Office	SCANTRON

2. General Questions

2.1 Case #: Case Name (ex. Jane Doe v. John Doe):

2.2 Mediation date: Mediator name or ID #:

2.3 I am the: ☐ Plaintiff ☐ Defendant

2.4 The mediator(s) told me what outcome(s) might occur if my case went to trial. ☐ Yes ☐ No ☐ Not sure

2.5 We: (Mark *all* that apply.)
☐ Did *not agree* on any issues ☐ Agreed on *some* issues ☐ Agreed on *all* issues
☐ Agreed to continue for another session

2.6 Do you think this case went to mediation: ☐ Too early ☐ Right time ☐ Too late ☐ Don't know

2.7 The mediator(s): ☐ Ended the session too soon ☐ Allowed the right amount of time ☐ Made the session too long

2.8 I would use this process again: ☐ Yes ☐ No ☐ Not Sure

2.9 I came to this session because: (Mark *all* that apply.)
☐ My choice ☐ Judge recommended ☐ Judge ordered
☐ My attorney recommended ☐ Other

3. Please provide the following information VOLUNTARILY. It is for statistical purposes only.

3.1 Gender: ☐ Female ☐ Male

3.2 Age: ☐ 19 and under ☐ 20-29 ☐ 30-39 ☐ 40-49 ☐ 50-59 ☐ 60+

3.3 Mark *all* that apply:
☐ Hispanic/Latino ☐ American Indian/Alaskan Native ☐ Asian
☐ Black/African American ☐ Native Hawaiian/Pacific Islander ☐ White

3.4 Education (highest level achieved): ☐ 1-8th grade ☐ High school/ GED ☐ 2-year college degree/ professional certificate ☐ 4-year degree ☐ Graduate degree

3.5 Household income: ☐ Up to $14,999 ☐ $15,000-$24,999 ☐ $25,000-$34,999 ☐ $35,000-$49,999 ☐ $50,000-$74,999 ☐ $75,000-$99,999 ☐ $100,000-$149,999 ☐ $150,000-$199,999 ☐ $200,000+

3.6 Military status: ☐ Active military ☐ Military veteran ☐ N/A

3.7 Zip code:

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Class Climate	Baltimore County Circuit Court Alternative Dispute Resolution Office	SCANTRON

MEDIATOR REPORT – CIVIL

Mark as shown: ☐ ☒ ☐ ☐ ☐ Please use a ball-point pen or a thin felt tip. This form will be processed automatically.

Correction: ☐ ■ ☐ ☒ ☐ Black out the wrong answer and put an X in the correct box.

1. Case Information – Please fill out this section even if mediation did not occur.

1.1 Date of mediation: Case #:

1.2 Mediator name or ID#:

1.3 Did mediation take place? ☐ Yes ☐ No

If mediation did not occur, please skip to section marked did not occur on the next page. If mediation did occur, please continue below.

2. About the mediation:

2.1 Outcome (mark **all** that apply):
☐ Full agreement ☐ Partial agreement ☐ Temporary agreement
☐ No agreement

2.2 Mark **all** scheduling/mediation issues that you encountered in this case:
☐ Party failed to contact mediator for scheduling as required by the Order ☐ Party with settlement authority failed to appear ☐ Mediation was not scheduled by ADR deadline
☐ Mediator had to schedule date without input of parties

2.3 Was an insurance adjuster involved?
☐ No ☐ Adjuster involved but did not attend ☐ Adjuster attended in person
☐ Adjuster attended via telephone

2.4 How many people on the plaintiff's side were in the room? ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 or more

2.5 Mark **all** that apply for the plaintiff.
☐ Plaintiff in the room ☐ Plaintiff's attorney in the room ☐ Plaintiff has an attorney who did not attend
☐ Plaintiff did not have an attorney

2.6 How many people on the defendant's side were in the room? ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 or more

2.7 Mark **all** that apply for the defendant.
☐ Defendant in the room ☐ Defendant's attorney in the room ☐ Defendant has an attorney who did not attend
☐ Defendant did not have an attorney

2.8 For this case, I practiced (mark **all** that apply):
☐ Solo mediation ☐ Co-mediation ☐ Facilitative
☐ Transformative ☐ Analytical ☐ Inclusive
☐ Settlement conferencing ☐ Other

2.9 Number of sessions: ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 or more

2. About the mediation: [Continue]

2.10 Hours spent on this case (excluding travel, preparation, and follow-up time):

☐ 1 ☐ 2 ☐ 3
☐ 4 ☐ 5 ☐ 6
☐ 7 ☐ 8 ☐ 9
☐ 10 ☐ 11 ☐ 12 or more

2.11 Payment (mark **all** that apply):

☐ Plaintiff paid ☐ Defendant paid ☐ Plaintiff has not paid (please contact ADR Coordinator)

☐ Defendant has not paid (please contact ADR Coordinator)

2.12 Settlement amount:

☐ N/A ☐ Under $7,500 ☐ $7,5001-$50,000
☐ $50,001-$100,000 ☐ $100,001-$500,000 ☐ $500,001-$1 million
☐ Over $1 million

2.13 Comments (**without** breaking confidentiality):

2.14 Mediator's signature:

3. If the mediation **did not** occur:

3.1 Why did the mediation not occur?

☐ Agreement reached prior to mediation ☐ Party failed to appear ☐ Dismissed, stayed, transferred, remanded
☐ Waived/exempt by court ☐ Other (mark here and explain below)

3.2 If you marked *other*, please explain:

3.3 Mediator's signature:

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CONFIDENTIAL ADR ATTORNEY SURVEY

Mark as shown: ☐ ☒ ☐ ☐ ☐ Please use a ball-point pen or a thin felt tip. This form will be processed automatically.

Correction: ☐ ■ ☐ ☒ ☐ Black out the wrong answer and put an X in the correct box.

To improve our program, these results may be shared with the mediator in the future; however, your name will remain **confidential**. Thank you for your feedback.

1. Questions

1.1 ADR session date: Case #:

1.2 ADR practitioner name or ID#:

		Strongly Disagree	Disagree	Neither	Agree	Strongly Agree
1.3	The ADR practitioner was attentive to my comments.	☐	☐	☐	☐	☐
1.4	The ADR practitioner helped clarify issues.	☐	☐	☐	☐	☐
1.5	The ADR practitioner maintained appropriate control over the session.	☐	☐	☐	☐	☐
1.6	The ADR practitioner pressured the parties to reach an agreement.	☐	☐	☐	☐	☐
1.7	The ADR practitioner did not favor any party.	☐	☐	☐	☐	☐
1.8	I was satisfied with the pace of the session.	☐	☐	☐	☐	☐
1.9	The ADR practitioner advocated for a specific outcome.	☐	☐	☐	☐	☐
1.10	The ADR practitioner allowed the parties to develop their own outcome.	☐	☐	☐	☐	☐
1.11	Overall, I was satisfied with this session.	☐	☐	☐	☐	☐
1.12	Overall, I was satisfied with the skills of the ADR practitioner.	☐	☐	☐	☐	☐
1.13	Overall, I was satisfied with the professionalism of the ADR practitioner.	☐	☐	☐	☐	☐

1.14 In approximately how many disputes, before this one, have you participated in a **mediation**:
☐ 0 ☐ 1-10 ☐ 11-25
☐ 26+

1.15 In approximately how many disputes, before this one, have you participated in a **settlement conference**:
☐ 0 ☐ 1-25 ☐ 26-75
☐ 76+

1.16 What is the status of discovery?
☐ Not Started ☐ Not Requested ☐ Ongoing ☐ Concluded

1.17 I am counsel for the:
☐ Plaintiff ☐ Defendant ☐ Third party defendant
☐ Counter plaintiff ☐ Counter defendant

1.18 Do you think this case went to the ADR process:
☐ Too early ☐ Don't know ☐ Right time ☐ Too late

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1. Questions [Continue]

1.19 Did the ADR practitioner need substantive knowledge related to the issues in this case? ☐ Yes ☐ No ☐ Not sure

1.20 The ADR practitioner told me what outcome(s) might occur if my case went to trial. ☐ Yes ☐ No ☐ Not sure

1.21 Was ADR appropriate to resolve the issues of this case? ☐ Yes ☐ No ☐ Not sure

1.22 The parties: (Mark *all* that apply.)

☐ Did *not agree* on any issues ☐ Agreed to continue for another session ☐ Agreed on *some* issues

☐ Agreed on *all* issues

1.23 If this case was not completely resolved, **please mark all reasons** why you believe the case was not resolved:

☐ My client wanted his/her day in court. ☐ The other side wanted his/her day in court. ☐ My client was unwilling to compromise.

☐ The other side was unwilling to compromise. ☐ Opposing counsel was not prepared. ☐ The ADR practitioner made it difficult to settle.

☐ My client refused to make a settlement proposal. ☐ The other side refused to make a settlement proposal. ☐ Continuing the ADR process was too expensive.

☐ There was not enough time to continue the process to a conclusion. ☐ Opposing counsel was not willing to compromise. ☐ I was not willing to compromise.

☐ N/A

1.24 If your case was completely resolved, did the final agreement include a clause to return to ADR if a problem arises? ☐ Yes ☐ No

1.25 Would you recommend this ADR process to other clients involved in a similar dispute? ☐ Never ☐ Sometimes ☐ Always

1.26 Did you encourage or discourage your client from participating in this ADR process? ☐ Encourage ☐ Discourage ☐ Neither

1.27 If applicable, settlement amount: ☐ $1-$25,000 ☐ $25,001-$50,000 ☐ $50,001-$100,000 ☐ $100,001-$500,000 ☐ $500,001-$1 million ☐ Over $1 million

1.28 Any additional comments or suggestions:

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MEDIATION PARTICIPANT SURVEY - FAMILY

Mark as shown: ☐ ☒ ☐ ☐ ☐ Please use a ball-point pen or a thin felt tip. This form will be processed automatically.

Correction: ☐ ■ ☐ ☒ ☐ Black out the wrong answer and put an X in the correct box.

To improve our program, these results may be shared with the mediator in the future; however, your name will remain **confidential**. Thank you for your feedback.

1. Please evaluate the mediator and process. Mark *one* response for each statement.

		Strongly Disagree	Disagree	Neither	Agree	Strongly Agree	N/A
1.1	The mediation process was clearly explained.	☐	☐	☐	☐	☐	☐
1.2	I had enough time to say what I wanted to say.	☐	☐	☐	☐	☐	☐
1.3	The mediator(s) understood what I said I needed.	☐	☐	☐	☐	☐	☐
1.4	The mediator(s) helped me think about different ways to resolve our issues.	☐	☐	☐	☐	☐	☐
1.5	I felt heard by the other participant(s).	☐	☐	☐	☐	☐	☐
1.6	I understand the other participants' views better now than I did before the session.	☐	☐	☐	☐	☐	☐
1.7	We discussed all issues that brought us to mediation.	☐	☐	☐	☐	☐	☐
1.8	The mediator(s) did not favor any party.	☐	☐	☐	☐	☐	☐
1.9	I felt pressured by the mediator(s) to reach an agreement.	☐	☐	☐	☐	☐	☐
1.10	The mediator(s) were good listener(s).	☐	☐	☐	☐	☐	☐
1.11	The mediator(s) helped clarify issues.	☐	☐	☐	☐	☐	☐
1.12	The mediator(s) were respectful to me.	☐	☐	☐	☐	☐	☐
1.13	The mediator(s) told me what I should agree to.	☐	☐	☐	☐	☐	☐
1.14	If the mediator(s) met with me/my side separately (caucus), it was helpful.	☐	☐	☐	☐	☐	☐
1.15	If an agreement was reached, it met my needs.	☐	☐	☐	☐	☐	☐
1.16	If an agreement was written, I understood it.	☐	☐	☐	☐	☐	☐
1.17	The mediator(s) helped me consider whether the agreement was realistic for me.	☐	☐	☐	☐	☐	☐
1.18	I will be able to communicate better with the other party because of mediation.	☐	☐	☐	☐	☐	☐
1.19	I would suggest mediation to others.	☐	☐	☐	☐	☐	☐
1.20	I am glad mediation services are available.	☐	☐	☐	☐	☐	☐
1.21	Overall, I was satisfied with this mediation session.	☐	☐	☐	☐	☐	☐

Please complete side two of this form.

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2. General Questions

2.1 Case #: Case Name (ex. Jane Doe v. John Doe):

2.2 Mediation date: Mediator name or ID #:

2.3 I am the: ☐ Plaintiff ☐ Defendant

2.4 Who suggested the possible solutions? (Mark *all* that apply.)
☐ I did ☐ The other side(s) ☐ The mediator(s)
☐ The lawyers ☐ No solutions were suggested

2.5 We: (Mark *all* that apply.)
☐ Did *not agree* on any issues ☐ Agreed on *some* issues ☐ Agreed on *all* issues
☐ Agreed to continue for another session

2.6 Do you think this case went to mediation: ☐ Too early ☐ Right time ☐ Too late ☐ Don't know

2.7 The mediator(s): ☐ Ended the session too soon ☐ Allowed the right amount of time ☐ Made the session too long

2.8 I would use this process again: ☐ Yes ☐ No ☐ Not Sure

2.9 What issues were addressed in this process? (Mark all that apply.)
☐ Custody ☐ Visitation ☐ Use & possession of marital home
☐ Marital property ☐ Alimony ☐ Monetary award
☐ Child support

3. Please provide the following information VOLUNTARILY. It is for statistical purposes only.

3.1 Gender: ☐ Female ☐ Male

3.2 Age: ☐ 19 and under ☐ 20-29 ☐ 30-39 ☐ 40-49 ☐ 50-59 ☐ 60+

3.3 Mark *all* that apply:
☐ Hispanic/Latino ☐ American Indian/Alaskan Native ☐ Asian
☐ Black/African American ☐ Native Hawaiian/Pacific Islander ☐ White

3.4 Education (highest level achieved): ☐ 1-8th grade ☐ High school/ GED ☐ 2-year college degree/ professional certificate ☐ 4-year degree ☐ Graduate degree

3.5 Household income: ☐ Up to $14,999 ☐ $15,000-$24,999 ☐ $25,000-$34,999 ☐ $35,000-$49,999 ☐ $50,000-$74,999 ☐ $75,000-$99,999 ☐ $100,000-$149,999 ☐ $150,000-$199,999 ☐ $200,000+

3.6 Military status: ☐ Active military ☐ Military veteran ☐ N/A

3.7 Zip code:

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MEDIATOR REPORT – FAMILY

Mark as shown: ☐ ☒ ☐ ☐ ☐ Please use a ball-point pen or a thin felt tip. This form will be processed automatically.

Correction: ☐ ■ ☐ ☒ ☐ Black out the wrong answer and put an X in the correct box.

1. Case Information – Please fill out this section even if mediation did not occur.

1.1 Date of mediation: Case #:

1.2 Mediator name or ID#:

1.3 Did mediation take place? ☐ Yes ☐ No

If mediation <u>did not</u> occur, please skip to section marked <u>did not occur</u> on the next page. If mediation <u>did occur</u>, please continue below.

2. About the mediation:

2.1 Outcome (mark **all** that apply):
☐ Full agreement ☐ Partial agreement ☐ Temporary agreement
☐ No agreement

2.2 Was a best interest attorney present? ☐ Yes ☐ No

2.3 How many people on the plaintiff's side were in the room? ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 or more

2.4 Mark **all** that apply for the plaintiff.
☐ Plaintiff in the room ☐ Plaintiff's attorney in the room ☐ Plaintiff has an attorney who did not attend
☐ Plaintiff did not have an attorney

2.5 How many people on the defendant's side were in the room? ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 or more

2.6 Mark **all** that apply for the defendant.
☐ Defendant in the room ☐ Defendant's attorney in the room ☐ Defendant has an attorney who did not attend
☐ Defendant did not have an attorney

2.7 If custody was an issue, what arrangement was reached? (Mark **all** that apply.)
☐ Joint legal ☐ Primary legal ☐ Joint physical
☐ Primary physical

2.8 For this case, I practiced (mark **all** that apply):
☐ Solo mediation ☐ Co-mediation ☐ Facilitative
☐ Transformative ☐ Analytical ☐ Inclusive
☐ Settlement conferencing ☐ Other

2.9 Number of sessions: ☐ 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 or more

2.10 Hours spent on this case (excluding travel, preparation, and follow-up time):
☐ 1 ☐ 2 ☐ 3
☐ 4 ☐ 5 ☐ 6
☐ 7 ☐ 8 ☐ 9
☐ 10 ☐ 11 ☐ 12 or more

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2. About the mediation: [Continue]

2.11 Comments (**without** breaking confidentiality):

2.12 Mediator's signature:

3. If the mediation **did not** occur:

3.1 Why did the mediation not occur?

- ☐ Agreement reached prior to mediation
- ☐ Dismissed, stayed, transferred
- ☐ Exempt by court
- ☐ Domestic violence issue
- ☐ Other (mark here and explain below)

3.2 If you marked *other*, please explain:

3.3 Mediator's signature:

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Expert Insights on Drafting Awards That Will Stick

Marcia L. Adelson, Esq.

Hon. William Bassler
(ret. U.S. Dis. Ct. For DNJ) AAA, ICDR, ICC and CPR Arbitrator

Sasha Carbone, Esq.
American Arbitration Association

Hon. Timothy Lewis
(ret. U.S. Court of Appeals 3rd Cir.) Schnader Harrison Segal & Lewis, LLP

Edna Sussman, Esq.
Sussman ADR, LLC

Hon. William G. Bassler, FCIArb
130 Bodman Place, Suite 15
Red Bank, NJ 07701
732-842-8658
Email: judgewb@comcast.net
Go to: www.wgbdisputeresolution.com

AWARD WRITING PROGRAM

Arbitration awards serve two functions: They communicate the decisions reached by the arbitrator and the reasons for those decisions to the parties and their counsel.

Writing an award requires the arbitrator explain his or her reasoning and to evaluate the sufficiency of the evidence. Writing serves as an intellectual discipline that help to ensure that the right result is reached. Unlike a published judicial opinion, it does not articulate the law other arbitrators, lawyers and the interested public generally do not benefit. Unlike a judicial opinion, except for the parties involved, it invokes the lines of the poet Thomas Gray: "The dark unfathom'd caves of ocean bear: Full many a **flower** is born to blush **unseen**, And waste its sweetness on the desert air."

The Award should state the significant facts accurately, clearly and fairly. And the arbitrator should then analyze those facts in the light of the relevant rules of law that demonstrate the result reached. You lose credibility as an arbitrator if you misstate the facts or the law.

Outline:

I. FUNCTIONS OF THE AWARD:
   a. To communicate the Arbitrator's decisions
   b. And the reasons for those decisions.

II. FACTORS TO CONSIDER IN DETERMINING THE SCOPE AND STYLE OF THE AWARD
   a. Complexity of the Facts
   b. Nature of the Legal Issues

III. PREPARING TO WRITE
   a. Marshalling the material facts
   b. Formulating the issues
   c. Identifying applicable rules of law
   d. Determining the appropriate forms of relief

IV. TECHNIQUES
   a. Use of outlines

b. Reaching a conclusion before writing or using the process of writing to reach the conclusion.

V. MATERIALS TO REVIEW
   a. Briefs of counsel
   b. Importance of the transcript when award turns on specific testimony
   c. Examination of crucial exhibits, particularly in contractual disputes the contract itself.

VI. ORGANIZING AND WRITING THE AWARD
   a. Introduction:
      i. Identification of the parties
      ii. Jurisdictional status
      iii. Framing the issues: before or after the statement of facts
      iv. Avoiding repetition of verbose parties' contentions
   b. Statement of Facts
      i. Enough facts at the beginning to make the opinion understandable
      ii. Limiting initial statement to necessary historical background
      iii. Incorporate specific decisional facts in the Analysis
      iv. Avoidance of excessive factual detail
      v. Importance of stating facts significant to the losing side
      vi. Reliance on the record and not the briefs
   c. Discussion of Legal Principles
      i. Organization of the issues by the Opinion itself
      ii. Organzation not necessarily by counsel's but by formulation of the issues
      iii. Case citations: Do they matter ?
      iv. Secondary sources
      v. When to quote relevant language
      vi. Avoiding an adversarial tone
      vii. Distinguishing the Opinion from the Analysis
      viii. Bullet proofing the Award
      ix. Dos and don't's in the Disposition
      x. Writing the Award when reasons aren't required

VII. LANGUAGE, STYLE AND SELF EDITING
   a. CHARACTERISTICS OF BAD WRITING
      i. Wordiness
      ii. Lack of precision and clarity
   b. CHARACTERISTICS OF GOOD WRITING
      i. See bibliography

VIII. DISTINGUISHING WRITING ARBITRAL AWARDS FROM WRITING JUDICAL OPINIONS: The Arbitration Agreement is the source and the limitation of the arbitrator's authority.

Hon. William G. Bassler U.S.D.J. (Ret.)
Independent Arbitrator & Mediator
130 Bodman Place, Suite 15
Red Bank, NJ 07701
(732) 842-8658
judgewb@comcast.net
Visit www.wgbdisputeresolution.com

Suggested Reading

ARBITRATION

American Arbitration: Principles and Practice; Robert B. von Mehren, Steven J. Burtyon, and George W. Coombe, Jr.; Practising Law Institute, Litigation Law Library

A Guide to the ICDR International Arbitration Rules; Martin F. Gusy, James M. Hosking, and Franz T. Schwarz; Oxford University Press

Commercial Arbitration at Its Best: Successful Strategies for Business Users; Thomas J. Stipanowich (Editor) and Peter H. Kaskell (Associate Editor); CPR Institute for Dispute Resolution and American Bar Association Section of Business Law Section of Dispute Resolution

Dispute Resolution: Examples and Explanations; Michael L. Moffitt and Andrea Kupfer Schneider; Aspen Publishers, Wolters Kluwer Law & Business

Valuation for Arbitration Compensation Standards Valuation Methods and Expert Evidence; Mark Kantor; International Arbitration Law Library, Wolters Kluwer Law & Business

International Commercial Arbitration in New York; James H. Carter and John Fellas; Oxford

The Secretariat's Guide to ICC Arbitration, A Practical Commentary of the 2012 Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration; James Fry, Simon Greenberg, and Francesca Mazza

Drafting International Contracts: An Analysis of Contract Clauses; Marcel Fontaine and Filip de Ly; Martinus Nijhoff Publishers

International Arbitration 2012, Volumes 1-3; Practising Law Institute (Ord #34489)

The College of Commercial Arbitrators: Guide to Best Practices in Commercial Arbitration; James M Gaitis (Editor in Chief), Curtis E. von Kann and Robert W. Wachsmuth (Editors)

American Arbitration Association's Handbook on International Arbitration & ADR, Thomas E. Carbonneau and Jenette A. Jaeggi (Editors); JurisNet Publishing

New York State Bar Association Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations
https://www.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Guidelines_for_the_Efficient_Conduct_of_the_Pre-hearing_Phase_of_Domestic_Commercial_Arbitrations_and_International_Arbitrations.html

GUIDELINES FOR DOCUMENT EXCHANGE

Debevoise & Plimpton LLP Protocol to Promote Efficiency
https://www.debevoise.com/insights/publications/2010/04/debevoise-issues-protocol-to-promote-efficiency-__

CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration
https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-disclosure-of-documents-presentation-of-witnesses-in-commercial-arbitration

WRITING GUIDES

Style: The Basics of Clarity and Grace; Joseph M. Williams; Longman

The Elements of Style; William Struck Jr. and E.B. White; Longman

Clear & Effective Legal Writing; Veda R. Charrow and Myra K. Erhardt; Little, Brown, and Company

Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing; Stephen V. Armstrong & Timothy P. Terrell; Practising Law Institute

On Writing Well: An Informal Guide to Writing Nonfiction; William Zinsser; Harper & Row

OTHER

Listen to Win: A Guide to Effective Listening, Curt Bechler Ph.D.

The Art of Persuasion: A National Review Rhetoric for Writers; Linda Bridges and William F. Rickenbacker; National Review Books

The Black Swan: The Impact of Highly Improbably; Nassim Nocholas Taleb; Random House

Intuition: Its Powers and Perils; David G. Myers; Yale University Press

Listening, The Forgotten Skill: A Self-Teaching Guide; Madelyn Burley-Allen; Wiley

The Art of Negotiating; Gerard I. Nierenberg; Barnes & Noble Books

Making Your Case: The Art of Persuading Judges; Antonin Scalia and Bryan A. Garner

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Recommended Reading on Arbitration Awards

"Awards, and Substantive Interlocutory Decisions" by John A. Barrett, Thomas J. Brewer, Thomas J. Brewer, Jay W. Elston, James M. Gaitis, Richard A. Levie, John Barritt McArthur, Michael S. Oberman and Michael S. Wilk, and Michael S. Wilk), Chapter 12 of The College of Commercial Arbitrators, Guide to Best Practices in Commercial Arbitration (Fourth Edition 2017) at pages 291-322).

New Jersey Arbitration Handbook 2018 By William A. Dreier and Robert Bartkus, ALM

Chapter 7: The Arbitration Award: Finality versus Reviewability, Commercial Arbitration at Its Best: Successful Strategies for Business Users, Thomas Stipanowich (Editor) and Peter H. Kaskell (Associate Editor), American Bar Association and CPR Institute for Dispute Resolution, 2001.

"Reasoned Awards: How Extensive Must the Reasoning Be?" by Peter Gillies and Niloufer Selvadurai (pp 125-132), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management; Volume 74, Number 2, May 2008; The Chartered Institute of Arbitrators in association with Thomson Sweet & Maxwell.

"Interpreting the New York Convention: When Should an Interlocutory Arbitral 'Order' Be Treated As an 'Award'?" by Marc J. Goldstein (pp 161-168), American Arbitration Association and International Centre for Dispute Resolution's Handbook on International Arbitration and ADR (Second Edition), JurisNet, LLC, 2010.

"The Arbitral Award," by Bernardo M. Cremades (pp 483-500), The Leading Arbitrators' Guide to International Arbitration (Second Edition), Lawerence W. Newman and Richard D. Hill (Editors), JurisNet LLC, 2008.

Chapter Nine: Arbitral Awards, American Arbitration Association's Handbook on Commercial Arbitration, Thomas E. Carbonneau and Jenette A. Jaeggi (Editors), JurisNet LLC, 2006.

I. "The Art of Communicating Arbitral Judgments," by Charles J. Coleman and Gladys Gershenfeld (pp 337-352)
II. "Another Look at Remedies in Arbitration," by Harvey Berman (pp 353-362)

III. “Punitive Damages in Arbitration: The Debate Continues,” by Lorenzo Marinuzzi (pp 363-376)
IV. “Remanding an Award for Clarification: A Common Sense Approach to Functus Officio,” by Richard H. Porter (pp 377-382)
V. “The ‘Finality’ Principle and Partial Awards,” by John Wilkinson (pp 383-392)
VI. A. “The Case Against Post-Decision Debriefing in Arbitration,” by Steven A. Arbittier (pp 399-402)
B. The Case for Post-Decision Debriefing in Arbitration,” by David J. Hickton and Kelly B. Bakayza (pp 393-399)

Resources for Arbitration Award Drafting

Sources of Arbitration Awards:

A list of arbitration award sites by topic of the arbitration:
https://law.duke.edu/lib/researchguides/arbitration/

International only Awards:
https://guides.ll.georgetown.edu/c.php?g=363504&p=2455950

ICDR Awards and Commentaries Vol. I, Grant Hanessian ed. JURIS Publ. 2012 (Vol. II 2018, forthcoming)

Other Resources:

ICC Checklist for What Should be Included in the Final Award
https://iccwbo.org/content/uploads/sites/3/2016/04/ICC-Award-Checklist-English.pdf

International Bar Association: Toolkit for Award Writing
https://www.ibanet.org › Document › Default

Chartered Institute of Arbitrators, International Arbitration Practice Guideline, Drafting Arbitral Awards, Part 1
https://www.ciarb.org/media/4206/guideline-10-drafting-arbitral-awards-part-i-general-2016.pdf

71 Disp. Resol. J. 61

Dispute Resolution Journal
2016

Article
Tracey B. Frisch [a1]

DEATH BY DISCOVERY, DELAY, AND DISEMPOWERMENT: LEGAL AUTHORITY FOR ARBITRATORS TO PROVIDE A COST-EFFECTIVE AND EXPEDITOUS PROCESS [d1]

Whether warranted or not, despite statistics to the contrary, [1] arbitration in recent years has become a punching bag for criticism that it has begun to mirror the type of scorched earth discovery practices and delays seen in litigation. Why is this? Is it because parties are not actively participating in the arbitration process and instead have allowed their outside counsels to use the litigation-style discovery and delay tactics with which counsel feel most comfortable? Maybe. Do parties themselves want protracted discovery and a drawn out arbitration process? Some, perhaps. Has arbitration become a victim of its own success, attracting more bet-the company-claims that demand a process reflecting the magnitude of those claims? It's possible. What role, if any, do arbitrators play in ensuring that the arbitration process does not fall victim to death by discovery, delay, and arbitrator disempowerment? A pivotal role. This article outlines why arbitrators should feel empowered to take an active role in managing the arbitration process--be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process--and it provides guidance ***62** as to how arbitrators can manage the arbitration process without feeling concerned that their award will be in danger of vacatur.

The Federal Arbitration Act ("FAA") lists as grounds for vacatur under Section 10(a)(3) failure to hear pertinent and material evidence, refusal to postpone a hearing, and other arbitrators' misbehavior prejudicing the rights of any party. [2] Arbitrators, however, do not need to live in fear that their awards will be vacated under FAA 10(a)(3). While arbitrators do need to be aware of the limits of their authority, courts around the country generally defer to the arbitrators' discretion in this context. Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration--no informed arbitrator should shy away from their responsibility for fear of jeopardizing the award.

I. ARBITRATORS CAN REFUSE TO HEAR EVIDENCE AND DENY DISCOVERY REQUESTS SO LONG AS PARTIES ARE PROVIDED A FUNDAMENTALLY FAIR HEARING

Judicial review of awards on the ground that arbitrators have refused to hear evidence is limited. Courts have confirmed awards so long as the arbitrators' refusal to hear evidence or deny discovery requests did not deprive the party of a fundamentally fair hearing. The court's analysis is performed on a case-by-case basis with wide discretion given to the arbitrator. The fundamentally fair hearing standard used to determine whether arbitrators have misconducted themselves by refusing to hear pertinent and material evidence under Section 10(a)(3) has been adopted by the Eleventh, Sixth, Fifth, and Second Circuits. The following cases highlight where courts draw the line between a fundamentally fair and not fair hearing. For instance, did the arbitrator exceed her authority pursuant to the parties' ***63** arbitration clause, and if so, did the erroneous determination cause prejudice to a party.

In *Rosenweig v. Morgan Stanley*, the Eleventh Circuit confirmed an arbitral award against Morgan Stanley finding that the arbitrators' refusal to allow Morgan Stanley additional cross-examination of Rosenweig, its former employee, did not amount to misconduct. [3] The arbitrators did not explain their reasons for denying the additional cross-examination. However, the court determined that the evidence from additional cross-examination, concerning a client list contained in disks produced by Rosenweig, would have been cumulative and immaterial, and for this reason, Morgan Stanley was not deprived of a fair hearing. [4]

The Sixth Circuit ruled similarly in *Nationwide Mutual Insurance Co. v. Home Insurance Co.* [5] In *Nationwide Mutual Insurance Co.*, the Court confirmed the arbitral award where the reinsurer argued that the panel was guilty of misconduct because the panel's damages decision was based on spreadsheets prepared by the insurer without allegedly allowing the reinsurer to conduct discovery as to the adequacy of the insurer's cost estimates. The Sixth Circuit stated:

> 'Fundamental fairness requires only notice, an opportunity to present relevant and material evidence and arguments to the arbitrators, and an absence of bias on the part of the arbitrators.' [*Louisiana D. Brown 1992 Irrevocable Trust v. Peabody Coal Co.*, No. 99-3322, 2000 WL 178554, at *6 (6th Cir. Feb. 8, 2000).] Because [the reinsurer] received copies of [the insurer's] submissions on the costs it incurred in defending against rescission, and the arbitration panel gave [the reinsurer] an opportunity to respond to these submissions, it is not clear what purpose discovery or a hearing on this issue would have served. [6]

Thus, the *Nationwide Mutual Insurance Co.* Court held that "the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing" and found that the parties had not been denied a fundamentally fair hearing. [7]

***64** The rationale behind the fundamentally fair hearing standard has been defined by the Fifth Circuit. [8] In *Prestige Ford v. Ford Dealer Computer Services, Inc.*, the Court confirmed the arbitral award when the arbitrators denied motions to compel discovery. [9] In its opinion, the Court explained that "arbitrators are not bound to hear all of the evidence tendered by the parties; however, they must give each of the parties to the disputes an adequate opportunity to present its evidence and arguments." [10] The arbitrators had not denied the parties a fair hearing when they held hearings on motions to compel discovery and denied them. The Court concluded that "submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial; but because the advantages of arbitration are speed and informality, the arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him." [11]

Courts have also examined arbitral rulings alleged to exclude material and pertinent evidence, which the losing party argues had a prejudicial effect. [12] In *LJL 33rd Street Assoc., LLC v. Pitcairn Property Inc.*, the Second Circuit Court of Appeals confirmed the award in part over the losing party's argument that the arbitrator excluded hearsay documents that should have been considered. [13] The Court explained that the evidence the arbitrator excluded was all hearsay and that while arbitrators are not bound with strict evidentiary rules, they are not prohibited from excluding hearsay documents. [14] Furthermore, the Court stated that the arbitrator gave the party the ***65** opportunity to eliminate the hearsay by bringing in the makers of the documents to the arbitration hearing. There was thus no prejudice to the party. For this reason, and based upon the Court's deference to arbitrators' evidentiary decisions, the Court held that the parties were not denied a fundamentally fair hearing. [15]

District courts have also adopted the fundamentally fair hearing standard. [16] In *A.H. Robins Co., Inc. v. Dalkon Shield*, the Court confirmed the arbitral award, finding that the arbitrator's decision to exclude evidence of defect in the product at issue was not

an abuse of their discretion, and even if it was, the exclusion of evidence did not deprive the claimants of a fundamentally fair hearing. [17] To determine whether Section 10(a)(3) of the FAA had been violated, the court used a two-pronged test. First, the claimant had to show "that the arbitrator's evidentiary ruling was erroneous." [18] Second, the claimant had to show "that the error deprived the movant of a fundamentally fair hearing." [19] The Court determined that the arbitrator's evidentiary rulings were not erroneous and that even if the court found that the arbitrator's evidentiary rulings were erroneous, the movants did not show that they were denied a fundamentally fair hearing. [20] Furthermore, the *Dalkon Shield* Court expressed concern that a court's review of arbitral awards should be limited because "an overly expansive review of such decisions would undermine the efficiencies which arbitration seeks to achieve." [21]

***66** Many district courts have applied a similarly limited review of arbitral awards challenged under Section 10(a)(3). [22] The Southern District of New York held that an arbitrator's refusal to hear or to admit evidence alone does not constitute misconduct; it only constitutes misconduct when it amounts to a denial of fundamental fairness. [23] For instance, in *Areca, Inc. v. Oppenheimer and Palli Hulton Assoc.*, the Court denied the motion to vacate based on petitioner's argument that the arbitrators erroneously refused to allow the petitioner to present the testimony of the brokerage firm's CFO. [24] However, the Court noted that "petitioners presented their direct case over seven full hearing days, in which they called ten witnesses, including four present and former [ ] employees and three experts, and introduced over 148 exhibits into evidence." [25] Therefore, "[t]he scope of inquiry afforded [to] petitioners was certainly sufficient to enable the arbitrators to make an informed decision and to provide petitioners a fundamentally fair hearing." [26] The Court further stated that the arbitrators' broad discretion to decide whether to hear evidence needed to be respected and that arbitrators needed not to compromise their hearing of relevant evidence with arbitration's need for speed and efficiency. [27]

***67** Certain state courts have also confirmed awards despite parties' allegations that arbitrators refused to hear or admit evidence. [28] Similar to their federal counterparts, the courts focused not only on the arbitrators' alleged error, but also on the alleged prejudice suffered by the claimant from this alleged error. For instance, in *Hicks III v. UBS Financial Services, Inc.*, a Utah appellate court reversed the lower court and confirmed an arbitral award in which the movant sought to vacate the arbitration award based on what it contended were erroneous discovery decisions that substantially prejudiced its rights to participate fully in the arbitration. [29] Namely, the movant based its motion to vacate on the arbitrator's alleged denial of its ability to cross-examine a witness and denial of certain deposition requests. [30] While the case focused on FINRA rules, the Court held:

> [A]n arbitrator's discovery decisions can provide grounds for vacatur if those decisions prevent a party from exercising statutorily-guaranteed rights to an extent that 'substantially prejudice[s]' the complaining party .... At a minimum, a discovery decision must be sufficiently egregious that the district court is able to identify specifically what the injustice is and how the injustice can be remedied. [31]

In this case, the movant presented no record of the arbitration proceeding itself and instead sought vacatur of the award based on an insinuation that a piece of evidence presented by the opposing party was false. [32] The Court held that credibility determinations are exclusively within the province of the arbitration panel and nothing movant presented identified any specific information he was denied or precluded from presenting. [33] Therefore, the court held that movant ***68** failed to show that the arbitration panel's discovery decisions substantially prejudiced his rights to present his case fairly. [34]

Not surprisingly, these state courts' views are similar to the federal courts' interpretations of the standard for a violation of Section 10(a)(3). Because evidentiary rulings are procedural in nature, courts rightfully defer to arbitrators' decisions on evidentiary issues so long as these decisions do not rob the parties of a fundamentally fair hearing. While courts will vacate awards at the

extremes, generally arbitrators are generally granted the wide discretion that they need to provide for an expeditious and cost-effective process.

II. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO HEAR PERTINENT AND MATERIAL EVIDENCE/DENIAL OF DISCOVERY REQUEST DEPRIVES A PARTY OF A FUNDAMENTALLY FAIR HEARING

The Fourth and Second Circuits, applying the fundamentally fair hearing standard, have vacated arbitral awards on the ground that the arbitrators denied the parties a fundamentally fair hearing. [35]

In *International Union, United Mine Workers of America v. Marrowbone Development Co.*, the Fourth Circuit vacated an award because the arbitrator had denied the parties a fair hearing. [36] The arbitrator reached a decision without holding a hearing. [37] First, the Court explained that the arbitrator's making of the award without an evidentiary hearing conflicted with the parties' agreement to arbitrate, which required the arbitrator to hold a hearing. Indeed, the parties' agreement stated that the arbitrator had to "conduct a hearing in order to hear testimony, receive evidence and consider arguments." [38] Second, the Court explained that while "an arbitrator typically retains broad discretion over procedural matters and does not have to hear every piece of evidence that the parties wish to present," the Court ***69** could not condone an arbitrator's decision to both go against the parties' agreement and to deny them a full and fair hearing. [39]

In *Tempo Shain Corp. v. Bertek, Inc.*, the Second Circuit vacated an arbitral award on the ground that the arbitrators' conduct in denying the testimony of one of the parties' officers deprived the party of a fundamentally fair arbitration. [40] The claims in arbitration were based on whether the parties were fraudulently induced to enter into a contract. The witness at issue was Bertek's former president who was intimately involved in the contract negotiations and allegedly was the only person who could testify about certain aspects of the negotiations. The witness became temporarily unavailable to testify after his wife was diagnosed with a reoccurrence of cancer. [41] Bertek asked the arbitrators to keep "the record open until [the witness] could testify." [42] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. [43] The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. [44] While the *Tempo Shain Corp.* Court recognized that "undue judicial intervention would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution," the Court found that:

> [B]ecause [the witness] as sole negotiator for Bertek was the only person who could have testified in rebuttal of appellees' fraudulent inducement claim, and the documentary evidence did not adequately address such testimony, there was no reasonable basis for the arbitrators to conclude that [the witnesses] testimony would have been cumulative with respect to those issues. [45]

***70** Similarly, district courts in the Second and Ninth Circuits have vacated awards on the grounds that the arbitrators denied the parties a fair hearing when they refused to hear material and pertinent evidence. [46] In *Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO*, the Court vacated the award because the arbitrator refused to consider testimony based on rules of evidence without first notifying the parties and counsel that the rules of evidence would apply. [47] The arbitrator's opinion stated that he disregarded a witness's rebuttal testimony because it should have been presented as part of the principal case and was not timely. [48] However, no evidentiary rules were announced prior to the hearing by the arbitrator and no such rules were included in the parties' arbitration agreement. [49] Thus, the Court found that the arbitrator's decision to ignore the testimony provided by the petitioner's rebuttal witness amounted to a fundamentally unfair hearing. [50] The Court held that the

rules of evidence did not apply to an arbitral proceeding and by denying evidence to be heard on that basis alone without warning the parties as to what rules the arbitrator would be applying, the arbitrator denied the petitioner a fundamentally fair hearing. [51]

State courts have also vacated awards pursuant to Section 10(a)(3) when arbitrators refused to hear evidence that the court found to be material and pertinent. [52] In *Boston Public Health Commission v. Boston Emergency Medical Services-Boston Police Patrolmen's Ass'n, IUPA No. 16807*, after the evidentiary hearing took place, the arbitrator set a date for the parties' post-hearing briefs to be due. [53] Prior to the due date for the post-hearing briefs, the employer filed a motion for leave to file supplementary evidence of warnings given to the employee that justified the employer issuing a five-day ***71** suspension. The arbitrator denied the employer's motion and refused to accept the supplementary evidence. The arbitrator based his denial on the fact that the evidentiary record was closed as of the conclusion of the evidentiary hearing. The arbitrator's award found that the employer was not justified in issuing the five-day suspension. The Massachusetts Court of Appeals vacated the award on the ground that the arbitrator did not have the authority under the American Arbitration Association rules adopted by the parties to declare the evidentiary record closed prior to the due date for the post-hearing briefs. [54] The Court found the following:

> [A]lthough decisions concerning excluding or admitting evidence are generally within an arbitrator's discretion, the arbitrator did not have the authority under the American Arbitration Association rules to declare that the hearing was closed before the briefs were filed, or to exclude evidence on that basis. As a result, the arbitrator's justification for excluding the evidence--that the hearing was closed--was not within his authority to determine, particularly when he never made a determination concerning the materiality or reliability of the evidence. [55]

The Court further found that the evidence excluded was material and the exclusion prejudiced the rights of the employer. [56]

An overarching theme in all of these cases is that courts show deference to arbitrators' evidentiary decisions. However, given that arbitration is a creature of contract, it is important that an arbitrator stay within the confines of the parties' agreement. For example, if the clause provides that each party take two depositions, then the arbitrator should not deny a party two depositions. Beyond that, courts should view evidentiary matters as procedural and thus leave them to the wide discretion of the arbitrator. Courts that substitute their own reasoning and vacate awards simply because they disagree with the arbitrators' evidentiary rulings risk going beyond the confines of 10(a)(3) and being reversed. If arbitration is to live up to ***72** its promise as an efficient and cost-effective alternative to litigation, courts need to continue to provide deference to arbitrators' evidentiary rulings.

III. COURTS DEFER TO ARBITRATORS' DISCRETION IN THEIR DECISION TO GRANT OR DENY ADJOURNMENTS

Even though FAA 10(a)(3) provides that awards may be vacated based on an arbitrator's refusal to postpone the hearing upon sufficient cause shown--as with evidentiary rulings--granting or denying requests for adjournments are generally considered procedural matters and thus courts grant arbitrators broad discretion in such determinations. This makes sense given that the arbitrator, not a reviewing court, is closest to the matter at the time when the request for adjournment is being sought. Requests for adjournments can derail an otherwise efficient arbitration. Unlike in the context of litigation where matters in court are often adjourned without protest, the granting of an adjournment in arbitration should be the exception rather than the rule. Not surprisingly, the Second and the Sixth Circuits, as well as several district courts, have held that arbitrators' refusal to postpone hearings did not negate a fundamentally fair hearing or amount to an abuse of the arbitrator's discretion. [57]

Courts have confirmed the awards submitted to them when arbitrators have denied adjournment requests in the arbitral proceedings. For instance, in *Alexander Julian Inc. v. Mimco, Inc.*, the Second Circuit determined that granting an adjournment falls within the arbitrator's broad discretion. [58] In *Mimco*, the Court held that the arbitrators' denial of an adjournment request

made by a party because his counsel had to be in federal court did not deprive the party of a fundamentally fair hearing. [59] The Court had two bases for ***73** its decision. First, the Court explained that the arbitrators had "at least a barely colorable justification" for denying the adjournment. [60] Second, the Court reiterated the *Tempo Shain* rule and held that "the granting or denying of an adjournment falls within the broad discretion of appointed arbitrators." [61] Thus, this decision illustrates courts' deference to the arbitrators' procedural decisions.

Other courts have held that when arbitrators have a reasonable basis and justification for the adjournment refusal, courts should defer to the arbitrators' decision. [62] For example, in *Bisnoff v. King*, the Southern District of New York deferred to the arbitrators' decision in refusing to postpone a hearing. [63] There, the arbitrators denied a party's request to postpone a hearing, even though the party asked for this postponement on the grounds of sickness. [64] The arbitrators clearly and reasonably justified their denial in a letter to the party explaining that they believed that the party was capable of participating in hearings. [65] The Court deferred to this decision for two reasons. First, the Court held that the arbitrators had clearly and reasonably justified their denial. Second, the Court stated that it was "not empowered to second guess the arbitrators' assessment of credibility." [66] The *Bisnoff* Court distinguished this case from *Tempo Shain*. In *Tempo Shain*, the Second Circuit had not deferred to the arbitrators' decision to refuse to hear a witness's testimony. There, Bertek, a manufacturing company planned on calling a crucial witness for its case. Bertek asked for the arbitrators to keep "the record open until [the witness] could testify." [67] The arbitrators refused Bertek's request on the ground that the testimony would be cumulative. The Second Circuit did not defer to the arbitrators' decision because they had given no reasonable basis for their denial. In *Bisnoff*, the situation was different because the arbitrators provided reasons for their decision. Thus, the standard of review remains deferential to the arbitrators' decision. Courts will defer to arbitrators' procedural ***74** decisions so long as the arbitrators have provided a reasonable basis for their choices. [68]

The Sixth Circuit has shown even greater deference to the arbitrators' procedural decisions, such as granting or refusing an adjournment request. [69] *In re Time Construction, Inc. v. Time Construction Inc.*, the Court confirmed the arbitral award and held that the arbitration panel's refusal to postpone a hearing requested on the ground of the illness of a partner in a partnership was not an abuse of discretion. [70] In this case, the arbitration involved a construction dispute between a construction company and a partnership. The partnership moved to vacate the award entered in favor of the construction company on the ground that the panel abused its discretion in denying the adjournment request asked for because of a partner's sickness. [71] The Sixth Circuit reviewed the case under Michigan Court Rules 3.602(j)(1)(d) (similar to FAA 10(a)(3)) and it stated that "the party seeking to vacate the arbitration award carried the burden of proving by 'clear and convincing evidence' that the arbitrators abused their discretion." [72] Furthermore, the Court stated that, within the arbitration, it was the burden of party seeking the adjournment to provide the information necessary for the arbitrator to grant the adjournment. [73] The Court thus reviewed the procedural facts and observed that the arbitrators had "been generous in granting [the partnership] continuances and ... adjournments throughout the two and a half years of the arbitration." [74] In light of these facts, the Court confirmed the award.

Courts have specified that so long as the parties had a full opportunity to present their case, the arbitrator's denial does not amount to a violation of the fundamentally fair hearing standard. [75] Courts have also relied on the principle that so long as arbitrators ***75** provide the parties an adequate opportunity to present their evidence and argument, they are not bound by formal rules of procedure and evidence. [76]

Finally, courts have decided that arbitrators who act within the authority granted to them by the rules of the arbitration have not denied a fundamentally fair hearing to the parties. [77] For example, in *Verve Communications Pvt. Ltd v. Software International, Inc.*, the New Jersey District Court confirmed the arbitral award and held that an arbitrator had properly refused the party's request for a continuance of discovery as the arbitrator acted within the authority granted to him by the arbitration rules. [78] In this case, the arbitration agreement provided that the dispute be resolved in accordance with the Commercial Arbitration Rules

of the American Arbitration Association. [79] The party against whom the award was entered moved to vacate the award on the ground that the arbitrator wrongfully denied him the right to a subpoena to depose a non-party and submit a transcript of the deposition. The Court disagreed and stated that since the AAA Rules provided that "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard is given a fair opportunity to present its case" and that the arbitrator "shall manage the exchange of information among the parties in advance of the hearing with a view to maintaining efficiency and economy," the arbitrator had sufficient authority to decide whether or not to extend discovery. [80] Furthermore, the Court observed that the party seeking to vacate the award had the opportunity to present evidence and chose not to during the eight months that the arbitration lasted. [81] For these reasons, the arbitrator's choice not to continue discovery did not amount to misconduct under FAA 10(a)(3). [82]

***76** As evidenced from the cases above, courts generally provide arbitrators with wide discretion when reviewing arbitrators' decisions regarding adjournment requests. However, courts will look to the arbitrator's reasoning to determine whether there was a reasonable basis or justification for denying a request for adjournment. Therefore, best practice dictates that arbitrators provide reasoning for their denial of an adjournment.

IV. COURTS WILL VACATE AN AWARD IF ARBITRATORS' REFUSAL TO GRANT ADJOURNMENT AMOUNTS TO PREJUDICIAL MISCONDUCT

Courts have held that while the decision to grant or to deny adjournment requests is generally within the arbitrator's discretion, when the decision amounts to prejudicial misconduct the award must be vacated. [83]

The appellate division of the Supreme Court of New York has held that an arbitrator's refusal to grant a party's request for adjournment of an arbitration proceeding amounts to misconduct and justifies vacatur of the award when the party requesting the adjournment was not properly notified of the arbitration. [84] In *Wedbush Morgan Securities, Inc. v. Brandman*, a New York Stock Exchange arbitration, the Court granted the vacatur of the award because the arbitrators failed to provide due notice of arbitration to one of the parties. [85] The Court held that New York Civil Practice Law and Rules 7506[b] which mirrored New York Stock Exchange Rule 617 required arbitrators in New York Stock Exchange arbitrations to "notify the parties [of an upcoming arbitration hearing] in writing personally or by registered or certified mail not less than eight days before the hearing." [86] Failure by the arbitrators to do so and denial of an adjournment upon request by the improperly notified party amounted to prejudicial misconduct. [87] In *In re Arbitration between Leblon* ***77** *Consultants Ltd. and Jackson China, Inc.*, the Court also vacated the arbitral award on the ground that the arbitrator denied an adjournment request. [88] The Court remanded the case to the American Arbitration Association. [89] In this case, the respondent in the arbitration sought a hearing adjournment from the arbitrator in order to have the only employee who had knowledge of the dispute fly from England to New York and attend the arbitral hearing. In light of these facts, the Court found that the arbitrator had abused his discretion by refusing the adjournment. [90] Judge Silverman, dissenting in this opinion, stated that he would have confirmed the award. Based on the history of adjournments and delays in this arbitration, Judge Silverman considered that the arbitrator acted within his discretion. [91]

In *Pacilli v. Philips Appel & Walden, Inc.*, the Eastern District of Pennsylvania partially vacated the award on the ground that the arbitrators had refused to adjourn proceedings to allow a party that was rejoined the opportunity to cross-examine a witness concerning the cross claim against the rejoined party. [92] In this case, the Pacillis initiated a New York Stock Exchange arbitration against a brokerage firm for unauthorized transfer of funds, unauthorized securities transactions, and other claims. [93] The claimants named a series of respondents, including Mr. Engelhardt, the Compliance Director of the brokerage firm. A few days into the proceeding, Engelhardt reached a settlement agreement with the Pacillis and the claims against him were dismissed. [94] However, later in the proceeding, the claimant's expert witness testified as to Engelhardt's compliance obligations. [95] At this time, the arbitral panel decided to entertain cross claims from Engelhardt and the other respondents. The panel left a telephone

message with Engelhardt's counsel inviting cross claims from Engelhardt. Within ten minutes of this phone call and before Engelhardt's counsel could respond, the arbitrators proceeded with the cross claims against Engelhardt with other defendants ***78** present.[96] Within forty minutes of the phone call, the arbitrators entertained cross-examination of the claimant's expert witness by another defendant, which was incriminating for Engelhardt.[97] Finally, the arbitrators entered an award against Engelhardt and other defendants.[98] The Court in this case vacated the award against Engelhardt on the ground that the arbitrators denied him his right to a fair hearing.[99] Therefore, the arbitrators' decision not to wait for Engelhardt to appear, respond, and cross examine the expert witness amounted to misconduct on the part of the arbitrators.

These cases show that the while there is a presumption in favor of deferring to the arbitrator's discretion, unreasonable denials of adjournments will justify vacatur. These cases, however, involved situations in which arbitrators denied the parties' basic rights, such as the right to notice, the right to present a crucial witness, and the right to appear in the arbitration and cross-examine a witness. Thus, these cases do not undermine arbitrators' discretion; they only show that this discretion is to be construed within the broad boundaries of a fundamentally fair hearing. Given that the grounds for vacatur under 10(a)(3) are based on an arbitrator's procedural determination, courts rightly grant arbitrators wide discretion in these matters, vacating awards only at the extremes.

V. COURTS HAVE CONFIRMED AWARDS WHEN ARBITRATORS DECIDED THE CASE ON DISPOSITIVE MOTIONS

Federal courts have confirmed awards and deferred to the arbitrators' decision to render either an award on the merits or a motion to dismiss without holding a full evidentiary hearing. These decisions focus on whether the process in which the arbitrator engaged to reach her determination deprived the parties of a fundamentally fair hearing. The matter at issue must be ripe for summary disposition and the parties must be given the opportunity to submit argument on the issue.

***79** In *Intercarbon Bermuda, Ltd. v. Caltex Trading and Transport Corporation*, the Southern District of New York confirmed an award that arbitrators made without holding in-person evidentiary hearings.[100] In this case, after the parties filed submissions and without holding a hearing, the arbitrator made a preliminary award in favor of Caltraport. The arbitrator then rendered his final award in favor of Caltraport, without holding any in-person hearings. InterCarbon, which had initiated the arbitration, moved to vacate the award on the grounds that the arbitrator was guilty of misconduct under FAA 10(a)(3) because he refused to hear evidence pertinent and material to the dispute. The Southern District of New York determined that InterCarbon had received a fundamentally fair hearing even though it was a "paper hearing."[101] To reach this decision, the Court applied the F.R.C.P. 56 standard (summary judgment) to determine whether the documents-only "hearing" was proper.[102] The Court determined that "the extent to which issues of fact were in dispute" determines whether the arbitrator should hold a live hearing.[103] In this arbitration, the circumstances were such that a summary disposition was fair.[104] Therefore, the arbitrator did not deny the parties a fundamentally fair hearing by considering only document submissions.

In *Warren v. Tacher*, the United States District Court for the Western District of Kentucky similarly refused to vacate an award on the ground that an arbitrator had decided to dismiss the case against certain respondents without permitting discovery.[105] In *Warren*, one of the respondents in an arbitration involving a broker-dealer transaction filed a motion to dismiss all claims against it at the outset of the arbitration. Petitioners filed a written response to this motion and the arbitration panel subsequently granted the respondent's motion to dismiss. After an arbitral award was rendered in petitioner's favor against the remaining respondents, petitioners moved to vacate the award in their favor on the ground that the arbitrator had granted one of the respondents' motion to dismiss prior ***80** to discovery and a full evidentiary hearing. The Court confirmed the award and held that petitioners failed to show that the arbitrator's decision denied them a fundamentally fair hearing.[106] Indeed, the Court noted that the arbitration panel entertained written submissions and a hearing on the motion to dismiss prior to granting the motion.

State courts have also deferred to arbitrators' granting dispositive motions and confirmed awards so long as parties were not denied a fundamentally fair hearing. [107] For instance, in *Pegasus Construction Corp. v. Turner Construction. Co.*, the Court of Appeals of Washington confirmed an arbitral award in which the arbitrator had decided that he could not award either party any damages because they did not comply with their contract. [108] In this arbitration, a subcontractor and a contractor on a construction project had a dispute. The subcontractor filed an arbitration demand under the AAA's Construction Industry Arbitration Rules. The contractor then moved to dismiss the claims against him on the ground that the subcontractor had not complied with the dispute resolution provisions agreed to in the prime contract. After reviewing written submissions and holding oral arguments on the motion to dismiss, the arbitrator held that neither party had complied with the contract provisions. [109] Thus, the arbitrator awarded damages to neither party. The Court confirmed the award and held that a full hearing is not required when a dispositive issue makes it unnecessary. [110]

In *Schlessinger v. Rosenfeld, Meyer & Susman*, the California Court of Appeals confirmed an award even though the arbitrator resolved the principal issues presented to him by summary adjudications motions. [111] In this case, a law firm and a former partner in the law firm resorted to arbitration to determine the amount due to the former partner. [112] The parties agreed to arbitrate pursuant to AAA ***81** rules. [113] First, the parties cross-motioned for summary adjudication on the validity of the partnership agreement's penalty for competition. [114] The parties submitted written documents and the arbitrator held a hearing via telephone conference on the motion. The arbitrator then determined that the agreement was valid but that the reasonableness of the penalty would be examined after taking further evidence. [115] After engaging in discovery on that matter, the former partner filed a motion for summary adjudication contending that the penalty ("tolls") was unreasonable. Both parties submitted written submissions as well as declarations and depositions from relevant persons in the dispute (accountant, current law firm partners, former law firm partner). The arbitrator then conducted a telephone hearing on the motion. The arbitrator then ruled that the penalty was reasonable as a matter of law. [116] The arbitral award was then issued after the parties resolved the remaining issues by stipulation. The Court held that the former partner was not deprived of a fundamentally fair hearing because the arbitrator was allowed to rule on summary adjudication motions even if the AAA rules did not explicitly grant that power to the arbitrator. [117] The Court did, however, caution that its holding "should not be taken as an endorsement of motions for summary judgment or summary adjudication in the arbitration context." [118]

These cases indicate that arbitrators' granting dispositive motions will be upheld when the contract or the parties' agreement grants arbitrators such power and when decisions do not deprive the parties of a fundamentally fair hearing. [119] The permissibility of arbitrators to grant dispositive motions is supported by administrative rules such as ***82** the AAA Commercial Arbitration Rules amended and effective October 1, 2013, R-33. "The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." [120] An arbitrator's authority to grant summary disposition motions is crucial to promoting the time and cost savings available in the arbitration process.

VI. SANCTIONS UNDER FAA 10 (A)(4)

One way for an arbitrator's ruling on discovery issues to have teeth is for the arbitrator to issue sanctions against a non-compliant party. Courts reviewing awards sanctioning a party for lack of good faith in the conduct of the arbitration or faulty document production have confirmed such awards. [121] The arbitrator must have the authority to award sanctions, be it granted by the parties' arbitration clause, applicable statute, or the parties themselves. Once the arbitrator determines that she has authority to award sanctions, one limit to the arbitrator's power is that the party owing sanctions must be a party to the arbitration agreement.

In *Reliastar Life Insurance Company of New York v. EMC National Life Co.*, the Second Circuit confirmed an award in which the arbitrator awarded attorney fees to the prevailing party. [122] In this case, the sanctioned party argued that the arbitrators had

exceeded their powers and that the award should be vacated pursuant to FAA 10(a)(4). [123] The Court determined that it must evaluate whether the arbitrator had the power to award attorney's fees in the parties' agreement to arbitrate. [124] The Court held that the parties' arbitration agreement, which stated that parties should bear their own arbitration ***83** expenses, was sufficiently broad to confer on arbitrators the power to sanction a party that participates in the arbitration in bad faith. [125]

Similarly, in *Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG*, the Second Circuit confirmed in part an award that sanctioned a party for faulty document production and held that "an arbitrator's determination that a party acted in bad faith is subject to limited review." [126] This case involved a commercial arbitration for a breach of a contract to sell and purchase a petrochemical. The purchaser initiated the arbitration against the seller for breach of contract. [127] The arbitration was to be conducted under the Commercial Arbitration Rules of the AAA. [128] In their initial submissions, both parties requested attorney's fees. During the arbitration proceeding, the arbitrator determined that the purchaser's document production was "patently dilatory and evasive," and at the request of the seller, the arbitrator imposed sanctions on the purchaser and its attorney. [129] The Second Circuit confirmed the award with regards to sanctions imposed on the purchaser on the ground that since the parties had both requested attorney's fees in the initial submissions, the arbitrator was authorized to award attorneys' fees. [130] There was thus no violation of FAA 10 (a)(4). However, the Court found that the arbitrator did not have the authority to award sanctions against the attorney herself because she was not a party to the arbitration agreement. [131]

In *First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co.*, the United States District Court for the Southern District of Florida confirmed an arbitral panel's decision to dismiss with prejudice a case on the ground that the claimant had sent "egregious" letters to clients concerning the respondent. [132] In that case, the Court ***84** held that the arbitrators had not exceeded their power in dismissing this case with prejudice. [133] Indeed, the Court reasoned that, "if arbitrators are not permitted to impose the ultimate sanction of dismissal on plaintiffs who flagrantly disregard rules and procedures put in place to control discovery, arbitrators will not be able to assert the power necessary to properly adjudicate claims." [134]

These cases show that even when they are confronted with a motion to vacate an award based on sanctions allegedly imposed improperly by arbitrators, courts show deference to arbitrators' decisions.

In *MCR of America, Inc. v. Greene*, the Maryland Court of Special Appeals vacated an arbitral award in which the arbitrator had sanctioned the employee and his counsel to pay the employer's attorney's fees in an arbitration between an employee and an employer. [135] The Court held that the arbitrator had exceeded her authority under Maryland's Uniform Arbitration for two reasons. First, the arbitrator exceeded her authority because the parties' agreement did not expressly enable her to award attorney's fees. [136] The Court disregarded the AAA rules applicable to the arbitration that allowed for attorney's fees, and it looked at the Maryland Arbitration Act, which presumed that parties have not agreed to attorney's fees unless expressly stated in the agreement. Second, the Court held that arbitration was a matter of contract and for this reason, since the employee's attorney was not party to the contract, he could not be sanctioned. [137]

While this Maryland decision vacated the award pursuant to FAA 10(a)(4), it does maintain that arbitrators' authority derives from the parties' agreement, and were the parties' agreement clear on the subject of attorney's fees, the award would have been enforced. Informed arbitrators should not shy away from their authority, if it exists in the case, to issue sanctions against a party who is not complying with the arbitrator's orders or who is flagrantly ***85** participating in bad faith. Arbitration is intended to be a cost effective and efficient process, and when a party to an arbitration abuses the process, that abuse should not be tolerated by the arbitrators.

VII. CONCLUSION

Arbitrators play a critical role in asserting their authority to provide parties with a cost-effective and expeditious arbitration. No informed arbitrator should shy away from that responsibility for fear of jeopardizing the award. Be it through refusing to hear unnecessary evidence, denying unwarranted discovery requests, denying excessive adjournment requests, deciding an issue or disposing of a case based on a dispositive motion, or sanctioning parties for failure to comply with a discovery order or lack of good faith in the arbitration process, arbitrators have the tools to manage the arbitration process. These tools coupled with courts' strong support of arbitrators' discretion in this context provide arbitrators with the means to take an active role in controlling the time and cost of arbitration.

Many arbitrators are already using these tools and successfully managing the arbitration process. [138] For those who have been hesitant, fearing that asserting control will create grounds for vacatur, fear not. Inform yourself of the judicially recognized boundaries outlined in this article and step into your rightful role as time and cost controller.

Footnotes

d1 This article originally appeared in 17 CARDOZO J. OF CONFLICT RESOL. 155 (2015).

a1 **Tracey B. Frisch**, Esq. is Senior Counsel at the American Arbitration Association. Ms. Frisch is also an adjunct Professor at Benjamin N. Cardozo School of Law. Special thank you to Alyssa Feliciano and Severine Losembe, AAA Legal Department interns, whose assistance motivated me to complete this article, and to Eric Tuchmann, AAA's General Counsel for his support and guidance in drafting this article. And of course to the editors of the Journal for accepting this article for publication and for helping me to get this article into shape.

1 The median time frame for a civil case to go to trial in Federal Court is 23.2 months based on U.S. Federal Court statistics for civil cases for the 12-month period ending March 31, 2011; but the median timeframe for an AAA commercial arbitration to be awarded is 7.3 months, based on AAA commercial arbitrations awarded in 2011. Statistics on file with author.

2 9 U.S.C. §10(a)(3). Section 10(a) of the Federal Arbitration Act lists four grounds for vacating an arbitration award:
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

3 Rosenweig v. Morgan Stanley, 494 F.3d 1328 (11th Cir. 2007).

4 *Id.* at 1334.

5 Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002).

6 *Id.* at 625.

7 *Id.*

8 *See* Bain Cotton Co. v. Chestnut Cotton Co., 531 F.App'x 500 (5th Cir. 2013). In this case, the circuit court affirmed the district court's denial of motion to vacate award on ground arbitrators denied discovery requests. The court held that "regardless whether the district court or this court--or both--might disagree with the arbitrators' handling of [Plaintiff's] discovery requests, that handling does not rise to the level required for vacating [award] under any of the FAA's narrow and exclusive grounds." *Id.* at 501. *See also* Prestige Ford v. Ford Dealer Comput. Serv., Inc., 324 F.3d 391 (5th Cir. 2003).

9 *Prestige Ford*, 324 F.3d at 391.

10 *Id.* at 395.

11 *Id.* at 394.

12 *See* LJL 33rd St. Assoc., LLC v. Pitcairn Prop. Inc., 725 F.3d 184 (2d Cir. 2013); *see also* Bangor Gas Co., LLC v. H.Q. Energy Serv. (U.S.) Inc., 695 F.3d 181 (1st Cir. 2012) ("So even if we were to assume [doubtfully] that consideration of these two additional documents was 'misconduct' under the FAA, it could not have been prejudicial, a requirement for vacating an award under §10(a)(3)."); *Rosenweig*, 494 F.3d 1328.

13 *LJL 33rd St. Assoc.*, 725 F.3d at 184.

14 *Id.* at 194.

15 *Id.* at 193.

16 *See* Ardalan v. Macy's Inc., No. 5:09-CV-04894 (JW), 2012 WL 2503972, at *1 (N.D. Cal. Jun. 28, 2012) (determining that even if an arbitrator deliberately excludes evidence because of bias, the plaintiff bears the burden of showing that the exclusion resulted in a fundamentally unfair hearing); A.H. Robins Co., Inc. v. Dalkon Shield, 228 B.R. 587 (Bankr. E.D. Va. 1999); *see also* Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F.Supp. 2d 459 (S.D.N.Y. 2012); Sebbag v. Shearson Lehman Bros., Inc., No. 89-CV-5477 (MJL), 1991 WL 12431 (S.D.N.Y. Jan. 8, 1991) (confirming the arbitral award despite the claimant's argument that they did not get access to files on the grounds that the court must look at the proceedings as whole in determining whether a fair hearing has been given and not look at each evidentiary decision and determine whether the court agrees with them).

17 *A.H. Robins Co., Inc.*, 228 B.R. 587.

18 *Id.* at 592.

19 *Id.*

20 *Id.* at 592-93.

21 *Id.* at 592.

22 *See* Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12-CV-283 (GBD), 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4 2013) (confirming the award and determining that an arbitral panel's decision to deny a party's request for two documents out of sixty does not amount to "misconduct" under the FAA); Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459 (S.D.N.Y. 2012) (confirming the arbitral award and held that arbitrators are afforded great deference and thus hearing only one witness when the issue was one of contractual interpretation did not make the hearing fundamentally unfair); AT&T Corp v. Tyco, 255 F. Supp. 2d 294 (S.D.N.Y. 2003) (confirming the award on the ground that the arbitration did entail a discovery process including depositions and documents exchange as well as briefing of the issues and evidentiary hearings).

23 *See* Robert Lewis v. William Webb, 473 F.3d 498 (2d Cir. 2007) (confirming the award although the arbitrators had restricted discovery because it did not deprive the claimant of a fundamentally fair arbitration process); Areca, Inc. v. Oppenheimer and Palli Hulton Assoc., 960 F.Supp. 52 (S.D.N.Y. 1997) (confirming the award despite the fact that arbitrators refused to allow investors to present testimony of the brokerage's firm CFO).

24 *Areca, Inc.*, 960 F.Supp. 52.

25 *Id.* at 55.

26 *Id.*

27 *Id.*

28 *See* American State Univ. v. Kiemm, No. B242766, 2013 WL 1793931, at *1 (Cal. Ct. App. Apr. 29, 2013) (confirming award and determining that courts "should focus on whether the exclusion was prejudicial, not whether the evidence was material"); Hicks III v. UBS Fin. Serv., Inc., 226 P.3d 762 (Utah Ct. App. 2010); Carson v. Painewebber, Inc., 62 P.3d 996 (Colo. App. 2002) (confirming the arbitral award because the NASD rules, which the arbitration followed, allowed for the arbitrator's conduct but held that "parties

to an arbitration proceeding have an absolute right to be heard and present evidence before the arbitrators, and that a refusal ... is such misconduct as affords a sufficient ground for setting aside the award").

29 *Hicks III*, 226 P.3d at 762.

30 *Id.* at 770.

31 *Id.* at 772.

32 *Id.* at 771.

33 *Id.* at 772.

34 *Id.* at 762.

35 *See* Int'l Union, United Mine Workers of America v. Marrowbone Dev. Co., 232 F.3d 383 (4th Cir. 2000); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997); *see also* Teamsters v. E.D. Clapp Co., 551 F.Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F.Supp. 488 (C.D. Cal 1967).

36 *Int'l Union, United Mine Workers of America*, 232 F.3d at 383.

37 *Id.* at 389.

38 *Id.* at 388

39 *Id.* at 390. As seen through this case, oftentimes parties will move to vacate based on both 10(a)(3) and 10(a)(4) (FAA 10(a)(4): "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.") grounds arguing that the arbitrator's alleged misdeed under 10(a)(3) resulted in the arbitrator exceeding her powers under 10(a)(4).

40 *Tempo Shain Corp.*, 120 F.3d 16.

41 *Id.* at 17.

42 *Id.* at 18.

43 *Id.*

44 *Id.* at 20.

45 *Tempo Shain Corp.*, 120 F.3d at 21.

46 *See* Teamsters v. E.D. Clapp Co., 551 F. Supp. 570 (N.D.N.Y. 1982); Harvey Aluminum (Inc.) v. United Steelworkers of America, AFL-CIO, 263 F. Supp. 488 (C.D. Cal 1967).

47 *Harvey Aluminum (Inc.)*, 263 F. Supp. at 488.

48 *Id.* at 490.

49 *Id.* at 491.

50 *Id.* at 492.

51 *Id.* at 490.

52 *See* Boston Public Health Commission v. Boston Emergency Medical Services-Boston Police Patrolmen's Ass'n, IUPA No. 16807, AFL-CIO, 85 Mass.App.Ct. 1126 (2014); Manchester Twp. Bd. of Educ. v. Carney, Inc., 199 N.J. Super. 266 (1985).

53 *Boston Public Health Comm'n*, 85 Mass. App. Ct. 1126.

54 Rule 31 AAA Labor Arbitration Rules as amended and effective July 1, 2005: "[i]f briefs ... are to be filed ... the hearings shall be declared closed as of the final date set by the arbitrator for filing with the AAA." Id. at *2.

55 Boston Public Health Comm'n v. Boston Emergency Med. Serv.-Boston Police Patrolmen's Ass'n, IUPA No. 16807, AFL-CIO, 85 Mass.App.Ct. 1126, at *2 (2014).

56 *Id.*

57 *See* Alexander Julian Inc. v. Mimco, Inc., 29 F.App'x. 700 (2d Cir. 2002); Metallgesellschaft A.G. v. M/V Captain Constante, 790 F.2d 280 (2d Cir. 1986); In re Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995); Sunrise Trust v. Morgan Stanley & Co., No. 2:12-CV-944 JCM (PAL), 2012 WL 4963766 (D. Nev. Oct. 16, 2012); HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio Sept. 28, 2012); Dealer Comput. Serv. Inc. v. Dale Spradley Motors, Inc., No. 11-CV-11853 (JAC), 2012 WL 72284 (E.D. Mich. Jan. 10, 2012); Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

58 *See Alexander Julian Inc.*, 29 F.App'x. 700; Berlacher v. Painewebber, 759 F. Supp. 21 (D.D.C. 1991).

59 *Alexander Julian Inc. v. Mimco, Inc.*, 29 F. App'x. at 703.

60 *Id.*

61 *Id.*

62 *See* Bisnoff v. King, 154 F. Supp. 2d 630 (S.D.N.Y. 2001); Gordon Capital Corp. v. Jesup, No. 91-CV-3821 (MBM) 1992 WL 41722 (S.D.N.Y. Feb. 20, 1992).

63 *Bisnoff v. King*, 154 F. Supp. 2d at 630.

64 *Id.* at 634.

65 *Id.* at 638.

66 *Id.* at 635.

67 *Bisnoff*, 154 F. Supp. 2d 630.

68 *Id.* at 637.

69 *See* In re Time Constr., Inc., 43 F.3d 1041 (6th Cir. 1995).

70 *Id.* at 1041.

71 *Id.* at 1044.

72 *Id.* at 1045.

73 *Id.*

74 *In re Time Constr., Inc.*, 43 F.3d at 1045.

75 *See* HBK Sorce Fin. v. Ameriprise Fin. Serv., No. 4:10-CV-02284 (BYP), 2012 WL 4505993 (N.D. Ohio, Sept. 28, 2012). *See also* Gwire v. Roulac Grp., 2008 WL 3907403 (Cal. Sup. Ct. 2008) (confirming an award despite the arbitrator having refused to grant a party's request for a "sur-reply brief").

76 *See Alexander Julian Inc.*, 29 Fed.Appx. 700; *Dealer Comput. Serv. Inc.*, 2012 WL 72284; Roche v. Local 32B-32J, 755 F. Supp. 622 (S.D.N.Y. 1991).

77 *Dealer Comput. Services Inc.*, 2012 WL 72284 (confirming the award and holding that the arbitrator acted within the authority granted to him by the AAA rules when he did not grant the party's request for continuance).

78 Verve Commc'n Pvt. Ltd v. Software Int'l, Inc., No. 11-1280 (FLW), 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

79 *Id.* at *1.

80 *Id* at *1, *7 (citations omitted).

81 *Id.* at *7.

82 *Id.*

83 *See* Wedbush Morgan Sec., Inc. v. Brandman, 192 A.D.2d 497 (1st Dep't 1993); Pacilli v. Philips Appel & Walden, Inc., 1991 WL 193507 (E.D. Pa. Sept. 24, 1991); Leblon Consultants, Ltd. v. Jackson China, Inc., 92 A.D.2d 499 (1st Dep't 1983).

84 *See Wedbush Morgan Securities, Inc.*, 192 A.D.2d 497; *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

85 *Wedbush Morgan Securities, Inc.* 192 A.D.2d 497.

86 *Id.* at 497 (citations omitted).

87 *Id.*

88 *Leblon Consultants, Ltd.*, 92 A.D.2d 499.

89 *Id.* at 499.

90 *Id.*

91 *Id.*

92 *Pacilli*, 1991 WL 193507.

93 *Id.* at *1.

94 *Id.*

95 *Id.* at *2.

96 *Id.*

97 *Id.* at *3.

98 *Pacilli*, 1991 WL 193507 at *3.

99 *Id.* at *6.

100 Intercarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp., 146 F.R.D. 64 (S.D.N.Y. 1993).

101 *Id.* at 72.

102 *Id.*

103 *Id.*

104 *Id.*

105 Warren v. Tacher, 114 F. Supp. 2d 600 (W.D. Ky. 2000)

106 *Id.* at 602.

107 *See* Altreus Cmty. Grp. of Arizona v. Stardust Dev., Inc., 229 Ariz. 503 (Ct. App. 2012) (confirming the award and holding that arbitrators have an implicit power to award summary judgment based on Rule 45 of the AAA Rules); Pegasus Const. Corp. v. Turner Constr. Co., 84 Wash.App. 744 (Ct. App. 1997); Schlessinger v. Rosenfeld, Meyer & Susman, 40 Cal.App.4th 1096 (App. Ct. 1995).

108 *Pegasus Const. Corp.*, 84 Wash. App. 744.

109 *Id.* at 747.

110 *Id.* at 750.

111 *Schlessinger*, 40 Cal. App. 4th 1096.

112 *Id.* at 1100-01.

113 *Id.*

114 *Id.* at 1101.

115 *Id.* at 1101-02.

116 *Id.* at 1103.

117 *Schlessinger*, 40 Cal. App. 4th 1096 at 1111. New AAA rules do expressly allow for dispositive motions.

118 *Id.*

119 However, despite this deferential review of arbitrators' summary adjudications, at least one state court has vacated an arbitration award when an arbitrator granted a motion to dismiss based on a statute of limitations defense. In *Andrew v. Cuna Brokerage Services, Inc.*, the court vacated a National Association of Securities Dealers arbitration award on the ground that the arbitrator should not have dismissed a valid claim on the basis of a statute of limitations as it denied the parties a full and fair hearing. *See* Andrew v. Cuna Brokerage Serv., Inc., 976 A.2d 496 (Pa. Super. Ct. 2009).

120 *See also* JAMS Arbitration Rules, effective July 1, 2014, Rule 18. Summary Disposition of a Claim or Issue: "[t]he Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."

121 *See* Reliastar Life Ins. Co. v. EMC National Life Co., 564 F.3d 81 (2d Cir. 2009); Interchem Asia 2000 Pte. Ltd. v. Oceana Petrochemicals AG, 373 F. Supp. 2d 340 (2d Cir. 2005).

122 *Reliastar Life Ins. Co.*, 564 F.3d 81.

123 *Id.* at 85.

124 *Id.*

125 *Id.* at 86.

126 *Interchem Asia 2000 Pte. Ltd.*, 373 F.Supp.2d at 355.

127 *Id.* at 343.

128 *Id.*

129 *Id.* at 344.

130 *Id.* at 354.

131 *Id.* at 359; *see also* Seagate Tech., LLC v. Western Dig. Corp., No. A12-1944, 2014 WL 5012807 (Minn. Sup. Ct. Oct. 8, 2014) (confirming an award and holding that the arbitrator did not exceed his authority by imposing punitive sanctions after the arbitrator determined a party fabricated evidence because sanctions were authorized by the AAA Employment rule).

132 First Preservation Capital, Inc. v. Smith Barney, Harris Upham & Co., 939 F. Supp. 1559 (S.D. Fla. 1996); *see also* Prime Associates Group, LLC. v. Nama Holdings, LLC., 2012 WL 2309055 (Cal. Ct. App. June 19, 2012) (confirming an arbitral award which sanctioned a party for discovery misconduct and holding that arbitrators did not exceed their powers in sanctioning that party).

133 *First Preservation Capital, Inc.*, 939 F. Supp. at 1566-67.

134 *Id.* at 1565.

135 MCR of America, Inc. v. Greene, 148 Md. App. 91 (Md. Ct. Spec. App. 2002).

136 *Id.* at 103.

137 *Id.* at 111.

138 The AAA looked at 4,400 cases administered by the AA concluded in 2009 through 2011, across five important U.S. business sectors and found that some large complex cases (exceeded $500,000 in claims) were awarded in five months of less. On file with author.

71 DRJ 61

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"*Cat Charter* is demonstrably not up to the task required of arbitrators across the country."

"*Will the Second Circuit use* Smarter Tools *to toss* Cat Charter *overboard and float a more supportable doctrine?* Another inadequately reasoned award has just been vacated in the Southern District. Time will tell whether it is fixed on remand, settled, or ends up appealed for its defective form."

THE SECOND CIRCUIT NEEDS TO BREAK PRECEDENT TO PROTECT REASONED ARBITRATION AWARDS

By John Burritt McArthur and Allison Snyder

Reasoned awards, which explain how the arbitrators arrived at the outcome, are the bedrock of modern arbitration. They are *de rigeure* in international arbitration. Domestically, CPR and JAMS make reasoned awards their default form.[1] Most arbitrators operating under AAA rules in domestic commercial arbitrations of any significant size write reasoned awards, even though the AAA's commercial rules make a standard award their default.[2]

Reasoned awards are important to arbitration's legitimacy. They let parties see *why* they won or lost. Studies of satisfaction with civil litigation have found that being heard increases user satisfaction.[3] What better way to know you have been heard than to read an award that shows the arbitrators understood your position, even if they did not accept it?

Although reasoned awards dominate commercial arbitration today, neither our courts nor domestic rules have developed an effective test to evaluate whether an award is "reasoned." The Second Circuit was an early adopter of the majority "*Cat Charter"*

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* John Burritt McArthur has been a trial lawyer for 36 years, an arbitrator for 25. A Fellow of the College of Commercial Arbitrators and of CIARB, he is on the arbitrator lists of, among other providers, the AAA, CPR, FedArb, FINRA, the LCIA, and other international arbitration centers. Mr. McArthur's law office is in Berkeley, California.

** Allison Snyder, a partner in Houston's Porter Hedges, is a litigator, arbitrator, and mediator with over 35 years of experience representing commercial and construction clients and more than 25 years experience as an arbitrator. She has served as Chair of multiple construction law and ADR associations and is a Fellow of the CCA and the American College of Construction Lawyers. She has been a SuperLawyer in Construction/Surety law since 2004.

[1] CPR Admin. Arb. Rule 15.2; CPR Non-Admin. Arb. Rule 15.2; JAMS Comprehensive Arb. Rule 24-h.

[2] AAA Comm. Arb. Rule R-46(b). A number of specialized AAA rules make reasoned awards their default. *E.g.,* AAA Constr. Arb. Rule 47(b)(providing for list award, but in Rule L-5, making reasoned awards the default for cases with claims of a million dollars and up).

[3] Deborah Hensler, *The Findings of Procedural Justice Research*, in AAA, HANDBOOK ON COMMERCIAL ARBITRATION 41, 43 (Thomas Carbonneau et al. eds.; 1st ed. 2006)(studies of procedural justice "consistently found that the degree of satisfaction with the legal process is a function of an individual's perception of the fairness of both the process and the outcome.").

test, which it borrowed from the Eleventh Circuit. The test is a failure. Too often, it guarantees parties will not get the reasoned award they deserve.

This article describes 2011's *Cat Charter L.LC. v. Schurtenberger*[4] award and opinion, the Fifth Circuit's 2012 acceptance of that test, and the Second Circuit's mistaken decision to join the group. It rests in part on research underlying one of the author's forthcoming *The Reasoned Arbitration Award in the United States.*[5]

I. The *Cat Charter* Test: The Eleventh Circuit Veers Off Course, the Fifth Circuit Tacks Over and Joins It.

Cat Charter emerged from the decision by a Massachusetts couple, the Ryans, to retire to Florida and build a catamaran, *The Magic*. Their ship builder, Walter Schurtenberger, allegedly befriended them, promised to build the boat for no more than $1.2 million, but exploited their trust and vastly overran that price. He did not finish the boat.

The dispute went to arbitration. Both parties asked for a reasoned award.[6] The Ryans claimed an elaborate fraud. The arbitrators found for them on two claims, but not on fraud. The award essentially gave them their $2 million back.

The award is two and a half pages long. It contains *no* discussion of the facts, the law, the denied fraud claim, the counterclaims, or the affirmative defenses. It just says the Ryans "have proven their [two winning] claim[s] against Respondents . . . by the greater weight of the evidence."[7] This after a five-day hearing. A Miami federal judge vacated because the award did not "offer[] any reasons for the result." It "merely announced winners and losers."[8]

The Eleventh Circuit, which should have readily affirmed, reversed. It found the award reasoned. It did agree that *if* the arbitrators did not issue a reasoned award, they would exceed their powers.[9] It also embarked on a praiseworthy quest to develop an operational definition of "reasoned."

Unfortunately, this quest made things worse. The court first drew on other cases to announce that a reasoned award is "something short of findings and conclusions but more than a simple result."[10] Almost any award, including *Cat Charter*'s, satisfies that test. The test is vacuous because it gives no indication of what "more" is required to be reasoned. Does adding a handful of words to a standard award transform it into a

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[4] 646 F.3d 836 (11th Cir. 2011).

[5] Mr. McArthur's book, scheduled for publication in the fall, will be available at https://arbitrationlaw.com/books/reasoned-arbitration-award-united-states-its-preparation-virtues-judicial-erosion-and.

[6] *Cat Charter*, 646 F.3d at 839.

[7] *Id.* at 840-41.

[8] Cat Charter L.LC. v. Schurtenberger, 691 F.Supp.2d 1339, 1344 (S.D. Fla. 2010), *rev'd and award confirmed*, 646 F.3d 836 (11th Cir. 2011). The court added that even were it to concede [and it did not] that announcing that a party prevailed by the "greater weight of the evidence" is a "reason," the award still would not be reasoned because "the Panel's denial of all other claims was simply announced as a bare result"; it "merely announced the winners and losers." *Id.*

[9] *Cat Charter*, 646 F.3d at 843 (following W. Employers Inc. v. Jefferies & Co., 958 F.2d 258, 260 (9th Cir. 1992)).

[10] *Id.* at 844.

reasoned one? Even the Eleventh Circuit acknowledged that its "something more" standard was not enough.[11]

The court drew its second test from the dictionary:

> [A] 'reasoned' award [is] an award that is provided with or marked by the detailed listing *or mention of* expressions or statements offered as a justification of an act – the "act" here being, of course, the decision of the Panel.[12]

To illustrate this test's inadequacy, consider the panel's "reason" that the Ryans won by the weight of the evidence. This is a "justification." But so what? The winner prevails by evidentiary weight *in every single arbitration*.

The Eleventh Circuit offered a third reason for confirmation. It declared the arbitrators' greater-weight finding "to mean that, in the swearing match between the Plaintiffs and the Defendants, the Panel found the Plaintiffs' witnesses to be more credible."[13] But only a mind reader could know such a thing. The award does not discuss witnesses or evidence. It does not mention "credible," "credibility," or any similar concept.

The award's failure to address the denied claims was not harmless. Maybe the arbitrators thought they were splitting the baby. But Schurtenberger went into bankruptcy. Lacking a fraud finding, the bankruptcy court discharged the judgment debt.[14] The Ryans recovered nothing.

The Fifth Circuit's *Rain CII Carbon.* The Fifth Circuit followed *Cat Charter* in *Rain CII Carbon, LLC v. ConocoPhillips*.[15] Predictably, it confirmed an unreasoned award.

The question was what price for green anode coke best fit market prices. The arbitrator found for the Buyer, Rain CII Carbon. But all he said was that "[b]ased upon the testimony, exhibits, arguments, and submissions presented to me in this matter," the existing price formula "shall remain in effect."[16]

The *Rain* award was unreasoned in a not uncommon way: It listed each side's contentions and then announced who won. The trial court confirmed because the award had "three and a half pages of background and discussion" followed by a "one sentence conclusion."[17] The court surmised "*one could certainly distill some level of reasoning* between the elements of the parties' proposed formulas discussed in the Award and the arbitrator's brief ruling."[18]

Affirming, the Fifth Circuit pointed to the same contentions-and-outcome sequence. It complained that ConocoPhillips "ignore[d] that the [award's] previous

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[11] *Id.* (calling its spectrum analysis "still insufficient to fully evaluate" award).
[12] *Id.* at 844 (emphasis in original). For the source of these definitions, see WEBSTER'S THIRD INT'L DICTIONARY: UNABRIDGED 1891-92 (1993).
[13] *Cat Charter*, 646 F.3d at 844-45.
[14] In re Schurtenberger, 2014 WL 92828 (S.D. Fla. 2014).
[15] 674 F.3d 469 (5th Cir. 2012).
[16] *Id.* at 471.
[17] *Rain*, 2011 WL 3565345, at *6 (E.D. La. 2011). The *Rain* arbitration was a baseball arbitration, but because the parties required a reasoned award, *id.* at ** 1, 4, just announcing which proposal won did not satisfy the reasoned requirement.
[18] *Id*. (emphasis added).

paragraph thoroughly delineates Rain's contention that Conoco had failed to show that the initial formula failed to yield a market price, ..."[19] The arbitrator "obviously accepted" Rain's contentions.[20]

These arguments have many problems. Most basic is that the arbitrator did not say anything about *why* he found Rain's contentions persuasive. Another problem is that he did not draft the contentions. He took his award almost *verbatim* from ConocoPhillips' draft (the losing party's!).[21] Even worse, the court's idea that the award gives the arbitrator's reasons is comical because the draft the arbitrator appropriated had reasons, but the arbitrator deleted them.[22]

To see that the *Rain* award is not reasoned, read it while asking: "What does this award tell us the arbitrator thought about specific disputed facts?"

II. The Second Circuit Boards the *Cat Charter* Catamaran.

The Second Circuit has adopted the *Cat Charter* standard uncritically. Predictably, it has confirmed unreasoned awards as reasoned.

Leeward Construction. The award-form question reached the Second Circuit in *Leeward Construction Co. v. American University of Antigua – College of Medicine.*[23] Antiguan law applied. The arbitrators wrote an award that has no meaningful fact section, no "rationale," but nonetheless minutely divided the arbitration into 68 "Controvers[ies]" that it answers with 68 "Panel's Decision[s]." All this without the award's saying a thing about what the arbitrators thought about specific evidence or analyzing legal arguments. The circuit and trial courts did not question that a failure to provide reasons would require vacatur.[24] They nonetheless confirmed under the *Cat Charter* standard. Satisfying that test should be no surprise. The award is, after all, 33 pages long. Clearly 33 pages, whatever their content, offer "something more" than a standard award.[25]

The *Leeward* award has substantive problems. Lacking reasons, its authors had no opportunity to benefit from the clearer thinking that sometimes comes with writing out a rationale. One problem concerns work the College contracted to Leeward. It later canceled the contract and rebid the same work under new "Separate Contracts." Leeward won some of the re-bid work, but at lower prices.

The arbitrators repeatedly held they lacked jurisdiction over Separate Contracts.[26] Yet they nonetheless awarded Leeward damages for the rebid work, using a "bad faith" theory Leeward never pled.[27] The trial court found this part of the award "questionable" and admitted that it "leaves much to be desired."[28] Yet it brushed past the problem of arbitrators injecting a liability theory by speculating on how the record might support bad

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[19] *Id.*
[20] *Id.*
[21] Taken from McArthur's forthcoming book, Chapter Five, Section B.
[22] *Id.*
[23] 826 F.3d 634 (2d Cir. 2016).
[24] *E.g., id.* at 638-40.
[25] *Id.* (citing, among other cases, *Rain* and *Cat Charter*).
[26] For the arbitrators' conclusion that the Separate Contracts lay outside their jurisdiction, see McArthur, Chapter Five, Section C.
[27] *Id.*
[28] *Leeward*, 2013 WL 1245549, at *4 n.30 (S.D.N.Y. 2013), *aff'd*, 826 F.3d 634 (2nd Cir. 2016)

faith.[29] Surely arbitrators cannot put their fingers on the scale by imposing their own theories, any more than reviewing courts ought to supply absent reasons.

The trial court speculated that bad faith might be based on "general principles of contract law" [perhaps New York principles?].[30] It noted "no party has argued that Antiguan contract law deviates from these principles."[31] But why should they? Leeward presumably enjoyed the arbitrators' *deus ex machina* construction of a bad-faith theory. And the College had no warning the arbitrators would gift Leeward.

The Second Circuit, like the trial court, blessed the award under *Rain* and *Cat Charter*.

Equally troubling was the award's unreasoned treatment of arguments over missed deadlines. The contract contained notice and other documentation requirements. Yet the arbitrators swept these aside. For example, they neutered a change order requirement by holding that "from the evidence considered by the panel it appears that both parties waived this requirement."[32] This conclusion is the entire detail on point. The panel rewrote the contract by treating contract requirements as ineffective.

Tully Construction 1. Another construction case soon presented the same question about what "reasoned" means. At issue was the alleged failure of Canam Steel, successor to the project's first steel fabricator, to timely supply steel to a construction company, Tully, which held a contract to renovate the Whitestone Bridge. The arbitration took 17 days and involved 800 exhibits.[33] The agreement, a scheduling order, and AAA rules required a reasoned award.[34]

Tully pled nine claims, Canam seven. Damages ran into the millions. Yet all the arbitrator wrote was a list award. It had one line with an amount per claim, nine of them showing "0.00." After getting the award, Canam asked the arbitrator for the reasons. He refused, claiming everybody knows a reasoned award is anything between a standard award and findings and conclusions.[35]

A Southern District court vacated because the award contained "no explanation whatsoever for the arbitrator's rulings."[36] It was not possible "to determine the reason or rationale for the arbitrator's liability and damages determinations."[37] The award did not "set forth the relevant facts, explain the nature of the claims, or offer any reason or rationale for his determinations as to liability and damages."[38] The court remanded for clarification.[39]

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[29] *Id.* at **4-5.
[30] *Id.* at *4.
[31] *Id.* at *4 n.31.
[32] *See* McArthur, Chapter Five, Section D.
[33] *Tully*, 2015 WL 906128, at *2.
[34] *Id.* at *12.
[35] For the arbitrator's dismissive refusal to provide reasons, see McArthur's forthcoming book, Chapter Five, Section D.
[36] Tully Construction Co. v. Canam Steel Corp., 2015 WL 906128, at *15 (S.D.N.Y. 2015), *revised award confirmed*, 2016 WL 8943164 (2016), *aff'd*, 684 Fed. Appx. 24 (2d Cir. 2017)(not for publication); *see also id.* at *17 (same).
[37] *Id.* at *15.
[38] *Id.*
[39] *Id.* at ** 19-20.

Tully Construction 2. The arbitrator replaced his two-page award with an eleven-page award. This was "something more" than the original standard award.[40] But the new award stubbornly did not explain the arbitrator's thinking. What did the arbitrator do? He added a brief introductory discussion, wrote a boilerplate listing of questions he claimed were relevant to each claim,[41] included for each a paragraph on each side's contentions with cites by exhibit number or transcript pages, and announced each outcome. He told the reader clearly who won. But he said nothing about why.

This is the second award's entire discussion of the Tully's first claim:

> **Contract Overpayment**
>
> A review of the relevant, related, or both, information below, justifies the following resolution of this portion of the award sought by Claimant.
>
> Claimant asserted a "Contract Overpayment" claim against Respondent of $4,194,471.00. *See,* **C-478** (formerly **C-459**), Rows 2-11, (also **C-447**, page 16, Ex. 8f), **McPartland Tr. 107-208.**
>
> Respondent opposed the $4,194,471.00 "Contract Overpayment" claim asserting, in essence, that Claimant's calculations were based on unsupported assumptions. *See,* **R-19K** at **CAN 16606, 16627**, and **19947; C-139; C-195; Mazza Tr. 438.**
>
> **Contract Overpayment Conclusion**
>
> Not having established by a preponderance of testimonial or of documentary evidence its entitlement to the $4,194,471.00 "Contract Overpayment" claim from Respondent, it is denied and Claimant awarded:
>
> $ 0.00[42]

Why does this arbitrator think Canam should not recover here? The award does not say. Canam alleged the arbitrator took the record cites from Tully's proposed award, not his own work.[43] Whether he did or not, he certainly does not explain his thinking about the evidence. This time the trial court confirmed. Perhaps it was too much to ask for a second vacatur, given an award "something more" than the first award. The Second Circuit affirmed, citing *Leeward* in less than half a page of text.[44] All this is a predictable result of *Cat Charter*'s shortcomings.

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[40] Because the initial list award did break out damages by claim, a *Cat Charter* fan might argue that it was "something more" than a pure standard award (because it did not just award a single lump sum). That one can make this argument is another sign of *Cat Charter*'s inadequacy.

[41] The arbitrator claimed these opaque questions should determine each claim: "The necessary determination is whether the Claimant's alleged damages are a result of non-concurrency, were not foreseeable, were not anticipated, are excusable, and are compensable."

[42] McArthur, Chapter Five, Section D.

[43] For Canam illustrating the arbitrator's pulling his record cites from Tully's brief, see *id*.

[44] *Tully*, 684 Fed. Appx. at 28.

Will the Second Circuit use* Smarter Tools *to toss* Cat Charter *overboard and float a more supportable doctrine? Another inadequately reasoned award has just been vacated in the Southern District.[45] Time will tell whether it is fixed on remand, settled, or appealed. If the award reaches the Second Circuit, it should seize the chance to fix the law. It is always hard to admit error, doing so within a system of precedent is even harder, but the court should abandon its current test. *Cat Charter* is demonstrably not up to the task of making sure reasoned awards have true reasons.

III. A Short Primer on Forms of Unreasoned Awards.

Parties, lawyers, judges, and arbitral providers trying to spot unreasoned awards masquerading as reasoned should be on the lookout for these characteristic unreasoned awards:

1. Announcement awards. Awards that merely announce outcomes, which is most of what the *Cat Charter* and *Tully 1* awards do.

2. Attestation awards. Awards in which the arbitrators, like *Rain's* arbitrator, attest that they have reviewed all the proper material and considered it, but then merely announce the outcome without explaining their reasons.

3. Burden of proof and credibility awards. Awards that announce that one party met or did not meet its burden, as the *Cat Charter* and *Tully 2* awards announce, or that its evidence or witnesses were more "credible," one of the Eleventh Circuit's three theories on why it should confirm the *Cat Charter* award.

4. Contention and issue-listing awards. Awards that list the parties' contentions, as in the *Rain* and *Tully 2* awards, and then announce an outcome without saying why.

5. Evidentiary list awards. Awards like the second *Tully* award that insert evidentiary cites without discussing what the evidence means.

6. Volumetric awards. Awards whose apparent virtue is that they are long, but that contain no reasons.

IV. A Standard that Would Thwart Unreasoned Awards.

A definition of "reasoned" that would effectively police awards is the following:

> A reasoned award explains who won by stating clearly its reasoning on all necessary dispositive issues: It explains the resolution of disputed gateway and threshold issues necessary to decide the arbitration, including but not limited to disputes over party and claim jurisdiction, adherence to the rule of law, choice of law, and burden of proof; explains the arbitrators' resolution of the issues and arguments of law and of fact that the parties raise on each dispositive claim, counterclaim, and defense; and explains as well the determination of each remedy, including any computations. A reasoned award also explains the disposition of each rejected claim, counterclaim, defense, and remedy that, if

[45] Smarter Tools Inc. v. Chongqing Senci Import & Export Trading Co., Ltd., 2019 WL 1349527 (S.D.N.Y. Mar. 26, 2019).

> granted, would have altered all or part of the outcome. A reasoned award may but is not required to address cumulative alternative claims and defenses.

The test might also specifically reject *Cat Charter*-type approaches and the main forms of unreasoned awards:

> Awards that merely announce winners, that merely attest that the arbitrators reviewed the facts and arguments, that only proclaim who prevailed by the weight of the evidence or whose case was more credible, or that list the parties' contentions and then announce a winner are not reasoned. Awards also are not reasoned just because they are very long and describe a lot of facts, or because they list exhibit numbers or transcript pages or portions of pleadings without explanation.[46]

The Second Circuit can protect the efficiency of arbitration and party expectations about that often favored form of dispute resolution if it throws *Cat Charter* overboard and adopts any reasonable version of this standard.

V. Meaningful Review for Reasons Would Not Sink New York as a leading Arbitration Venue.

If the Second Circuit begins to take reasons seriously as we suggest, would it hurt New York's position as a world center of arbitration? The answer is an unequivocal no.

Reasoned awards are the *sine qua non* of international arbitration, so making awards contain real reasons should not deter those arbitrations. Indeed, none of the awards described here -- *Cat Charter*, *Rain*, *Tully 1 or 2*, *Leeward,* or *Smarter Tools* – would be likely to secure confirmation under the New York Convention in any even half-way skeptical foreign court. Jettisoning *Cat Charter* therefore should strengthen New York's as a leading international arbitration venue.

Domestically, perpetuation of the *Cat Charter* standard jeopardizes arbitration's legitimacy. We propose to remove that flaw in arbitration by having courts make sure that awards contain reasons when they are required. Our recommendations should ensure parties get what they ask for.

New York will benefit if it leads the way in making arbitration more responsive to its users in this way. Given the Second Circuit's prominence, if it revises its test along the lines we suggest, it will persuade other jurisdictions to fix their standard, too, reducing the gap between New York as a first mover and jurisdictions still trying to stay afloat on a leaky *Cat Charter* raft.

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[46] These definitions are taken from Chapter Two in McArthur's forthcoming book.

Artificial Intelligence and Its Impact on the Future of ADR

Ross J. Kartez, Esq.
Ruskin Moscou Faltischek, P.C.

Lucas Bento, Esq.
Quinn Emanuel Urguhart & Sullivan, LLP

Alyson Carrel
Pritzker School of Law, Northwestern University

Diana Colon, Esq.
New York Unified Court System

Colin Rule
Tyler Technologies

Artificial Intelligence and the Future of Online Dispute Resolution

Dave Orr and Colin Rule

One concept that has seized the popular imagination is the idea of the digital judge. There is something intuitively appealing about the concept that one day our unruly, chaotic human disputes will be resolved by the cool, all-knowing rationality of a fair and impartial electronic decision maker. While the concept may be enticing, this leap from human-powered justice to electronic justice is a pretty big one. Much like the concept of self-driving cars or watches we can talk into, many people seem to have concluded that this future is inevitable, even when we don't yet have the technology that could make it come to pass. Right now we're just biding time, waiting for the future to arrive.

There are several reasons why we feel the arrival of the digital judge is inevitable. First, we humans generate billions of disputes each year, soon to be tens of billions. This growth shows no signs of stopping. We cannot help ourselves; we love to fight with each other. Despite this love of fighting, the idea that current, inefficient, human-based resolution processes could resolve all these disputes strains credulity. Faith in our very ability to be fair and impartial arbiters weakens under this strain, and it is undermined even further by what we continue to learn about how our brains work. Alongside these developments, computers continue to become more powerful and more deeply integrated into our everyday lives. It stands to reason, then, that if current trends continue, computers will one day be better at fairly resolving our disputes than we are.

Considering this, one thing becomes clear: if computers are going to resolve our disputes, they are going to go about it in a very different way than we have up until now.

I. Technology, Dispute Resolution, and the Fourth Party

Online dispute resolution (ODR) is the use of information and communication technology to help people prevent and resolve disputes. ODR, like its offline sibling *alternative dispute resolution* (ADR), is characterized by its extrajudicial nature. In a sense, dispute resolution is defined by what it is not: it is not a legal process. Any resolution outside of the courts is dispute resolution. If you and your counterparty decide to resolve your dispute by consulting tarot cards, that is alternative dispute resolution. If you decide to resolve your dispute with a game of checkers, that is also alternative dispute resolution. However, if you decide to resolve your dispute with a game of *online* checkers, that is online dispute resolution. Either way, in the dispute resolution world, we paint with a pretty big palette.

As ODR has developed over the past 20 years, a few core concepts have emerged. One of the most foundational concepts is that of the "fourth party". Originally introduced by Ethan Katsh and Janet Rifkin in their book *Online Dispute Resolution*,[1] the fourth party describes technology as another party sitting at the table, alongside party one and party two (the disputants) and the third party (the neutral human, such as a mediator or arbitrator). You may be forgiven for picturing the fourth party as a friendly robot sitting next to you at the negotiating table and smiling patiently. Bear in mind, though, that this fourth party could just as easily be a black

[1] Ethan Katsh & Janet Rifkin, *Online Dispute Resolution* (Jossey-Bass, 2001).

cylinder sitting on the table - *a la* Amazon Echo - or just software floating somewhere in the cloud. The form of the fourth party is irrelevant to the function the fourth party provides.

The fourth party can play many different roles in a dispute. In most current ODR processes, the fourth party is largely administrative, handling tasks like case filing, reporting on statistics, sharing data, and facilitating communications. We ask our friendly fourth party robot to take notes, or to dial in someone who could not join us at the table in person. But it is obvious to those of us in the ODR field that the fourth party is capable of much more. While we humans pretty much work the way we always have, with our cognitive biases and attribution errors, computers are getting more powerful all the time. It is inevitable that at some point we will ask our fourth party robot to help us resolve our issues, or maybe even to just handle it for us outright. The fourth party is just getting started.

II. Getting Used to the Machines

There was a time when technology was perceived as very dehumanizing. Dispute resolvers in particular resisted the idea that algorithms had any useful role to play in helping disputants find solutions to their disagreements. But technology has become much more accessible and integrated into our lives, and we now use technology in ways we never would have considered ten years ago. People take to the internet to find their spouses, to find information on where to go to church, to choose the best school to send their kids, and even to seek out a cardiac surgeon. The younger generation is even more comfortable: they ask each other to prom, break up over Twitter, and Snapchat their friends embarrassing pictures from last night's party.

Individuals have come to trust information presented to them by an algorithm more than they trust information presented by a human. While this might seem initially jarring, upon reflection, it makes some sense. If you are thinking about getting a divorce, you may want to consult a lawyer to learn about your rights and the required steps. Perhaps in the consultation with that lawyer, you feel they are judging you in some way – maybe for your age, or for your ethnicity, or even for your perceived ability to pay. Maybe you suspect that the lawyer is wondering whether the divorce is your fault, or is tailoring the information he or she presents to you in order for you to pick a resolution process that the lawyer feels is more appropriate in your particular situation. That feeling can be very uncomfortable.

Now think about an algorithmic consultation. You go to Google and type "divorce". The search returns hundreds of millions of results, and you scan through the first twenty-five to see if any appear to be on target. You select, somewhat at random, a guide published by a legal service bureau a few counties away from you. This online guide was clearly not created specifically for you – it was put online several years ago, long before you ever thought you would need to consult it. None of your personally identifiable information is required to navigate the guide. You can answer high level questions about your situation (*e.g.*, do you have kids, are you both employed) without providing your name. After six or seven minutes of navigation and simple questions, the guide shares its conclusions about the likely steps that would be involved in your divorce. If the result seems questionable, you can merely reload the homepage and start again, perhaps providing different answers to see how your changes alter the final results. In any event,

this algorithmic process does not judge you on the basis of your race, sex, age, income, or other characteristics – largely because it knows nothing other than what you tell it. It stands to reason that people might be more comfortable using assessment tools such as this one when they are trying to get their questions answered. In addition, that algorithm is probably free, while a lawyer will probably charge an hourly rate for the same service.

III. The Rise of Artificial Intelligence

Technology is likely to alter many areas of professional services, from financial planning to medical care. But in the justice sector, this development may prove particularly significant. Government has an interest in the consistent resolution of disputes, and to that end, government funds the courts. But it is unlikely that the government will be the sole provider of algorithms used in these ways. Just as the internet has weakened the role of the public sector in many areas of the economy (*e.g.*, bitcoin has made financial transactions stateless and invisible to regulators), it may also weaken the role of the public sector in providing justice.

A shorthand for the expansion of technology into these realms formerly dominated by humans is the term *artificial intelligence*, or AI. People often envision AI working the way humans work, perhaps taking the form of a humanoid robot in the front of a courtroom, wearing a powdered wig on his metal head and wielding a gavel in his little robot hand. That image may be drawn more from old episodes of *The Jetsons* than from technological necessity, but sometimes there is value in matching people's expectations. If that form is more satisfying to people, it certainly is doable. In reality, though, the action in AI takes place in software, no powdered wigs necessary.

AI uses software algorithms to tackle complex tasks that have been traditionally handled by non-artificial intelligences (*i.e.*, us, the humans). Humans have their own ways of understanding problems and devising solutions. AI also has to understand problems and devise solutions, so that it can deliver outcomes equivalent to, or better than, human devised outcomes. But algorithmic intelligence doesn't go about devising those outcomes in the same way as human intelligence would.

We've all heard about IBM's Watson winning *Jeopardy!* over the top human players in the world. Many of us might presume that Watson works like an electronic human brain, mimicking the same types of connections that happen in the human players' brains during the game. But that isn't the way Watson is programmed to operate. As Alex Trebek is reading off each word of the question, Watson is guessing what the question is getting at, and instantly generating thousands of possible responses to the possible question. Watson is scoring all of those possible responses in real time, estimating the likelihood that each one is the right answer. As soon as Watson finds an answer with the highest likelihood of both 1) the question being the right question, and 2) the answer being the correct answer to that question, Watson buzzes in. The other human players are trying to make connections in their brain that generate the one best answer, but Watson is generating thousands upon thousands of answers and scoring them all to see which one is best. This is similar to the way computers win chess matches: they evaluate all possible moves one move out, two moves out, and three moves out; score them all; and then decide which move is

best in each situation. This is fundamentally different from the way a human plays chess or plays *Jeopardy!*, but the result is equivalent to or even better than a human's performance.

When an AI is first created, it is a blank slate hungry to learn. But as we can see from the above examples, an AI learns in a very particular way. It learns by looking at data, and this data must be structured into a format that the AI can make sense of. The AI can then look at this data in order to formulate some observations, but to train an AI to make these observations, you must always first provide the AI a corpus of data.

For example, imagine an AI is asked to decide the appropriate penalty payment owed by a business for inappropriately sharing a consumer's private information. Maybe there is a large database of prior cases that contains more than ten thousand decisions made by customer service representatives about penalty payments. The details of each of these violations (such as severity, scope, and type of information shared) are stored in the database. The algorithm then crawls through all of the cases and creates a set of rules that correlate the decision rendered in each case to the details of each case. With this setup, when a new case is presented to the AI, it will consult the rules it already created when it learned from the corpus, and it will then make a determination as to the appropriate payment amount.

This algorithm is built from determinations originally made by the customer service representatives. Let's say the reps were very skilled at making their determinations, but were still wrong about 10% of the time. Because the algorithm trains itself based on these decisions, the AI

cannot make the correct decision more than 90% of the time. The algorithm cannot use the data in the corpus to train itself to be *better* than the data set it was presented. But the bigger the corpus, the more specific the AI will be in crafting rules, and that will enable the AI to get ever closer to that 90% accuracy level.

Sometimes a corpus of data might not exist around a particular decision type. For example, imagine there is a need to decide if a certain online review is specific enough for inclusion on a hotel rating website. No database exists that contains prior evaluations of reviews to determine if they meet the standards in question. But perhaps the hotel rating website starts a crowdsourced process to evaluate reviews. Members of the website are repeatedly asked if a particular review is specific enough for inclusion. Every time they log in they get another review to evaluate. Maybe customer service reps also decide some cases as well, in addition to the users. Slowly but surely, website members and customer service reps would generate a corpus of data. As each decision is rendered, the AI could be watching and learning from each new case. Again, maybe the users only get it right about 90% of the time, but by observing enough of these evaluations, and by capturing all of the outcomes from the crowdsourced process in a structured database, the AI algorithm could train itself what to look for, and eventually be able to make decisions about future online reviews at a similar level of accuracy. At this point, the human-powered crowdsourced decisions could taper off, and the AI algorithm could increasingly take over.

When AIs come up with rules, it may seem like magic. You might even want to open the hood and see just what these miraculous rules are, so that you can leverage them in your own

decision-making. Don't bother. Most humans cannot make heads or tails of the rules AIs glean from a large corpus of data. For example, an AI may decide that a review that has the word "actually" within eight words of the word "budget" is likely to be a trustworthy review. Now why is that? Our simple little human brains might not be able to come up with a good explanation as to why that may be true. But the AI has found a pattern, and that pattern may have truth undergirding it that a human is not able to comprehend. In fact, if you look at most rules generated by AIs, they appear to us humans as gobbledygook. But that is only because humans think like humans, and AIs think like computers. There may be insight in those rules that we are simply unable to understand. As they say, the proof is in the pudding, and if the output is high quality, then the logic generated by AIs is quality, even if to humans it doesn't seem all that logical.

IV. Building the Corpus

The challenge is not necessarily to think about how to train an AI to decide a dispute. As we've already described, we know how to program an AI so that it can take on that task. The real challenge is, how do you categorize the world's resolution information into a format an AI can make sense of, and not only make sense of, but learn from?

There is no shortage of raw data in the world. There are lots of court decisions that we could give an AI to read, for example. There are also many companies out there trying to make sense of court cases via AI. The problem lies in finding ways for AI to process this data. Currently it is very difficult to do. There is a lot of structure to the law, but it is not the kind of structure that

can easily help an algorithm learn and identify patterns and rules. We are still a long way away from giving an AI Lexis-Nexis access and then asking it to serve on the Supreme Court.

So what do we do? If we want to train AIs to be better decision makers, we need to build data sets. Since so many cases are now being decided on ODR platforms, one task AIs could take on in the near term would be to help build these data sets through case classification. Humans would negotiate, mediate, and arbitrate new cases, and AIs would review the outcomes and structure the data they generate in real time. This would give us a good head start on building a large corpus we could use to train future AI algorithms. AIs are very good at labeling data and storing it in a structured way that will make sense to future algorithmic analysis. If an AI labels and classifies millions of traffic court decisions in real time, for example, then we can open that database to other algorithms that could then use that data to educate themselves about traffic cases. This could potentially teach all those algorithms how to accurately decide traffic court cases moving forward. It's a long way from the Supreme Court, but it's a start.

This is an important point, and an important limitation to consider. An AI must focus on similar baskets of cases. It is very difficult for an algorithm to get a database of many different kinds of cases (*e.g.*, workplace, traffic, divorce) and then somehow glean rules that could make sense out of any possible new case. Specialization into specific case types (*e.g.*, traffic) is very important for accuracy in rules. General decision-making systems (humans) still need to be able to determine the classification of each new case, and then apply the rules relevant to that specific case type. AI is not there yet, but perhaps one day a team of AIs will work to resolve cases, with

the first AI routing each incoming case to the appropriate queue, and a second AI determining the appropriate outcome for cases of a particular type.

V. Changing the Way We Think About Justice

The techniques we are describing are feasible today. But if that's the case, where are all of the algorithmic judges? The truth is that they are out there, silently churning away, but currently they are primarily focused on answering relatively simple data-based questions.

The reason for this is that AI algorithms are still not very good at making sense of unstructured data. For example, if we were to show the transcript of a negotiation session to an AI and ask that AI to suggest a fair resolution, that would require some pretty advanced capacity on the part of the AI. In the near term, the speech transcription of the session is being solved, so the AI can probably learn the words said in the session. But words are only part of what is communicated in a negotiation. Identifying the truly important points of disagreement in a dispute, and comprehending the subtexts and assumptions behind each of those points, is much harder. Teaching an AI to contextualize unstructured communication may be possible in 10-20 years, but at the current moment AI may get just as confused by legalese as a layperson.

What breakthroughs are required to help AIs get over that hump? How could an AI gather more understanding to fill in the blanks in a negotiation? Maybe AIs can be taught to ask the disputants questions, the same way a judge or a mediator might, in order to get at more subtle points of meaning. Perhaps the AI could educate itself by reading the internet, or looking through

case databases to try to learn from similar matters. The AI could then bring conclusions drawn from other cases into each new conversation, which could help it parse points of confusion without constantly asking the parties to explain what they mean by each comment they contribute.

One way we could make it easier for algorithms to resolve our disputes is to structure our negotiations into questions that are more easily answerable by computers. For example, instead of asking an algorithm to simply issue a decision from scratch in a disagreement, perhaps the two parties in a disagreement could be asked to put forward their last, best offer, and the algorithm would be asked which of the final offers is more appropriate. In this design, the algorithm would conduct research in databases around the world, return a result, and then see which of the proposals is the closest to its template resolution. The parties would also have an incentive to be as reasonable as possible in putting their offers on the table, because they would want the AI to pick their suggested resolution over the other party's proposed solution. This kind of technology-assisted final offer arbitration could be a shortcut to AI-powered resolutions, because this design plays to algorithmic strengths and avoids difficult, more nuanced questions that might trip it up. It also avoids the possibility that the AI really gets it wrong and delivers a resolution that is wholly unjustified, frustrating both of the parties.

There are intermediate steps on the road to the digital judge. AIs do not have to serve as the final decision maker right out of the box. AIs could start out by evaluating cases and coming up with suggested resolutions that human decision makers might consult on an advisory basis. Parties

could also run their cases by an algorithm in advance of a human-powered arbitration to see what resolution the algorithm might consider fair. Even the best arbitrator can only keep a couple hundred case outcomes in their mind, but an algorithm can consult millions or tens of millions of cases and factor all of that information into its suggested resolution. Consulting AIs in this way could not only help to improve the quality of AIs, but also increase confidence in the ability of AIs to render trustworthy decisions. Once the AI has proven itself effective – perhaps after consulting on millions of cases – then it could be put into the final decision-making role.

VI. Deciding What AIs Can Consider

AIs act very differently from people, but these differences may actually be beneficial. AIs can be programmed in a way that makes them more "fair", by ignoring information that system designers and programmers deem to be outside the scope of the question at hand. For example, you can never be sure whether your jury was swayed by some unforeseen factor, like your accent or your hemline. The jury may not be sure themselves as to why they feel compelled to decide your case one way or the other, but a computer algorithm can not only be explicitly instructed to ignore certain factors (*e.g.*, accent, hemline), but it can also be prevented from even knowing those bits of data in the first place. There is no way for a jury to ignore such factors, not even after explicit instructions from the judge not to pay attention. There is a surefire way, though, to prevent the AI from knowing them.

This leads to some interesting design choices – and complex ethical and moral ramifications – for building dispute resolution AI. For example, computers have gotten very good at reading

human facial expressions. Is it reasonable for a computer to closely watch a disputant explain their actions, and then to determine based on the observed facial expressions whether the explanation is a lie? What if the computer could conduct an MRI on the disputant as they offer their explanation, and from that MRI provide certifiable evidence that the statement is a lie? Should that information be factored into the computer's decision-making process, or should the AI be forbidden from considering it? It is up to the AI's programmer to determine if that information is relevant, as well as whether the algorithm will even be capable of gathering this kind of data during the dispute. There may be a certain ick factor in giving computers so much visibility into things that we as humans cannot perceive ourselves. But we may conclude that the accuracy and accountability that comes from these new capabilities may outweigh the ick factor, and our instinctual resistance may ease over time.

On the other side of the coin, AI systems might make egregious mistakes that humans would never make. This may, however, be due to their systems designers failing to integrate all of the information required to avoid such mistakes. For example, Google's self-driving car follows the explicit laws on the books that regulate driving, but it does not follow the *implicit* rules that so often conflict with the laws on the books.[2] A human understands both these sets of rules, and appropriately contextualizes them in real time. A machine might not know both sets of rules unless there is some way to integrate them into the algorithm. To picture the problems of this lack of context, imagine a human driver seething behind a row of Google cars all driving the

[2] Matt Richtel and Conor Dougherty, "Google's Driverless Cars Run Into Problem: Cars With Drivers," *New York Times*, September 1st, 2015, last accessed November 28, 2017, https://www.nytimes.com/2015/09/02/technology/personaltech/google-says-its-not-the-driverless-cars-fault-its-other-drivers.html?_r=1.

exact speed limit.Sometimes AIs may make decisions that seem odd or ill-advised to a human observer, and it can be very hard to understand the reasoning behind an AI's decisions. By carefully deciding the information AIs are given, and by working out the kinds of decisions AIs are allowed to make with that information, all of these kinks can eventually be worked out, and AIs can gradually become more integrated into the decision-making process.

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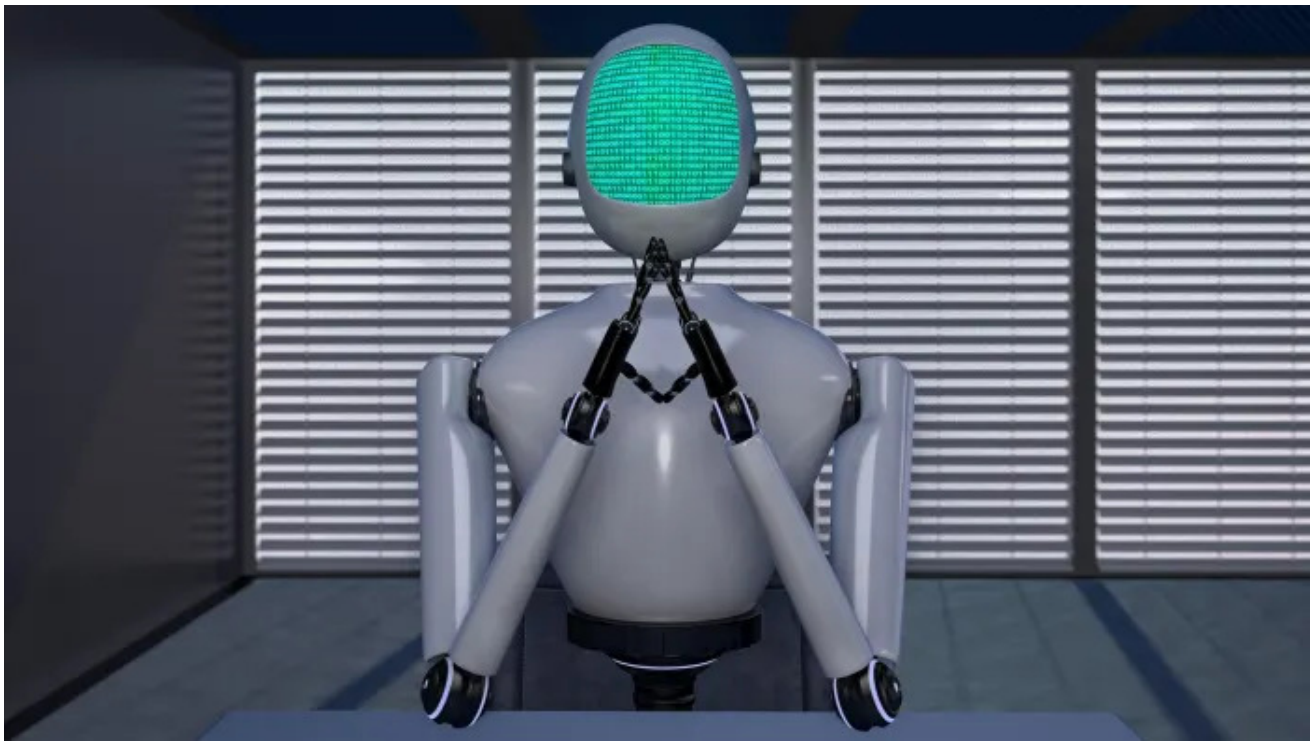
Special Report **International Mediation**

Legal services

Robots and AI threaten to mediate disputes better than lawyers

Algorithms and big data are entering the often shrouded world of alternative dispute resolution



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Kate Beioley YESTERDAY

Robots and artificial intelligence seem worlds away from the sensitive and nuanced area of international mediation. Here, battles are largely settled behind closed doors and skilled mediators pick their way through sticky negotiations.

Algorithms and big data, however, are fast entering the often mystery-shrouded world of alternative dispute resolution. This is much the result of the rapidly increasing demand for the kind of data analytics being harnessed in US litigation to predict trial outcomes.

The incursion of robots into mediation hit a new milestone in February, when Canadian electronic negotiation specialists iCan Systems reputedly became the first company to resolve a dispute in a public court in England and Wales using a "robot mediator".

Smartsettle ONE, an AI tool, replaced a human mediator and, in less than an hour using a kind of blind-bid mechanism, settled a three-month dispute over a £2,000 unpaid bill for a personal counselling course, according to the Law Gazette.

"It builds on the basic negotiation concepts that have existed for a while — how do you find the

area of settlement for both parties," says Guy Pendell, head of disputes at international law firm CMS. "You're really just trying to find the sweet spot and this was touted as a way to help parties settle in mediation.

In the case of disputes worth huge amounts of money you need the skills of an experienced negotiator to persuade people to do things they don't want to do

Ben Carroll, Linklaters

Some lawyers argue, however, that while such technology may be appropriate for helping deal with small financial claims, it remains worlds away from the kind of big-ticket mediations and arbitrations that leading law firms are involved in.

"In the case of disputes worth huge amounts of money you need the skills of an experienced negotiator to persuade people to do things they don't want to do," says Ben Carroll, a disputes resolution partner at Linklaters.

"A skilled mediator can read the people in the room and can understand what they're worried about and shape the settlement," he adds. "So, it's about more than just people paying out money. There are often things thrown in that help bridge the gap."

AI is already bedded into the world of alternative dispute resolution, however, in the form of tools to analyse mammoth bodies of data and documentation, often before mediation is arrived upon as the best route.

Nick Rundle, a partner at Eversheds, says: "Mediation has different forms for different types of cases, but there is no doubt that technology plays a key role in alternative dispute resolution."

In particular he cites the ability to analyse large amounts of data, identify and prioritise the early review of key documents through the use of technology-assisted review software [which classifies and prioritises documents] and achieve a swift conclusion on the merits of the case by following an early case assessment process. The latter is an early evaluation of the risk of defending or prosecuting a case, which is the most common arena for the use of AI in mediation.

Tools like Brainspace detect and sort unique phrases in large data sets, enabling partners like Mr Pendell recently to examine a pool of 2.7m documents in just two hours.

International law Allen & Overy uses clustering, an AI method that attaches its own labels to groups of documents and clusters together documents with similar themes. This enables the uncovering of potentially key words and themes to prioritise for human review.

However, lawyers say the real value in mediation and arbitration might in the future come

from large-scale data analysis of arbitrators and mediators themselves, in an effort to predict outcomes and potentially affect the course of settlements.

Data-driven justice is a growing theme in the US. Legal analytics companies crunch vast tomes of data in order to mindread judges in US district courts, in the mode of author Philip K Dick's science fictional *The Minority Report*, or Michael Lewis' *Moneyball* on the analytics of baseball player performances.

Such a trend could be headed for alternative dispute resolution, too, say some lawyers.

Matthew Saunders, partner at Ashurst, notes that data analytics "could be extended to predicting which way arbitrators or a mediator might go". An ethical dilemma of this is the influence it would have on the choice people make of the arbitrator or mediator of the proceedings in which they are involved.

Some people store information about arbitrators' tendencies in their minds . . . the question is how we might store some of that in a database

Professor Daniel Katz

With about 90 per cent of litigation settled out of court or dropped, the vast majority of case documents are not made public. This can make for patchy data but "the data are out there," argues Daniel Katz, Illinois Tech law professor and co-founder of LexPredict, a consultancy sold last year to legal technology company Elevate Services.

"If you want to know the tendencies of a panel of arbitrators, for example," Mr Katz says, "there are currently a handful of people who store this information in their minds . . . the question is how we might store some of that in a database, so it could be more generally available."

Such technology may yet be some way off. In mediation, "a skilled facilitator helps the parties to explore where common ground can be found as the basis for an amicable settlement," says James Freeman, arbitration partner at Allen & Overy. "The mediation process", he adds, "is inherently a human one".

Technology & Mediation

Mind the Gap: Bringing Technology to the Table

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Northwestern Pritzker School of Law

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@DeltaModelLawyr

When we ask mediators about technology in mediation...

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Technology in Mediation = ODR

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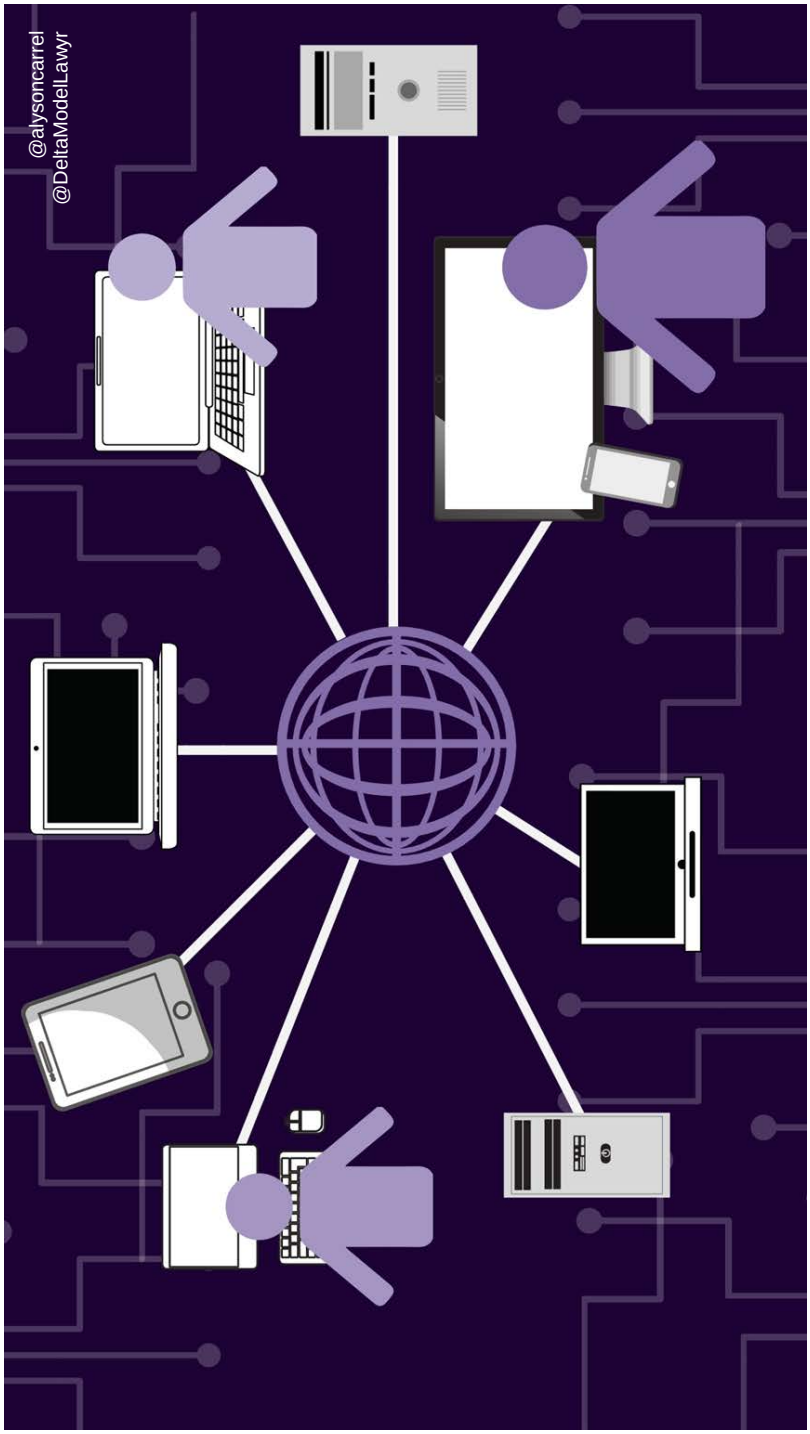
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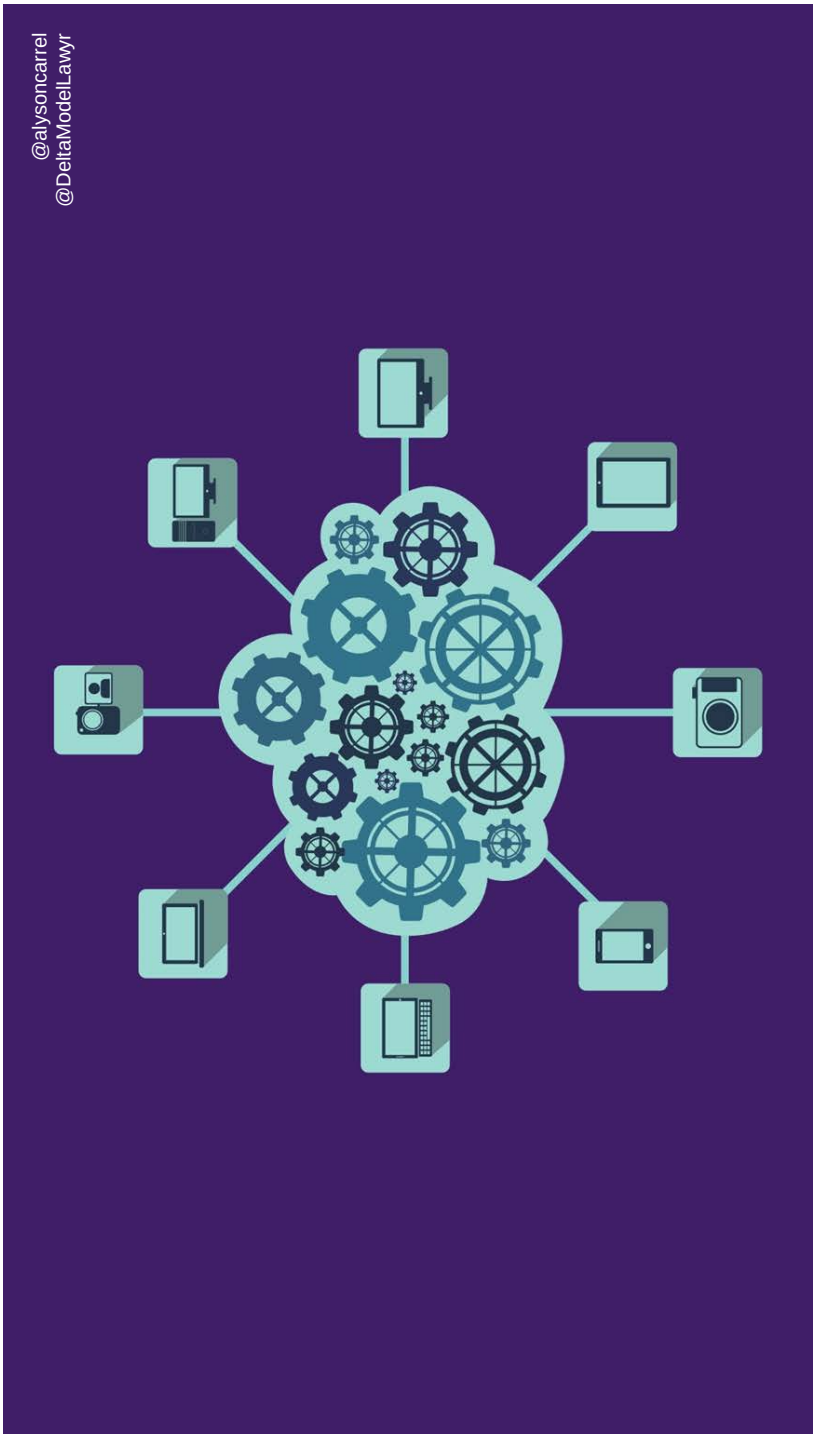
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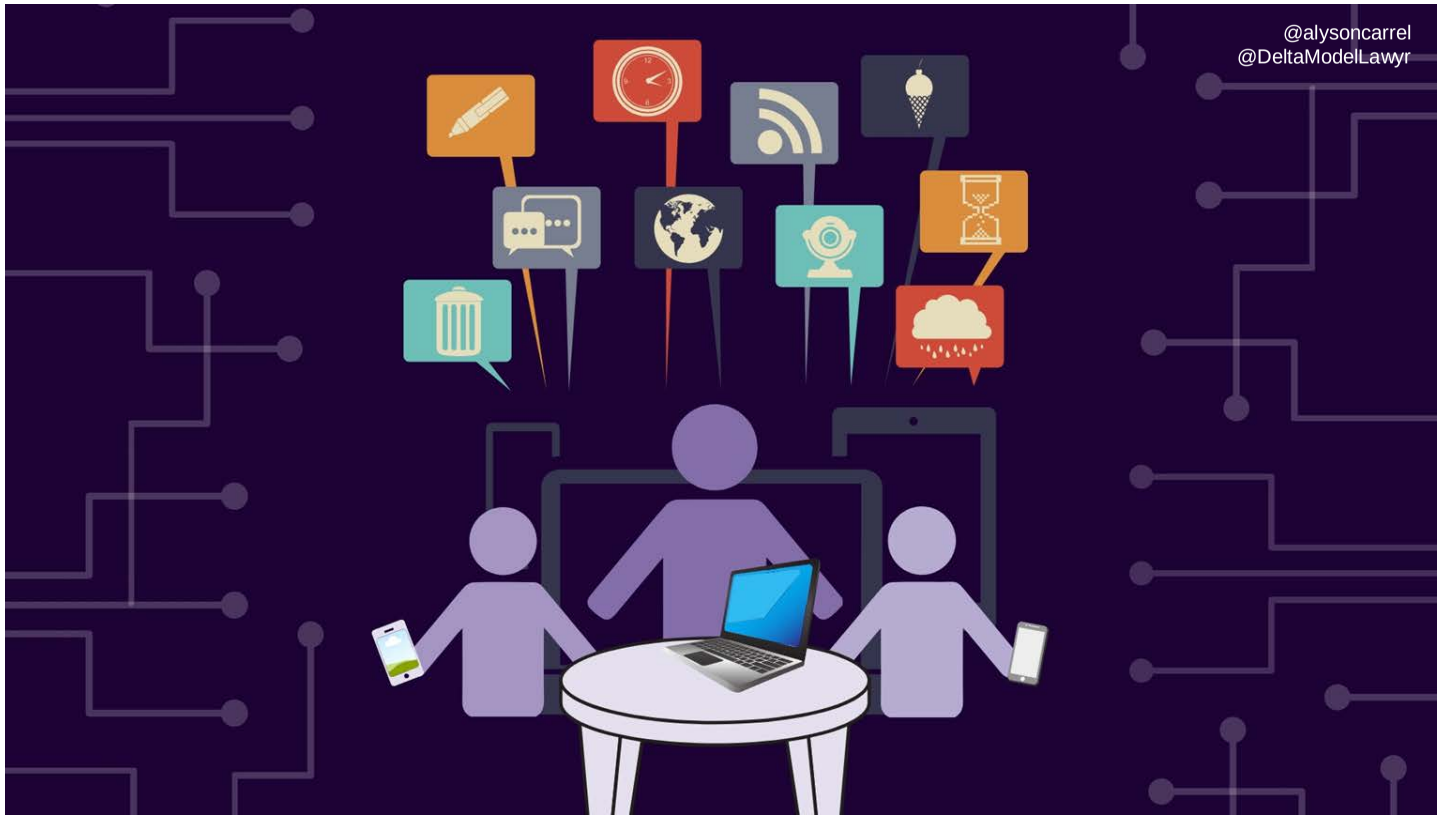
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Mediation bereft of technology
Mediation wholly online
Mind the Gap

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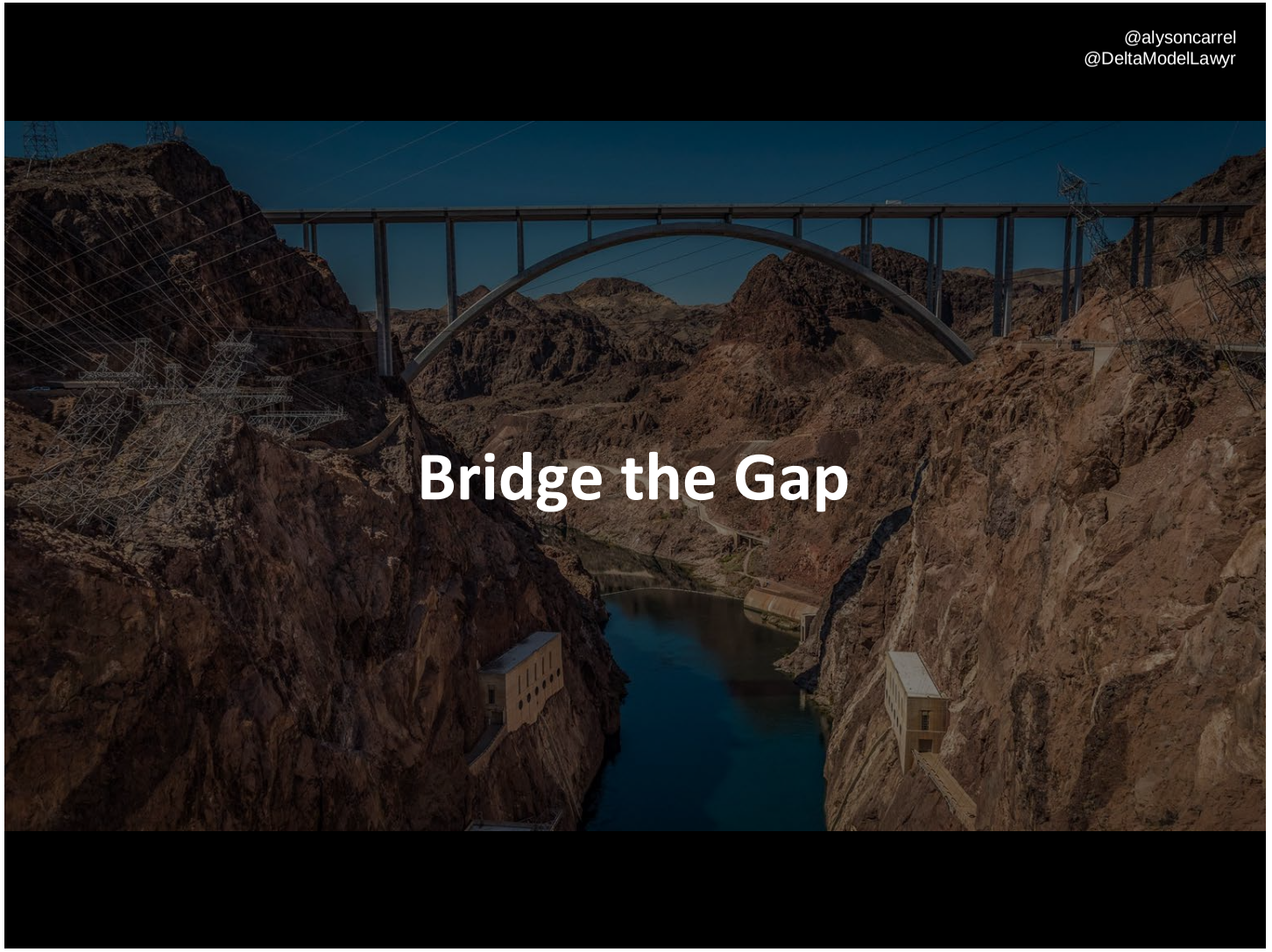
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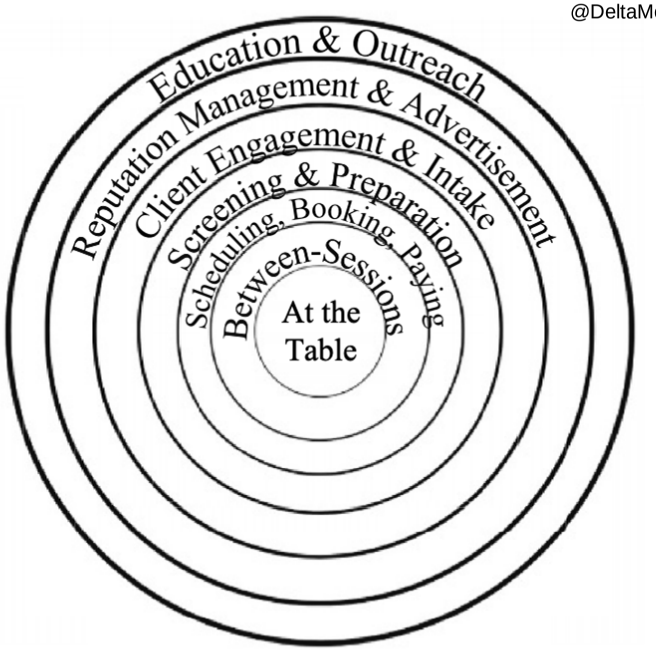
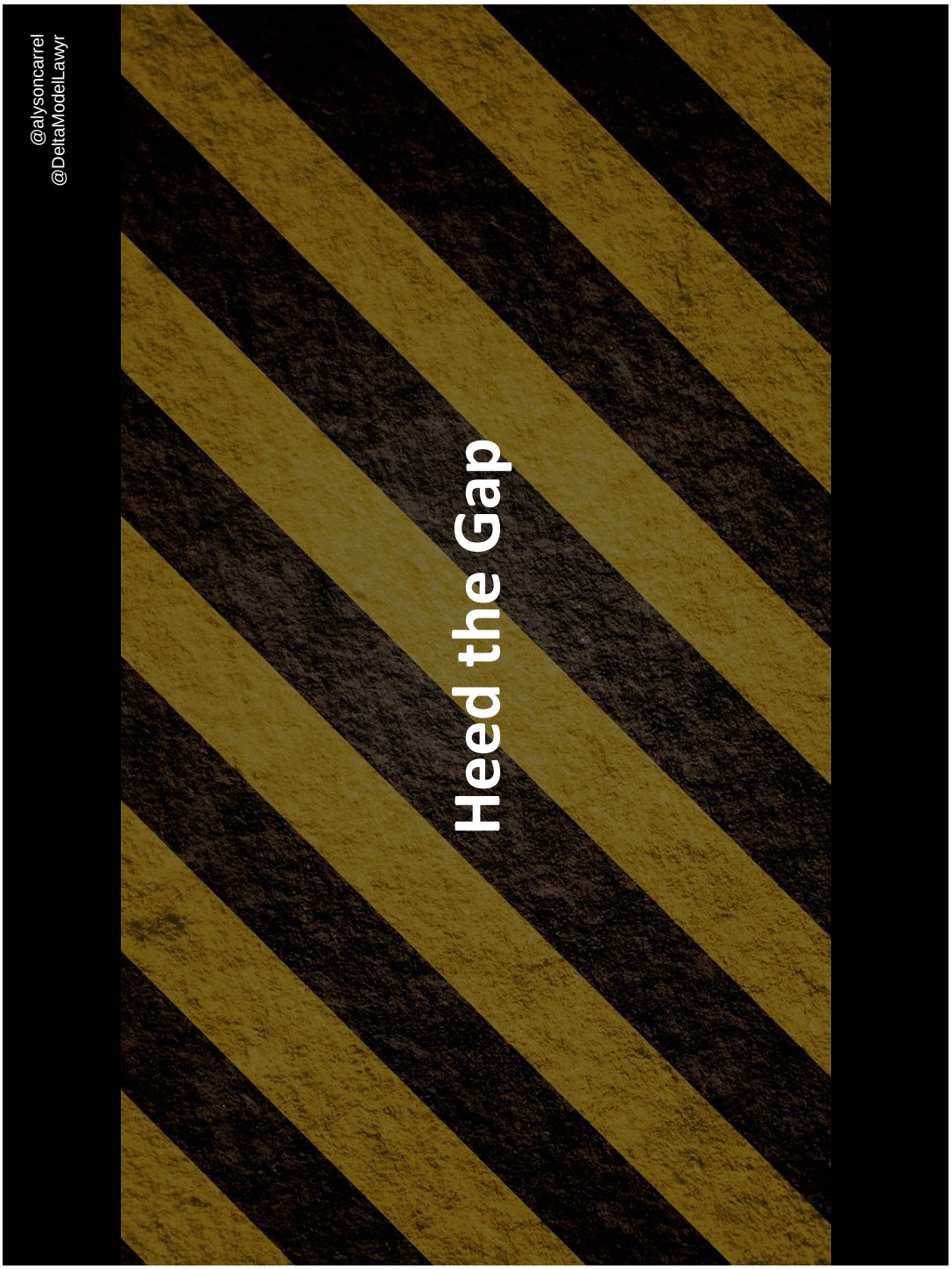


Figure 2. Areas of mediator activity, areas of fourth party support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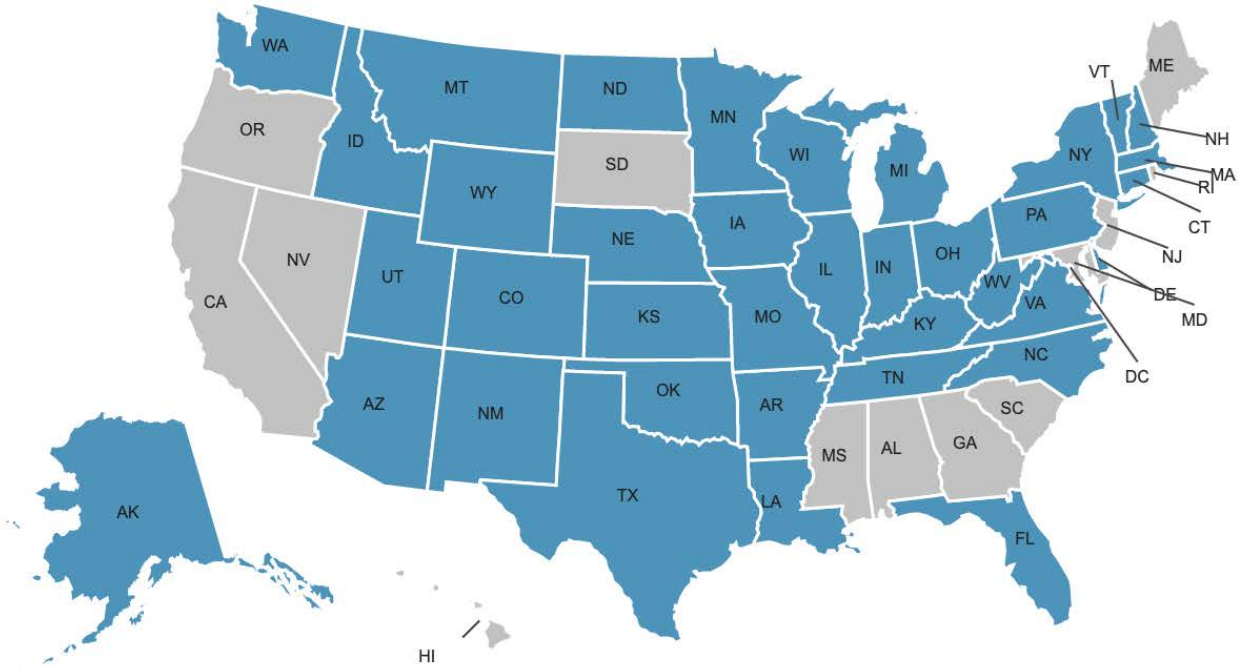
ABA MRPC 1.1, Comment 8

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject



*37 states have now adopted comment 8 (PLUS California via ethics opinion)
https://www.lawsitesblog.com/tech-competence/

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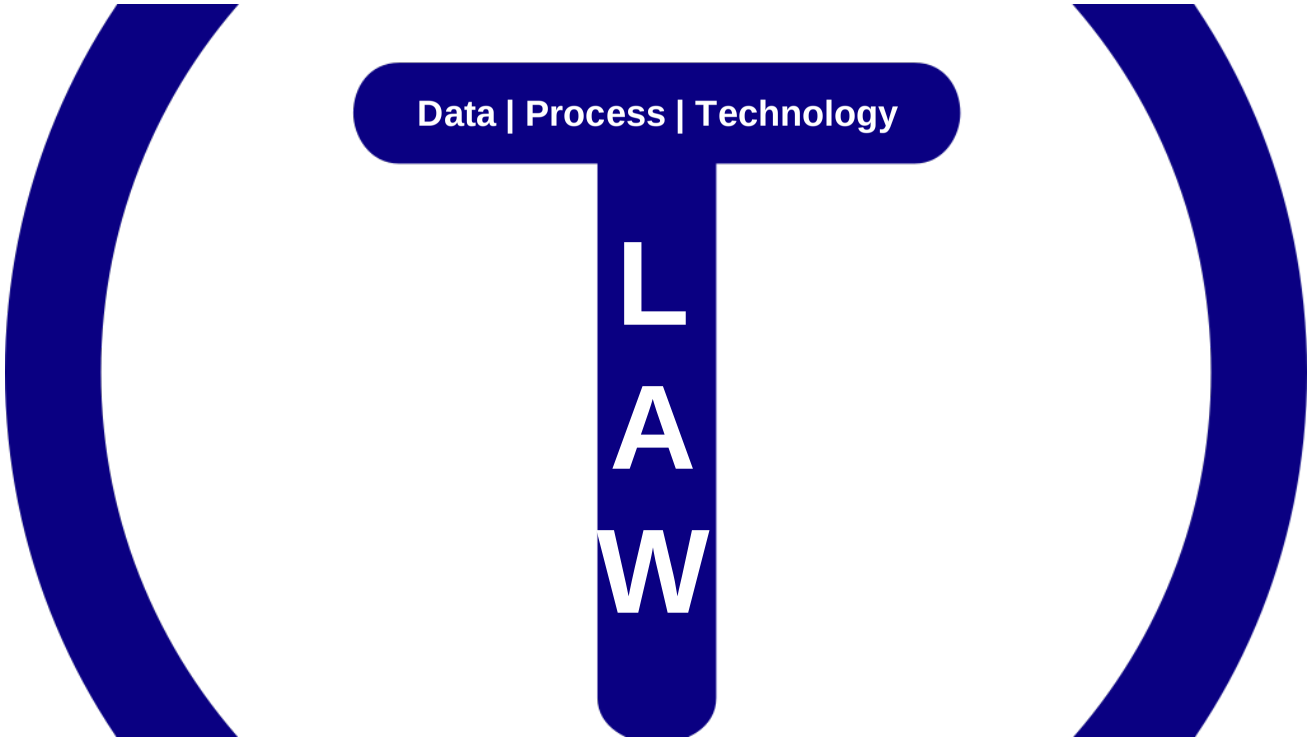

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Impact of AI on Workflow

Gather information

Research the law

Analyze and interpret the results

Determine a recommended course of action

Implement the course of action

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Professionals become:
TRAINERS
MAINTAINERS
EXPLAINERs

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INCREASING need to focus on Emotional Intelligence

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Emotional Intelligence

https://hbr.org/2017/02/the-rise-of-ai-makes-emotional-intelligence-more-important

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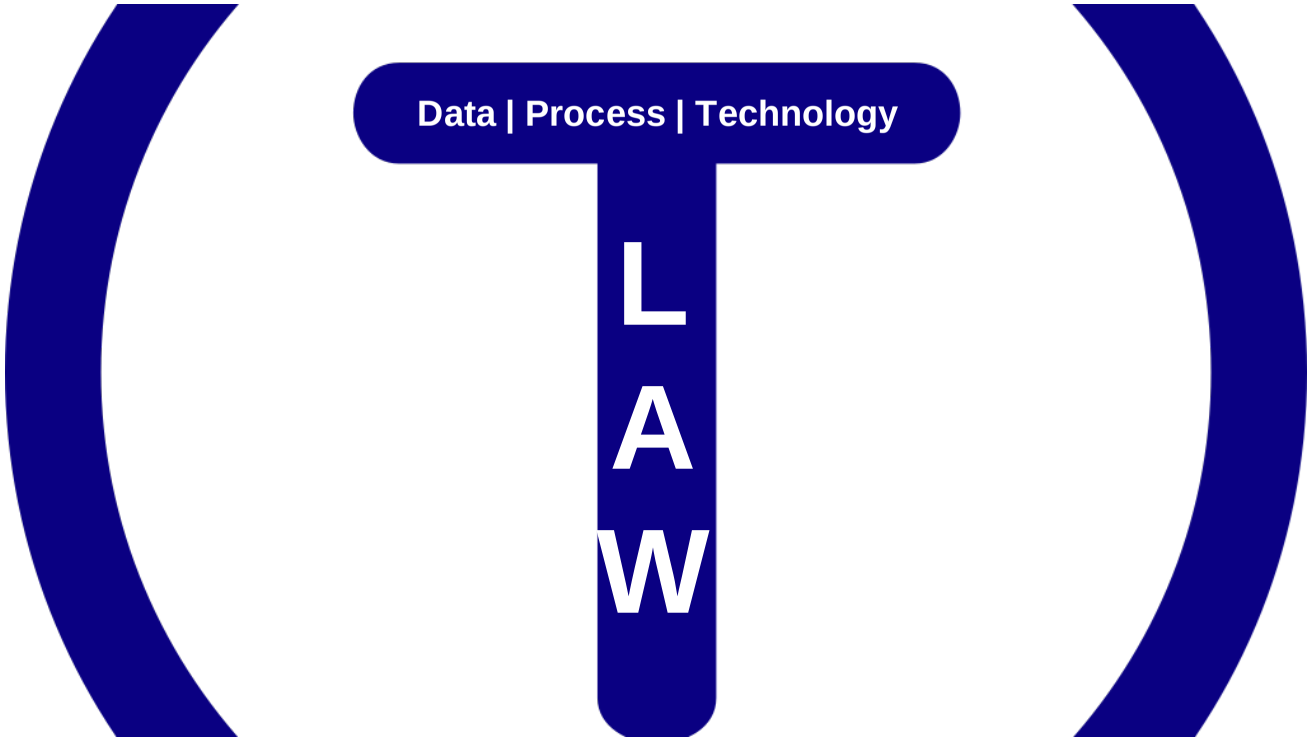

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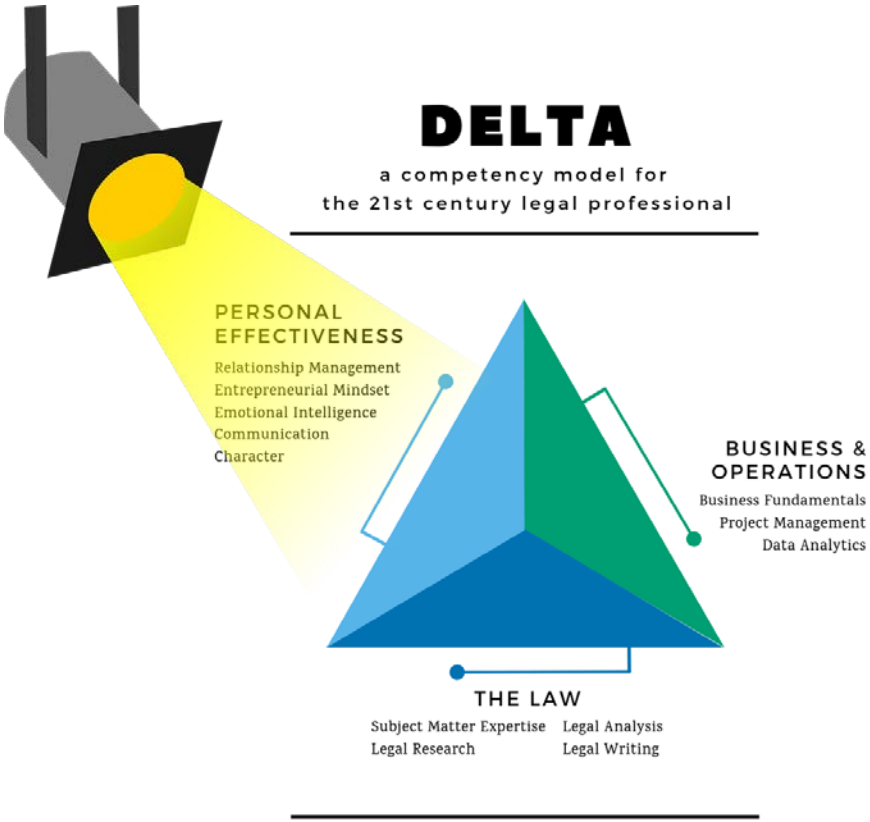

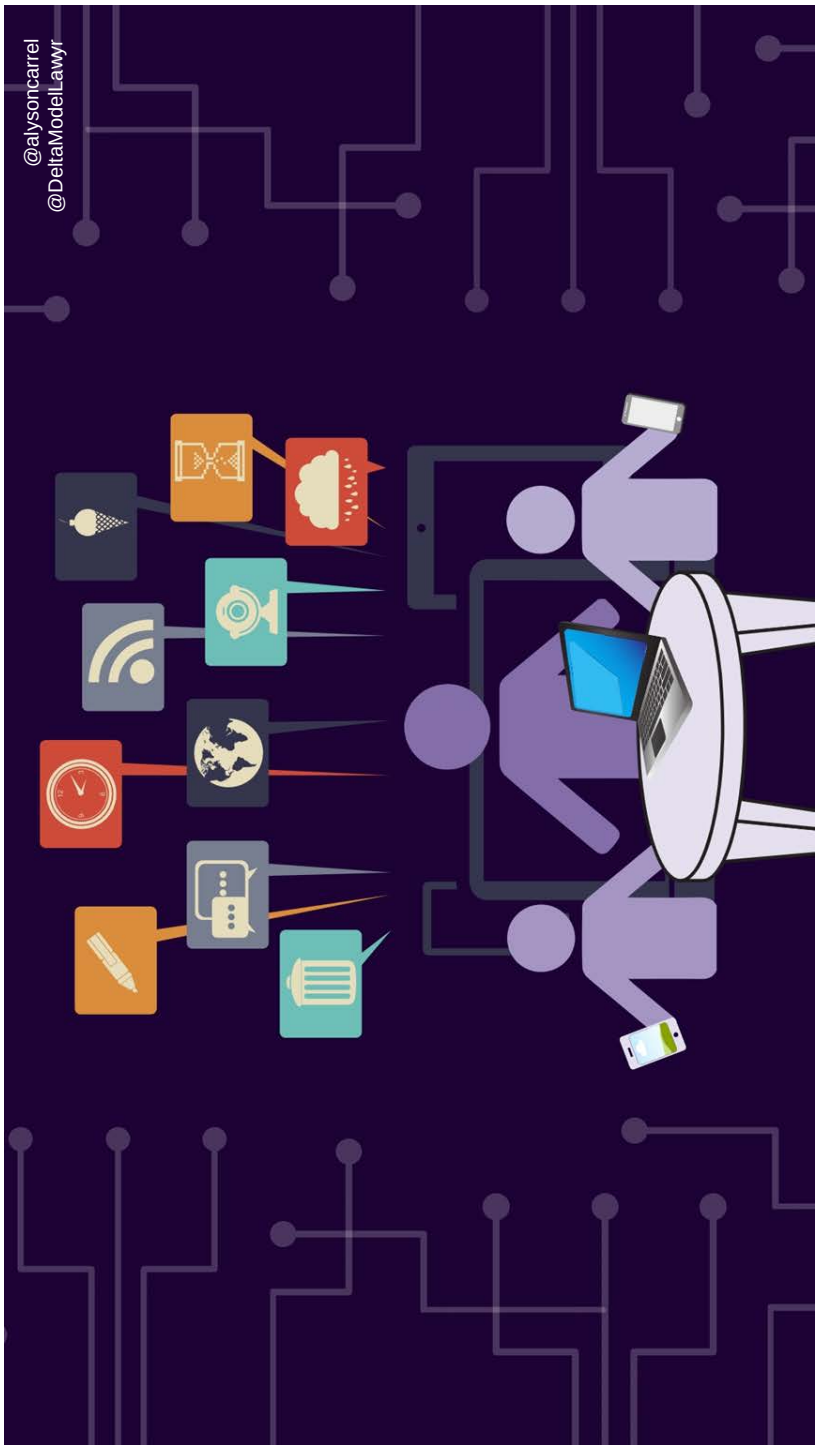
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@DeltaModelLawyr

Ethics in Mediation: Threats, Realities, and Modalities

Simeon H. Baum, Esq.
Resolve Mediation Services, Inc.

Lawrence S. Goldman, Esq.
Law Offices of Lawrence S. Goldman

James B. Kobak, Jr., Esq.
Hughes Hubbard & Reed, LLP and COSAC

Kathleen M. Scanlon, Esq.
Chief Circuit Mediator at United States Court of Appeals for the Second Circuit

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Do I Have to Say More? When Mediation Confidentiality Clashes with the Duty to Report

Rosemary J. Matthews

Do I Have to Say More? When Mediation Confidentiality Clashes with the Duty to Report*

I. BEGINNINGS

Joe Smith is an experienced mediator and well-respected attorney in his county.[1] He usually mediates divorce settlements, priding himself on a nearly eighty percent settlement rate.[2] Smith was recently hired to mediate a settlement between a couple that was heading for an ugly court battle. The attorney for the husband, a younger attorney who clearly looked up to Smith, confided in Smith that he had advised the husband to conceal from the wife the existence of a mutual fund account that was performing extremely well. The attorney joked with Smith about how he was "putting one over on" the wife, and that the mutual fund had been transferred into the name of a paralegal in order to avoid detection by the wife or her attorney.

Smith was concerned about whether the husband was mediating in good faith and counseled the husband and his attorney on the importance of open dialogue and of behaving with integrity toward the wife. Eventually, however, Smith, unable to persuade the husband or his attorney to be open about the mutual fund, withdrew from the mediation, citing to the wife an unspecified conflict of interest.[3] With a second mediator, a settlement was eventually reached without the existence of the mutual fund ever coming to light. Some months later, the wife's attorney, by chance, overheard the husband's attorney talking about the settlement and did some investigative

* This Comment would not have been written without the insights provided by Professor Mark Morris of the North Carolina Central University School of Law. The Author is indebted to him and to Mr. Frank Laney, Chief Mediator for the 4th Circuit Court of Appeals, for their help and generosity. Any and all errors are the Author's alone.

1. This is an entirely hypothetical fact situation, although some general details were taken from N.C. DISPUTE RESOL. COMM'N, ADVISORY OP. 10-16 (2010), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/compliedaor_10-16.pdf; OR. STATE BAR BD. OF GOVERNORS, FORMAL OP. NO. 2005-167 (2005); and FLA. MEDIATOR QUALIFICATIONS ADVISORY PANEL, ADVISORY OP. 95-005 (1995).

2. The settlement rate for mediated divorce and custody actions ranges between sixty and eighty percent. Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 919 (1997).

3. Withdrawal is what the ethics opinions cited *supra* note 1 would tell Smith to do.

work, uncovering the mutual fund and the plot to keep it secret. The wife filed an action with the court to have the settlement set aside, a complaint against the husband's attorney for fraud, and a separate complaint against Smith under Rule 8.3 of the state's Code of Professional Responsibility (the Code).[4] This Comment will explore the mediation rules and Codes of the various states.

Without mediation—and other forms of alternative dispute resolution—the civil justice system in this country would surely collapse under its own weight.[5] Legal scholars from Chief Justice Warren Burger down have noted that the adversarial process should not be the only way to resolve disputes, and indeed, it is not suitable for many people.[6] Recognizing this, many states have made attempts at alternate dispute resolution (ADR) necessary to continuation of lawsuits.[7]

The demand, therefore, for trained ADR professionals is high. The American Arbitration Association lists approximately 8,000 arbitrators and mediators in its network;[8] there are over 1,200 certified Superior Court me-

4. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010) ("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 in other respects shall inform the appropriate professional authority."). This rule is referred to in several amusing ways by practicing attorneys, one of the best being the "duty to squeal." Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 741 (1997).

5. For the period July 1, 2009–June 30, 2010, a total of 5,319 of the 8,691 cases filed in North Carolina Superior Court were sent to mediation—of which, 2,772 (43%) settled. 2009–2010 N.C. DISPUTE RESOL. COMM'N REP. 10 (2010). Since 2007, the U.S. Department of Justice has saved 2,869 months (or over 239 years) of litigation time by using some form of alternate dispute resolution. *Alternative Dispute. Resolution at the Department of Justice*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/odr/doj-statistics.htm (last updated Dec. 2010). In 2010 alone the Department saved more than $11 million in litigation and discovery expenses. *Id.*

6. Burger noted that:

> [W]e must move away from total reliance on the adversary contest for resolving all disputes. For some disputes, trials will be the only means, but for many, trials by the adversary contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversary process as the principal means of resolving conflicting claims is a mistake that must be corrected.

Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

7. For example, *all* civil actions filed in North Carolina Superior Court must be mediated before a court date will be calendared. N.C. GEN STAT. § 7A-38.1(a) (2009).

8. *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, AM. ARBITRATION ASS'N, http://www.adr.org/sp.asp?id=22036 (last visited Oct. 31, 2011).

diators in North Carolina.[9] Most states allow both attorney and nonattorney mediators, requiring only that certified mediators have professional qualifications and complete mediation training.[10]

Problems arise when the attorneys for the parties in the mediation behave in ways that would, in a litigation setting, lead to professional sanctions. How the states should handle this situation is the subject of quite heated debate.

One side of the debate holds that attorney–mediators are *attorneys* first. They are still bound by the same Code that they abide by as attorneys, and these responsibilities cannot be put on hold. Those who adhere to this side believe that the Code protects the integrity of the profession, because violations harm the profession as a whole. As another part of their argument, the *attorney*–mediator would note that reporting attorney misbehavior under Rule 8.3 is (generally) mandatory;[11] if a mediator, such as Smith, does not report infractions that he has knowledge of, he opens himself up to sanctions.[12]

The other side of the debate holds that attorney–mediators are, at that moment, *mediators*, not attorneys. The mediator is not at the mediation as a referee, but as a facilitator who is working to get the best resolution for the parties. Forcing mediators to wear two hats is unfair, they argue, to both the mediator and the participants. Forcing attorney–mediators to be on the alert for every infraction the parties may have committed in order to protect themselves from liability is not conducive to a good process or result. It also means that attorney–mediators have additional responsibilities that nonattorney–mediators do not, leading to discrepancies in how these two groups of identically trained mediators operate.

This Comment surveys the conflict at the state level and proposes a solution.[13] In the first section, there will be a short discussion of mediation

9. 2009–2010 N.C. DISPUTE RESOL. COMM'N REP. 4 (2010).

10. *See generally State Requirements for Mediators*, MEDIATION TRAINING INST. INT'L, http://www.mediationworks.com/medcert3/staterequirements.htm (last visited Oct. 31, 2011). *But see* Poly Software Int'l v. Su, 880 F. Supp. 1487, 1493 (D. Utah 1995) (defining "mediator" as "an attorney who agrees to assist parties in settling a legal dispute").

11. In some states, reporting is not mandatory. *See infra* Part III.C.2.

12. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2010) ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . .").

13. My focus here is primarily on mediation in civil litigation (civil mediation). Mediation occurs in many other settings (criminal law, family law, worker's compensation, employment disputes, to name but a few), and the issues discussed here are no less relevant in those areas than they are here. However, in the interests of brevity and clarity, I have chosen to discuss only the civil arena.

and the clash between the mediation rules and the Code. In the second section, the Comment will discuss the choices that are available to the states in designing mediation and professional conduct rules. This section will explore the interplay between the two sets of rules in more detail, paying close attention to what the rules allow and what they forbid. Finally, a concluding section will discuss the competing, important interests and a proposed path forward.

II. SOME BACKGROUND

A. An Introduction to Mediation

Mediation is defined by Black's Law Dictionary as "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."[14] Mediation can be defined broadly—as allowing for neutral evaluation of claims and reasonableness of settlement offers—or narrowly—as only allowing the neutral[15] to facilitate the parties' negotiations.[16] However mediation is defined, each state determines the qualifications, standards, and sanctions applicable to mediators.[17]

14. BLACK'S LAW DICTIONARY 453 (3d pocket ed. 2006).

15. "Neutral," for the purposes of this Comment, is used interchangeably with "mediator."

16. *See* Douglas H. Yarn, *Lawyer Ethics in ADR and the Recommendations of Ethics 2000 to Revise the Model Rules of Professional Conduct: Considerations for Adoption and State Application*, 54 ARK. L. REV. 207, 216 (2001). Note that nonattorney–mediators will almost necessarily be confined to a more narrow version of mediation, while attorney–mediators, because of their legal knowledge, may choose either style.

17. *See* ALA. CODE OF ETHICS FOR MEDIATORS II (Alabama); ALASKA R. CIV. P. 100 (Alaska); ARIZ. REV. STAT. § 12-2238 (LexisNexis, Westlaw through 2011 3d Legis. Sess.) (Arizona); ARK. CODE ANN. § 16-7-206 (Westlaw through 2011 Legis. Sess.) (Arkansas); CAL. CIV. PROC. CODE § 1775.12 (Deering, Westlaw through 2011–2012 1st Extra. Sess.) (California); COLO. REV. STAT. § 13-22-307 (Westlaw through 2011 1st Reg. Sess.) (Colorado); CONN. GEN. STAT. § 52-235d (Westlaw through 2011 Jan. Reg. Sess.) (Connecticut); DEL. CH. CT. R. 95 (Delaware) (mediation for "business and technology disputes"); D.C. CODE § 16-4207 (Westlaw through Sep. 2011) (District of Colombia); FLA. STAT. § 44.405 (Westlaw through 2011 1st Reg. Sess.) (Florida); GA. ALT. DISP. RESOL. R. VII (Georgia); GUIDELINES FOR HAW. MEDIATORS V, *available at* http://www.courts.state.hi.us/services/alternative_dispute/selecting/guidelines/confidentiality_&_information_exchange.html (Hawaii); IDAHO CODE ANN. § 9-808 (Westlaw through 2011 Chs. 1–335) (Idaho); 710 ILL. COMP. STAT. 35/8 (Westlaw through P.A. 97-342 of 2011 Reg. Sess., with exception of P.A. 97-333 to -334) (Illinois); IND. R. OF ALT. DISP. RESOL. 2.5, *available at* http://www.in.gov/judiciary/rules/adr/#_Toc244667873 (Indiana); IOWA CODE § 679C.108 (Westlaw through 2011 Reg. Sess.) (Iowa); KAN. STAT. ANN. §§ 5-

Parties to mediation and their attorneys will have certain expectations of both the mediator and the mediation process. They expect that the mediation will be conducted according to the conventions of the state, that the mediator will make some evaluation of the chances of success of the claims, and that the mediator will keep their discussions confidential.[18] Confidentiality is perhaps the most important factor in the success of mediation as a form of dispute resolution. Parties expect that what they say will go no further and so are more willing to admit fault or regret than they would be if their statements could be repeated in court.[19]

511 to -512 (Westlaw through 2011 Reg. Sess.) (Kansas); KY. MODEL CT. MEDIATION 12 (Kentucky); LA. REV. STAT. ANN. § 9:4112 (Westlaw through 2011 1st Extra. Sess.) (Louisiana); ME. R. CIV. P. 16B (2009) (Maine); MD. CT. R. 17-109 (2009) (Maryland); MASS. R. SUP. JUD. CT. 1:18 at R. 8, *available at* http://www.lawlib.state.ma.us/source/mass/rules/sjc/sjc118.html (Massachusetts); MICH. COMP. LAWS § 205.747 (Westlaw through 2011 Reg. Sess.) (Michigan); MINN. GEN. R. PRAC. 114.10 (Minnesota); MISS. MEDIATION R. FOR CIV. LITIG. VII, *available at* http://courts.ms.gov/rules/msrulesofcourt/court_annexed_mediation.pdf (Mississippi); MO. SUP. CT. R. 17.06 (Missouri); MONT. CODE ANN. § 26-1-813 (Westlaw through 2011 legislation) (Montana); NEB. REV. STAT. § 25-2937 (Westlaw through 2011 1st Reg. Sess.) (Nebraska); NEV. MEDIATION R. 11 (Nevada); N.H. SUPER. CT. R. 170 (New Hampshire); N.J. STAT. ANN § 2A:23C-8 (West, Westlaw through L. 2011 c. 136) (New Jersey); N.M. STAT. ANN. §44-7B-5 (Westlaw through 2011 1st Reg. Sess.) (New Mexico); N.Y. C.P.R.L. § 7504 (MCKINNEY 2011) (New York); N.C. STANDARDS OF PROF'L CONDUCT FOR MEDIATORS III (North Carolina); N.D. R. CT. IV (North Dakota); OHIO REV. CODE ANN. § 2710.07 (West, Westlaw through portion of 2011–2012 Sess.) (Ohio); OKLA. STAT. tit. 12, § 1805 (Westlaw through 2011 1st Reg. Sess.) (Oklahoma); OR. REV. STAT. § 36.220 (Westlaw through 2011 Reg. Sess.) (Oregon); 42 PA. CONS. STAT. § 5949 (Westlaw through 2011 Act 81) (Pennsylvania); R.I. GEN. LAWS § 9-19-44 (Westlaw through 2011 Jan. Sess.) (Rhode Island); S.C. ALT. DISP. RESOL. R. 8 (2009) (South Carolina); S.D. CODIFIED LAWS § 19-13A-8 (Westlaw through 2011 Reg. Sess.) (South Dakota); TENN. SUP. CT. R. 31 (2009) (Tennessee); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053 (West, Westlaw through 1st Called Sess. 2011) (Texas); UTAH CODE ANN. §78B-6-208 (West, Westlaw through 2011 2nd Special Sess.) (Utah); VT. STAT. ANN. tit. 12, §5720 (Westlaw through 2011 1st Sess.) (Vermont); VA. CODE ANN. §8.01-581.22 (Westlaw through 2011 Reg. Sess.) (Virginia); WASH. REV. CODE § 7.07.070 (Westlaw through 2011 legislation) (Washington); W. VA. TRIAL CT. R. 25.12 (West Virginia); WIS. STAT. § 904.085 (Westlaw through 2011 Act 44, except for Acts 32 and 37), *amended by* Executive Budget Act, 2011 Wis. Act 32 (updating statutory cross-reference) (Wisconsin); WYO. STAT. ANN. §1-43-102 (Westlaw through 2011 Gen. Sess.) (Wyoming).

18. Pursuant to the Federal Rules of Evidence, "conduct or statements made in compromise negotiations" are inadmissible as evidence to prove "liability for, invalidity of, or amount of a claim . . . or to impeach through a prior inconsistent statement or contradiction[.]" FED R. EVID. 408(a).

19. One place where apologies have been found to be extremely useful tools in reducing litigation is in medical-malpractice suits. A study by Johns Hopkins found that apologies reduced malpractice settlement amounts by thirty percent. Rachel Zimmerman, *Doc-*

B. Attorney Ethics Rules

While confidentiality is important, parties to mediation also expect that the mediator will behave according to the standards of his profession. If mediators are presumed to adhere to mediation ethical standards, then in most states, they would be expected to keep everything said and done in mediation confidential.[20] However, if the mediator is an attorney, then the question becomes: is he or she expected to adhere to the attorney ethics standards also?[21] The American Bar Association has attempted to solve

tors' New Tool to Fight Lawsuits: Saying I'm Sorry, WALL ST. J., May 18, 2004, at A1; *see also* Jeffrey M. Senger, *Frequently Asked Questions About ADR,* 48 U.S. ATTY'S BULLETIN 9, 11 (2000).

20. "Everything" is slightly misleading. However, it is much simpler than "everything except child and elder abuse, threats or actual violence, and in some states, statements covered by open meetings legislation."

21. Each state also retains its own Code. *See* ALA. RULES OF PROF'L CONDUCT R. 8.3 (Alabama); ALASKA RULES OF PROF'L CONDUCT R. 8.3 (Alaska); ARIZ. RULES OF PROF'L CONDUCT R. 8.3 (Arizona); ARK. RULES OF PROF'L CONDUCT R. 8.3 (Arkansas); CAL. RULES OF PROF'L CONDUCT R. 1-100 (California); COLO. RULES OF PROF'L CONDUCT R. 8.3 (Colorado); CONN. RULES OF PROF'L CONDUCT R. 8.3 (Connecticut); DEL. RULES OF PROF'L. CONDUCT R. 8.3 (Delaware); D.C. RULES OF PROF'L CONDUCT R. 8.3 (District of Colombia); FLA. BAR REG. R. 4-8.3 (Florida); GA. RULES OF PROF'L CONDUCT R. 8.3 (Georgia); HAW. RULES OF PROF'L CONDUCT R. 8.3 (Hawaii); IDAHO RULES OF PROF'L CONDUCT R. 8.3 (Idaho); ILL. SUP. CT. RULES OF PROF'L CONDUCT R. 8.3 (Illinois); IND. RULES OF PROF'L CONDUCT R. 8.3 (Indiana); IOWA RULES OF PROF'L CONDUCT R. 32:8.3 (Iowa); KAN. RULES OF PROF'L CONDUCT R. 8.3 (Kansas); KY. SUP. CT. R. 8.3 (Kentucky); LA. STATE BAR ASS'N. ART. XVI § 8.3 (Louisiana); ME. RULES OF PROF'L CONDUCT R. 8.3 (Maine); MD. LAWYER'S RULES OF. PROF'L CONDUCT R. 8.3 (Maryland); MASS. R. SUP. JUD. CT. 3.07 at R. 8.3, *available at* http://www.lawlib.state.ma.us/source/mass/rules/sjc/sjc307/rule8-3.html (Massachusetts); MICH. RULES OF PROF'L CONDUCT R. 8.3 (Michigan); MINN. RULES OF PROF'L CONDUCT R. 8.3 (Minnesota); MISS. RULES OF PROF'L CONDUCT R. 8.3 (Mississippi); MO. SUP. CT. R. 4-8.3 (Missouri); MONT RULES OF PROF'L CONDUCT R. 8.3 (Montana); NEB. CT. RULES OF PROF'L CONDUCT § 3-508.3 (Nebraska); NEV. RULES OF PROF'L CONDUCT R. 8.3 (Nevada); N.H. RULES OF PROF'L CONDUCT R. 8.3 (New Hampshire); N.J. RULES OF PROF'L CONDUCT R. 8.3 (New Jersey); N.M. RULES OF PROF'L CONDUCT R. 16-803 (New Mexico); N.Y. RULES OF PROF'L CONDUCT R. 8.3 (New York); N.C. RULES OF PROF'L CONDUCT R. 8.3 (North Carolina); N.D. RULES OF PROF'L CONDUCT R. 8.3 (North Dakota); OHIO RULES OF PROF'L CONDUCT R. 8.3 (Ohio); 5 OKLA. STATE CH. 1, APP. 3-A R. 8.3 (Oklahoma); OR. RULES OF PROF'L CONDUCT R. 8.3 (Oregon); PA. RULES OF PROF'L CONDUCT R. 8.3 (Pennsylvania); R.I. SUP. CT V at R. 8.3 (Rhode Island); S.C. RULES OF PROF'L CONDUCT R. 8.3 (South Carolina); S.D. CODIFIED LAWS § 16-18-APPX-8.3 (Westlaw through 2011 Reg. Sess.) (South Dakota); TENN. SUP. CT. R. 8 at R. 8.3 (Tennessee); TEX. RULES PROF'L CONDUCT R. 8.03 (Texas); UTAH RULES OF PROF'L CONDUCT R. 8.3 (Utah); VT. RULES OF PROF'L CONDUCT R. 8.3 (Vermont); VA. SUP. CT. R. pt. 6, § II, para. 8.3 (Virginia); WASH. RULES OF PROF'L CONDUCT R. 8.3 (Washington); W. Va. RULES OF PROF'L CONDUCT R. 8.3 (West Virginia); WIS. SUP. CT. R 20:8.3 (Wisconsin); WYO. RULES OF PROF'L CONDUCT R. 8.3 (Wyoming).

this issue by providing, in the words of one author, "an 'exit door' from the lawyers' ethical rules. The 'key' to this 'door' is advising the ADR disputants that the lawyer/neutral is not acting as an attorney for any or all of the disputants with the attendant attorney-client ethical rules, but is instead acting as a neutral."[22] To be sure, this so-called exit door may not be perfect because the lawyer *qua* neutral may still be subject to some other provisions of the Model Rules.

While this exit strategy sounds great in theory, it works only when all parties to the mediation behave according to the highest ethical standards. In cases such as the hypothetical described *supra*, where a party actively tries to defraud the other party, the attorney–mediator's "exit" begins to look like complicity. Attorney–mediators are, if not formally then at least perceptually, bound by both the mediator ethics rules *and* the Code.

As one might expect, there is very little case law in this area. The American Bar Association did not adopt a modern version of Rule 8.3 until 1969, and the first major case involving the Rule was not until 1988.[23] That first major case was *In re Himmel*.[24] Himmel, a solo practitioner,[25] was suspended from practicing law for a year by the Illinois Supreme Court because he failed to report the misconduct of another attorney.[26] *Himmel* came as a "dramatic surprise to the bar."[27] To that point, Professor Rotunda notes:

> [w]hile there [were] lawyers who [took] seriously their ethical obligations to report the violations of other lawyers, it [was] unusual to find the bar authorities enforcing this rule. . . . [Until *Himmel*, it was] virtually unheard of to find a case where a lawyer [was] disciplined merely for refusing to report another lawyer.[28]

22. Duane W. Krohnke, *ADR Ethics Rules to Be Added to Rules of Professional Conduct*, 18 ALTERNATIVES TO HIGH COST LITIG. 108, 115 (2000).

23. Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. ILL. L. REV. 977, 979–80 (1988). Rotunda notes that the Rules contained a "vague" provision for whistleblowing in their original form, written in 1908. *Id.* The Rules were significantly amended in the 1980s; however, Rule 8.3 was in place in the 1969 revisions. *Id.* at 980.

24. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). The actual details of *Himmel*, while fascinating, are not as relevant here as the fact that the case happened at all.

25. Rotunda, *supra* note 23, at 982.

26. *Himmel*, 533 N.E.2d at 796. The attorney whose misconduct led to the charges against Himmel was disbarred. *Id*. at 790.

27. Rotunda, *supra* note 23, at 991. The case was described to the author by a member of the North Carolina Dispute Resolution Commission as the seed that grew into the recent changes in the North Carolina Code.

28. *Id*. at 982.

The dearth of case law noted by Professor Rotunda has not changed. One case that is frequently cited in discussions of mediation confidentiality is *In re Waller*.[29] Waller represented the plaintiff in a medical malpractice case that was sent to mediation.[30] As there was no mediation confidentiality statute in D.C. at the time, the trial court made an order regarding the mediation.[31] The order indicated that "no statements of any party or counsel shall be disclosed to the court or admissible as evidence for any purpose at the trial of this case."[32] The mediator realized that the surgeon who operated on the plaintiff was not named as a defendant, and asked Waller why not.[33] Waller told the mediator that he had not named the surgeon because he "was the surgeon's attorney."[34] The mediator encouraged Waller to tell the trial court about this, and when he did not, the mediator himself did so.[35] Waller made some excuses,[36] but was eventually disciplined by the D.C. Board of Professional Responsibility, an action confirmed by the D.C. Court of Appeals.[37]

The mediator, whose actions were technically in contempt of the court order, was not disciplined. Professor Irvine cautions that in the *Waller* case, "the attorney–mediator made a judgment call that was supported by the court. Not every attorney–mediator should expect to be so fortunate."[38] That mediators are rarely the subject of such disciplinary actions has several causes. Firstly, if we use the Smith hypothetical above as our example, the actual infraction was not committed by Smith—his liability is secondary and mainly to the profession, rather than to the wife. Secondly, there is usually a hold harmless clause in any mediation contract, so that the wronged party is contractually bound to overlook any primary liability of the mediator. A more persuasive reason is that the goal of mediation is a confidential settlement—parties are therefore reluctant to air their dirty

29. *In re* Waller, 573 A.2d 780 (D.C. 1990).

30. *Id*. at 781.

31. Mori Irvine, *Serving Two Masters: The Obligation under the Rules of Professional Conduct to Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155, 179 (1994).

32. *Waller*, 573 A.2d at 781 n.4.

33. *Id*.

34. *Id*.

35. *Id*.

36. *Id*. at 782 ("What really happened is that I said I represented Dr. Jackson [the surgeon] but I really meant that I didn't represent Dr. Jackson. Dr. Jackson wasn't a party so I didn't think it was important.").

37. *Id*. at 780 ("suspended from the practice of law in the District of Columbia for a period of sixty days").

38. Irvine, *supra* note 31, at 180.

laundry in the courts where everything is public record. Infractions of the Code or the mediation ethics rules by an attorney–mediator are not often adjudicated by the courts, but rather by ethics committees that publish decisions only when they would be helpful to future attorneys or mediators. A final reason is that some courts believe that the clash between the two sets of rules is a question for the legislature.[39]

Because the courts have been unhelpful in this area, attorneys and dispute resolution professionals have turned to the rules that govern attorneys and mediators in order to bring some order and guidance to the situation.

III. THREE APPROACHES TO THE PROBLEM

> The current Model Rules do not recognize the role of neutral for lawyers, and the prevailing paradigm of lawyering under the Model Rules is the lawyer functioning as a representative of a client. Arguably, the legal and ADR professional regimes are distinct, and lawyers acting as neutrals should be governed by ADR professional standards like any non-lawyer acting as a neutral. An analogous distinction is between lawyers and lawyers acting as judges, wherein the former are subject to the Model Rules and the latter are subject to the Judicial Code of Conduct.[40]

While some commentators may claim that the two standards are not in tension,[41] they are, and in fact cause problems in certain, easily repeatable situations.

In order to get an idea as to how the states have approached the conflict between mediation confidentiality and reporting requirements, this Comment looked at the Code and the mediation rules for each state and the District of Colombia.[42] The states fall into three basic categories: (1) those

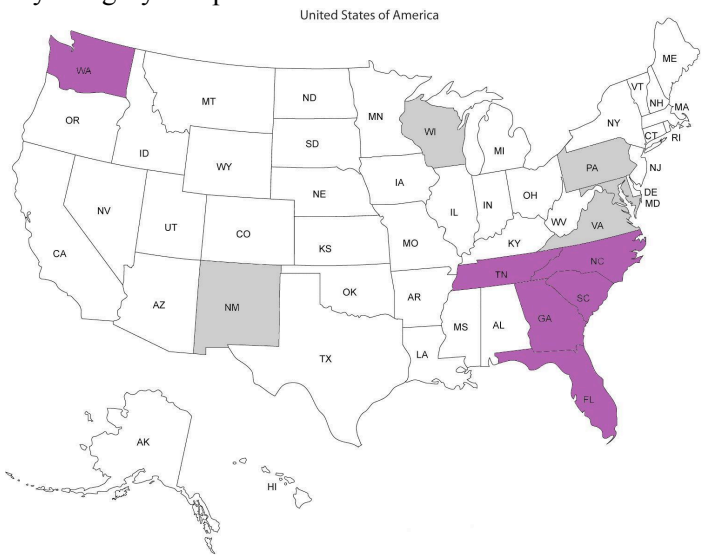
39. *See, e.g.*, Foxgate Homeowners' Ass'n v. Bramalea Cal., Inc., 25 P.3d 1117, 1128 (Cal. 2001) ("Whether a mediator in addition to participants should be allowed to report conduct during mediation that the mediator believes is taken in bad faith and therefore might be sanctionable under [the] Code of Civil Procedure [or the Code] . . . is a policy question to be resolved by the Legislature.").

40. Yarn, *supra* note 16, at 220.

41. *See id*. at 216 (stating that the two standards "neither overlap nor conflict significantly"). Also note that the ADR rules generally provide for reporting of any matter "required by law or rule." Several mediators have commented to the Author that they are not willing to risk their professional reputations and mediation certifications on such vague language, especially since the Codes have not been enacted by the legislature.

42. In the analysis that follows, three states are not included: California, Michigan, and New York. The California Ethics Rules have no provision analogous to Rule 8.3. *See* CAL. RULES OF PROF'L CONDUCT R. 1-100 to 5-320. If there were an equivalent provision, California would fall into the second category of states, those where mediators are allowed to testify. See CAL. EVID. CODE § 703.5 (2011) ("[N]o arbitrator or mediator, shall be compe-

with direct tension between the mediation confidentiality requirements and the Code's reporting requirements under Rule 8.3,[43] (2) those with an "out" for the mediator *if* the misconduct has already been reported, and (3) those that have made an attempt to harmonize the two. A breakdown of the states by category is represented below.



States in black are those with harmonious rules. States in gray have rules that allow mediators to talk about misconduct, but not to report it. States in white have clashing rules.

A. Wishin' and Hopin'

Thirty-six states and the District of Colombia have mediation rules that clash with their Code of Professional Responsibility.[44] This means that

tent to testify . . . except as to a statement or conduct that could . . . be the subject of investigation by the State Bar or Commission on Judicial Performance . . . ."). What Michigan calls "mediation" is actually more like arbitration, with a panel of "mediators" and formal presentations of evidence by the parties. *See* MICH. COMP. LAWS § 600.4691 (2009). New York has no centrally-codified mediator ethics rules.

43. Or the equivalent.

44. This Comment considers only state rules, not all the rules for mediation in federal courts. In a few cases, the federal rules fall into a different category from the state rules. *Compare* GUIDELINES FOR HAWAI'I MEDIATORS § V.1. (2002) ("The mediator . . . should hold all information acquired in mediation in confidence. Mediators are obliged to resist disclosure of information about the contents and outcomes of the mediation process."), *available at* http://www.courts.state.hi.us/services/alternative_dispute/

in over seventy percent of jurisdictions, the highest court has adopted two sets of rules that are in direct conflict. An example of the clashing rules is provided by the District of Colombia. Pursuant to the D.C. Rules of Professional Conduct, "[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 in other respects, *shall* inform the appropriate professional authority."[45] The operative words in this rule, of course, are "knows" and "shall." If the hypothetical involving Mediator Smith was in D.C. and he knew that the husband's lawyer was perpetrating a fraud, he would be required to report said behavior to the State Bar. However, pursuant to section 16-4207 of the D.C. Code, "[u]nless subject to [open meetings requirements], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of the District of Columbia."[46] Mediators are trained to report child or elder abuse, threats of violence, or actual violence,[47] but they are extremely hesitant to make a call where the issue is professional malpractice. Many interpret the conflicting rules as requiring them only to confirm whether a mediation session did or did not take place and whether a settlement was reached.

There are a couple of explanations as to why so many states have clashing rules. Firstly, mediation is relatively new, and the rules are generally on their first or second iteration—all the kinks have not been noticed or ironed out. Secondly, attorneys generally abide by their Codes—it is rare that a mediator would have cause to report an attorney because of something that attorney did in a mediation session.[48] Also, as noted above, the liability of the mediator is usually secondary to that of the attorney involved. Any aggrieved party would need to take a lot of time and energy to bring charges under the Code against the mediator—time and energy that probably would be better spent pursuing the other party or his attorney.

selecting/guidelines/introduction.html, *with* D. HAW. LOCAL R. 88.1(k) (2009) (allowing mediators to break confidentiality "to provide evidence in an attorney disciplinary proceeding").

45. D.C. RULES OF PROF'L CONDUCT R. 8.3(a) (emphasis added).

46. D.C. CODE § 16-4207 (Westlaw through Sep. 2011).

47. These reporting requirements are explicitly required in some states and implicitly required in others. *Compare*, ME. R. CIV. P. 16B(k)(ii) ("A neutral does not breach confidentiality by making such a disclosure if the disclosure is . . . information concerning the abuse or neglect of any protected person."), *with* MASS. R. SUP. JUD. CT. 1:18 at R. 9(h)(i) ("[I]nformation disclosed in dispute resolution proceedings . . . shall be kept confidential by the neutral . . . unless disclosure is required by law or court rule.").

48. A cynic might note that this is because attorneys are smart enough to keep their misdeeds hidden and their clients quiet enough that a mediator would never notice the misconduct.

B. The Ability to Testify Only

Five states (Maryland, New Mexico, Pennsylvania, Virginia, and Wisconsin) have mediation rules that allow the mediators some kind of "out" when allegations of misconduct are made.[49] These states do not allow the mediator to *report* misconduct, but will allow him or her to either testify or to disclose information that may be relevant after an accusation of misconduct is made or proven.[50]

In New Mexico, the mediator can be compelled to testify in cases where his or her testimony is needed to "disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant."[51] There is no provision for reporting misconduct by the mediator.[52] Virginia's rule is substantially the same.[53]

The rules in Maryland, Pennsylvania and Wisconsin are vaguer. Pursuant to section 904.085 of Wisconsin's General Statutes,

[i]n an action or proceeding *distinct from the dispute whose settlement is at-*

49. Each has a Rule 8.3 that requires attorneys with knowledge of misconduct to report it. MD. LAWYER'S RULES OF PROF'L CONDUCT R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); N.M. RULES OF PROF'L CONDUCT R. 16-803(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); PA. RULES OF PROF'L CONDUCT R. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority."); VA. SUP. CT. R. pt. 6, §. II, para. 8.3 ("A lawyer having reliable information 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 to practice law shall inform the appropriate authority."); WIS. SUP. CT. R. 20:8.3 ("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 in other respects, shall inform the appropriate professional authority.").

50. *See, e.g.*, 42 PA. CONS. STAT. § 5949(b)(3) (Westlaw through 2011 Act 81) ("[Duty of confidentiality] does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.").

51. N.M. STAT. ANN. § 44-7B-5(A)(8) (Westlaw through 2011 1st Reg. Sess.).

52. *See id.*

53. VA. CODE ANN. § 8.01-581.22 (Westlaw through 2011 Reg. Sess.) (detailing that confidentiality may be waived "where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation").

> *tempted through mediation*, the court may admit evidence otherwise barred by this section if, after an *in camera* hearing, it determines that admission is *necessary to prevent a manifest injustice* of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.[54]

Wisconsin attorney–mediators, therefore, cannot *report* misconduct that they become privy to via mediation. However, if there is an accusation in a hearing *distinct from the dispute that led to the mediation*—e.g., a grievance hearing or a hearing to set aside the settlement—and the court decides that the mediator's testimony would be in the interests of justice, then the mediator may be ordered to testify. The rules in Maryland and Pennsylvania are, though not as detailed, substantially the same.[55]

While the five states discussed here have rules that acknowledge that things occasionally go wrong in mediation and that parties do not always bargain in good faith, no state recognizes the requirement of reporting in its own version of Rule 8.3.[56] If there is a hearing and the mediator is called to testify, it may become obvious that the mediator has not reported misconduct that he had knowledge of, opening the mediator to professional sanctions.

It is worth noting that the Uniform Mediation Act states that where there has been "a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation[,]" the strict confidentiality requirements are relaxed.[57] However, they are only relaxed for the parties involved and their attorneys, for the Act goes on to state that "[a] mediator may not be compelled to provide evidence of a mediation communication" in order to substantiate such a claim.[58]

C. A Clear Harmonization

54. WIS. STAT. § 904.085(4)(e) (Westlaw through 2011 Act 44, except for Acts 32 and 37) (emphasis added), *amended by* Executive Budget Act, 2011 Wis. Act 32 (updating statutory cross-reference).

55. MD. R. OF ALT. DISP. RESOL. 17-109(d)(3) (indicating confidentiality may be waived to "assert or defend against a claim or defense that because of fraud, duress, or misrepresentation a contract arising out of a mediation should be rescinded."); 42 PA. CONS. STAT. § 5949(b)(3) (Westlaw through 2011 Act 81) ("The privilege and limitation [to confidentiality] does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.").

56. *See supra*, notes 17, 21 and accompanying text.

57. UNIF. MEDIATION ACT § 6(a)(6) (2001).

58. *Id.* § 6(c).

Six states (Georgia, Florida, North Carolina, South Carolina, Tennessee, and Washington) have harmonious mediation and ethics rules.[59] These states are concentrated geographically in the southeast, which is an unexpected but explainable result. If states are a laboratory for experimentation,[60] then it stands to reason that nearby states will copy a state that has sensible and logical rules. The six states fall into two categories: those that use the *mediation rules* as the (to borrow a metaphor) exit door[61] and those that use the *Code* as the exit.[62] The same number of states fall into the former category (Florida, South Carolina, and Tennessee) as the latter, but North Carolina, as discussed below, is the latest state to harmonize its rules, and it chose to amend the Code.[63] It remains to be seen whether more states will follow the lead of these six states and which approach they will choose.

1. Reporting Permitted by Mediation Rules

Florida, South Carolina, and Tennessee all make provision in their mediation ethics rules for reporting of professional malpractice as required by the respective state Codes.[64] The malpractice must be *professional* to be

59. *Compare* FLA. BAR REG. R. 4-8.3, *and* GA. RULES OF PROF'L CONDUCT R. 8.3, *and* N.C. RULES OF PROF'L CONDUCT R. 8.3, *and* S.C. RULES OF PROF'L CONDUCT R. 8.3, *and* TENN. SUP. CT. R. 8 at R. 8.3, *and* WASH. RULES OF PROF'L CONDUCT R. 8.3, *with* FLA. STAT. § 44.405 (Westlaw through 2011 1st Reg. Sess.), *and* GA. ALT. DISP. RESOL. R. VII, *and* N.C. STANDARDS OF PROF'L CONDUCT FOR MEDIATORS R. III, *and* S.C. ALT. DISP. RESOL. R. 8, *and* WASH. REV. CODE. § 7.07.070 (Westlaw through 2011 legislation).

60. Gonzales v. Raich, 545 U.S. 1, 42 (2005) (quoting New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

61. *See* FLA. STAT. § 44.405 ("[T]here is no confidentiality or privilege attached to . . . any mediation communication . . . [o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding."); S.C. APP. CT. R. 407 ("This rule [guaranteeing mediation confidentiality] does not prohibit . . . [a]ny disclosures required by law or a professional code of ethics."); TENN. SUP. CT. R. 31 ("Nothing herein shall replace, eliminate, or render inapplicable relevant ethical standards.").

62. *See* GA. RULES OF PROF'L CONDUCT R 8.3 ("There is no disciplinary penalty for a violation of this Rule."); N.C. RULES OF PROF'L CONDUCT R. 8.3(e) ("A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators . . . is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report."); WASH. RULES OF PROF'L CONDUCT R. 8.3(a) ("(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct . . . *should* inform the appropriate professional authority." (emphasis added)).

63. N.C. RULES OF PROF'L CONDUCT R. 8.3(e).

64. *See supra* note 61.

reportable—simple bad behavior or bad faith is not enough.[65] Pursuant to the Florida mediation rules, "there is no confidentiality or privilege attached to . . . any mediation communication . . . [o]ffered to report, prove, or disprove professional malpractice . . . [or] professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."[66] Pursuant to the South Carolina rules, one of the limited exceptions to confidentiality is "[a]ny disclosure[] required by law or a professional code of ethics."[67] Pursuant to the Tennessee mediation rules, "[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information."[68] However, "[n]othing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral's professional calling."[69]

Each of the three states, then, permits the disclosures required by the mediator's professional Code.[70] The flaw in the design is clear. Some mediators will be bound by professional codes, and some will not. This will have two distinct impacts on mediations. Firstly, the mediator who is bound by the code will be forced to keep an eye out for infractions that he is bound to report—Smith, in the hypothetical above, would have had to report (under the attorney Code of ethics) what the husband's lawyer was doing. Secondly, parties to the mediation will (or should) be aware that their actions will be subject to an extra layer of scrutiny by the mediator.

If the mediator is required to abide by the reporting requirements of his professional Code, then he cannot give his full attention to the mediation; he must necessarily give some of his attention to possible reportable infractions. A nonattorney–mediator, when confronted with a situation like the one described above, would work to encourage disclosure, urge the husband to recognize the problem with failing to disclose the asset, and the discuss issues with negotiating in bad faith. In other words, the nonattorney–mediator would be focused on the mediation and on getting both parties to a successful and fair resolution. An attorney–mediator, on the other hand, would be focused on the mediation, but a small voice in the back of his or her head would be calculating the risks and rewards of reporting the

65. *See supra* note 61.
66. FLA. STAT. § 44.405(4)(a)(4), (4)(a)(6).
67. S.C. ALT. DISP. RESOL. R. 8(b)(5).
68. TENN. SUP. CT. R. 31, at app. A § 7(a).
69. *Id.* § 2(b).
70. *See supra* note 61 and accompanying text.

conduct of the husband's lawyer. If the attorney–mediator reports the lawyer and the complaint is without foundation, the mediator has broken confidentiality as a mediator and will be subject to sanctions by the board that oversees mediators.[71]

Reporting—even if the report is substantiated—will give the mediator a reputation in the community as a reporter. This reputation should not scare attorneys who negotiate in good faith and ethically, but may well cause a drop in the reporter's mediation business because attorneys may worry that the mediator will report first and think later.[72] Even if parties continue to use the mediator, there is a chance that they will be less forthcoming than they would be with a nonattorney–mediator or with an attorney–mediator who has no history of reporting, out of concern that their legitimate actions could be misconstrued and lead to an investigation by the state bar.

The solution to Smith's dilemma used by Florida, South Carolina, and Tennessee is, therefore, not without complication. While the method used by these states is infinitely preferable to simply ignoring the problem, it has flaws that may negatively impact the mediation process.

2. Harmonization Through the Ethics Code

Three states with harmonious rules (Georgia, North Carolina, and Washington) use their Codes to provide the harmony. The differences between the three are interesting and instructive. Georgia's mediation rules are substantially the same as those in the states with clashing rules—mediators are required to report child abuse and may break confidentiality to defend against claims of mediator misconduct. However, Georgia has no provision for testimony where misconduct has already been reported (as in the states like Maryland with some kind of exit for testimony) and no harmonization as in Florida, South Carolina, or Tennessee.[73] In Georgia, the exit is in the Code: "[a] lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *should* inform the appropriate professional authority."[74] The rule continues: "[t]here is no disciplinary penalty for a violation of this Rule."[75] In every other state with an equiva-

71. *See* Irvine, *supra* note 31, at 180.

72. Mediation is, after all, a place where lying is accepted—the dance of negotiation requires that both sides conceal their bottom line, at least in the beginning.

73. *See* discussion *supra* Part III.C.1.

74. GA. RULES OF PROF'L CONDUCT R. 8.3 (emphasis added).

75. *Id.*

lent to Rule 8.3, the lawyer who knows of the misconduct is required to inform the appropriate authority.[76] The Georgia Code was amended in 2001 to its current form. Before 2001, the pertinent rule read:

> (A) A lawyer possessing unprivileged knowledge of [misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
>
> (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.[77]

The mediation rules were enacted in 1993 and require complete confidentiality except in four situations: (1) confirming appearance (or not) at a scheduled mediation, (2) reporting child abuse or threats, (3) documents or communications needed to prove or disprove misconduct on the part of the mediator, and (4) statutory duties.[78] The rules have been amended but not substantially altered since their enactment.[79] Perhaps concluding that the

76. *See, e.g.*, ALA. RULES OF PROF'L CONDUCT R. 8.3 ("A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 *shall* report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." (emphasis added)); IND. RULES OF PROF'L CONDUCT R. 8.3 ("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 in other respects, *shall* inform the appropriate professional authority." (emphasis added)).

Interestingly, the official comment to the Georgia Rule reads: "Self-regulation of the legal profession *requires* that members of the profession initiate disciplinary investigations when they know of a violation of the Georgia Rules of Professional Conduct[,]" even though the language of the rule makes it clear that reporting is not required. GA. RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (emphasis added).

77. GA. RULES OF PROF'L CONDUCT DR 1-103 (repealed 2001), *available at* http://www.gabar.org/handbook/part_iii_before_january_1_2001_-_canons_of_ethics/_rule_3-101/.

78. GA. ALT. DISP. RESOL. VII. In many states, "statutory duties" refer to open meeting requirements. *See* 710 ILL. COMP. STAT. 35/8 (Westlaw through P.A. 97-342 of 2011 Reg. Sess., with exception of P.A. 97-333 to -334) ("Unless subject to the Open Meetings Act or the Freedom of Information Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.").

79. There have been multiple amendments: removing protections of confidentiality where there have been threats or reports of child abuse (February 1995); making intake sessions confidential (November 1996); making notes and records of a court ADR program immune from discovery to the extent that such notes or records pertain to cases and parties ordered or referred by a court to the program (November 1996); removing confidentiality where there has been a complaint against the mediator (November 1996); and limiting discovery to written and executed agreements only (May 1999). *See* GA. ALT. DISP. RESOL.

rules were intentionally harmonized with the Code is a charitable interpretation, but it does explain why Georgia's Code is different from that in almost every other state.

Washington State adopted new ethics rules in 2006.[80] The state bar debated modifying Washington's permissive reporting requirement to make Rule 8.3 reporting mandatory.[81] The committee charged with determining whether to amend the rule (the WSBA Ethics 2003 Committee) debated for over two months whether to require mandatory reporting under Rule 8.3, and eventually decided against such a move.[82] The debate over whether to move to mandatory reporting is fascinating, but nowhere in the minutes of the meetings is mediation mentioned.[83]

North Carolina has recently amended its Code in order to exempt attorney–mediators from the reporting requirements imposed by Rule 8.3.[84] Pursuant to North Carolina's new Rule 8.3,

> [a] lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report . . . .[85]

In North Carolina, attorney–mediators are mediators first and attorneys second. North Carolina is the only state in the union to have rules that are written in this manner.[86] The amendment to Rule 8.3 was recommended by the Standards, Discipline and Advisory Opinions Committee of the Dispute Resolution Commission.[87] The Commission had been asked by the State Bar to examine the conflict between the Code and the mediation rules, and, after "wrestl[ing] with the Rule 8.3 scenario as well as with the larger issue of what happens when a mediator's ethical obligations conflict with the standards of conduct of another profession to which he or she belongs," the Commission decided to recommend amending the Rule to make the media-

VII, *available at* http://www.godr.org/files/CURRENT%20ADR%20-RULES%20COMPLETE%201-19-2010.pdf.

80. *Ethics 2003 Committee*, WASHINGTON STATE BAR ASSOCIATION, http://www.wsba.org/Resources-and-Services/Ethics/Ethics-2003 (last visited Oct. 23, 2011).

81. *Id.*

82. *Id.*

83. *Id.*

84. N.C. RULES OF PROF'L CONDUCT R. 8.3(e).

85. *Id.*

86. *See supra*, notes 17, 21 and accompanying text.

87. 2009–2010 N.C. DISPUTE RESOL. COMM'N REP. 5 (2010).

tion rules dominant.[88]

The difficulty with using the Code to ease the tension between the mediation ethics and the Code is that the Code only applies to attorneys. Attorneys, therefore, will know that they should keep misconduct of other attorneys, revealed in mediation, confidential. Nonattorney–mediators may, however, be bound by a Code applicable to their own profession—for example, the mediator may be a Doctor of Medicine (MD). Nonattorney–mediators may see misconduct like that described above, know that it is ethically bad, but not know to whom they should report the misconduct. The body that oversees mediation ethics would advise nondisclosure.[89] If the misconduct is especially egregious, it is easy to imagine that a mediator frustrated by this answer would look around for someone to whom he or she could to report the attorney's conduct.

IV. WHERE DO WE GO FROM HERE?

There are four issues that are important to consider when examining the tensions that have been identified here. These are (1) whose interests would (and would not) be served by reporting attorney misconduct; (2) whether confidentiality can ever be absolutely guaranteed; (3) whether keeping misconduct confidential is within the reasonable expectations of the parties to the mediation; [and] (4) whether it is possible to provide clear guidance for all parties involved.[90]

A. Whose Interest Are Best Served by the Confidentiality Rules?

Public confidence in lawyers and the legal profession is undermined when stories of misconduct come to light. This is doubly so if the misconduct was ignored by other lawyers. In ruling on *Himmel*, the Illinois Supreme Court held that the "underlying purposes" of the disciplinary rules were to "maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public."[91] Each of

88. *Id.*

89. *See* N.C. DISPUTE RESOL. COMM'N, ADVISORY OP. 10-16 (2010), *available at* http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/compliedaor_10-16.pdf.

90. The four have their genesis in the minority report from a committee of the N.C. Dispute Resolution Commission. *See* N.C. DISP. RESOL. COMM'N. STANDARDS AND DISCIPLINE COMM., MINORITY REPORT TO THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION 2–4 (November 3, 2006) (on file with the Campbell Law Review) [hereinafter Minority Report].

91. *In re Himmel*, 533 N.E.2d 790, 795 (Ill. 1988) (quoting *In re LaPinska*, 381 N.E.2d 700, 705 (Ill. 1978)).

the three purposes identified in *Himmel* is impaired when attorneys fail to abide by the requirements of Rule 8.3. Notwithstanding the damage external to the mediation, the confidence of parties to the mediation in the fairness of the settlement would be undermined if one party learned of misconduct serious enough to have been subject to reporting requirements that was not reported.

If stories of misconduct come to light, they also erode the confidence of the parties to mediation. No matter if one's mediation was conducted according to the highest ethical standards and the resultant settlement was fair to all parties, if one of the parties hears about some misconduct that occurred in his mediation, he is going to reexamine his settlement. If the misconduct becomes known before the mediation is scheduled, both parties may be on the defensive from the start, expecting that the other party may be acting unethically and that the mediator is acting as an accomplice.

B. Are Guarantees of Confidentiality Disingenuous?

Very few states have mediation rules that demand absolute confidentiality.[92] In most of the other states, there are four common exceptions that either require or allow mediators to disclose information they learned in the mediation: (1) child or elder abuse;[93] (2) threats to people or property;[94] (3) to defend against allegations of mediator misconduct,[95] and (4) to train or consult with other mediators.[96] In three states (Mississippi, Louisiana, and Arkansas) a court may examine the mediator's testimony *in camera* in order to make a determination as to whether "the facts, circumstances and context of the communications or materials sought to be disclosed warrant

92. *See* DEL. CH. CT. R. 95(b) (Delaware); IND. R. OF ALT. DISP. RESOL. 2.11 (Indiana); N.H. SUPER. CT. R. 170(E)(1) (New Hampshire); R.I. GEN. LAWS § 9-19-44 (Westlaw through 2011 Jan. Sess.) (Rhode Island); TEX. CIV. PRAC. & REM. CODE § 154.053(c) (Westlaw through 2011 1st Called Sess.) (Texas).

93. *See, e.g.*, ME. R. CIV. P. 16B(k) ("[I]nformation concerning the abuse or neglect of any protected person" is not confidential).

94. *See, e.g.*, OR. REV. STAT. § 36.220(6) ("A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.").

95. *See, e.g.*, OKLA. STAT. tit. 12. § 1805(f) ("If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation . . . [confidentiality] shall be deemed to be waived as to the party bringing the action.").

96. *See, e.g.*, UTAH CODE ANN. §78B-6-208(5) (Westlaw through 2011 2nd Special Sess.) ("An ADR provider or an ADR organization may communicate information about an ADR proceeding with the director for the purposes of training, program management, or program evaluation and when consulting with a peer. In making those communications, the ADR provider or ADR organization shall render anonymous all identifying information.").

a protective order of the court or whether the communications or materials are subject to disclosure."[97]

Are absolute guarantees of confidentiality, especially in court-ordered mediation, a good idea? Would they simply mean that parties have an incentive to hide assets or material facts? With lowered guarantees of confidentiality, the parties and their attorneys know where the line is and what behavior will put them over that line, making the chances of a fair and honest negotiation that much higher.

C. What Are the Reasonable Expectations of Parties to a Mediation?

It is unlikely that a person can become an attorney without having some working knowledge of the Code in his or her state.[98] As a member of North Carolina's Dispute Resolution Commission Standards and Discipline Committee put it, "[t]he unethical attorney should have no reasonable expectation that an attorney–mediator will keep his professional misconduct in confidence."[99] Attorneys know that professional misconduct will be reported by other attorneys with knowledge.[100] Attorneys who know about misconduct value their law license too highly not to report such behavior.

It is harder to argue that parties to mediation will reasonably expect that misconduct will be kept confidential. If a lawyer tells his client that there is a way to hide assets and that he or she will not tell the mediator about those assets, the client would reasonably assume that the lawyer has a legal, ethical way to hide the assets.

D. Can We Provide Clear Guidance?

The need for a firm, simple, *clear* rule is obvious. As things stand in the overwhelming majority of states, attorney–mediators must make very tough choices when confronted with clear misconduct. They know that state Bar Associations are willing and able to sanction attorneys who do not report misconduct, that mediation ethics bodies zealously guard the integri-

97. MISS. MEDIATION R. CIV. LIT. § VII(D); *see also* LA. REV. STAT. ANN. 9:4112 (Westlaw through 1st Extra. Sess.); ARK. CODE ANN. § 16-7-206 (Westlaw through 2011 Reg. Sess.). These states are not included in the "partly harmonious" category because there is nothing in those rules about misconduct—the *in camera* review is limited to issues concerning the underlying case.

98. Law schools typically require law students to take a course in Ethics and Professional Responsibility and all but four states require would-be attorneys to pass the Multistate Professional Responsibility Examination (MPRE). NATIONAL CONFERENCE OF BAR EXAMINERS, http://www.ncbex.org/multistate-tests/mpre/ (last visited Oct. 21, 2011).

99. *See* Minority Report, *supra* note 90 and accompanying text.

100. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3.

ty of the process, and that those bodies are willing to suspend the attorney–mediator if he or she breaches their rules. They also know that nonattorney–mediators do not face the same high-stakes choices that they do. While there is pressure on attorney mediators to decide which side their bread is buttered on,[101] there is also increasing demand for attorney–mediators.[102] After all, an attorney–mediator knows the lay of the land, so to speak, and can give the parties informed guidance on chances of litigation success or failure.

Clear guidance will help all of the parties prepare for the mediation. The parties will know what they should disclose and that the other side will be held to the same standard; the attorneys will know the consequences of unethical behavior, and the mediator will have no discretion about reporting misconduct.

E. The Way Forward

So where does this leave us? We need a way to harmonize the Code and the mediation rules that takes into account the interests of both the parties and the wider community, that recognizes that confidentiality is not always absolute, that conforms to the reasonable expectations of all involved, and that is clear and simple to apply. This Comment argues that the best rule is that used by Tennessee. Pursuant to the Tennessee mediation rules: "[a] Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information."[103] However, the general standards of the mediation rules provide that: "[n]othing herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules which may be imposed by the Code of Responsibility with respect to lawyers, or similar sets of standards imposed upon any Neutral by virtue of the Neutral's professional calling."[104]

These rules allow the attorney–mediator to be bound by both sets of rules at the same time.[105] As noted *supra*, there is the problem that nonat-

101. That is, whether they would rather lose their law license or their mediation certification.

102. *See* Urska Velikonja, *Making Peace and Making Money; Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 263 (2009) (arguing that there is "attorney domination of the mediator selection process" because "most of the private mediators' caseload is disputes already in litigation or about to be litigated.").

103. TENN. SUP. CT. R. 31 at app. A § 7(a).

104. *Id.* § 2(b).

105. The problem with this whole system, of course, is that nonattorney–mediators are not bound by the Code as attorney mediators are, raising the inference that there are two

torney–mediators will not be beholden to the Code, but they are not bound by it in any other situation, so it is unfair to complain that they are not bound in this situation. This rule allows the attorney–mediator to create a mediation that is fair to all involved and to report misconduct when necessary. The rule also formalizes the expectations of all parties that a mediator who is also an attorney will not completely shed that persona when he acts as a neutral. It is also clear; the rule itself says that confidentiality is not absolute where it conflicts with the professional code of the mediator.

This rule does, however, require the mediator to wear two hats—that is, to focus both on the mediation at hand *and* on any potential ethical violations that may be revealed. However, as noted *supra*, ethical violations are rare. The author could not find any published mediation ethics opinions that dealt with the subject, and the first court case that dealt with Rule 8.3 was not until 1988 (almost twenty years after the modern Code was written).

If we return to the hypothetical, Smith would be required to report the misconduct of the attorney for the husband if he cannot persuade him to reveal the asset. In this way, Smith can protect the wife *and* his own law license *and* the interests of the wider community.

Rosemary J. Matthews

separate standards. In the regular case, however, where attorneys for the parties behave ethically, there will be no difference between the two mediators. The issues discussed here will only have an effect where one attorney behaves unethically. Deciding how to resolve this distinction is, thankfully, beyond the scope of this Comment.

NYSBA

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

To supplement the other materials submitted with respect to the Committee on Standards of Attorney Conduct, attached are comments submitted by the Criminal Justice Section.

March 22, 2019

Recommendations of the Criminal Justice Section

The Criminal Justice Section has been requested by other sections to review and comment on certain proposed revisions to the Rules of Professional Responsibility. Following are our recommendations and comments:

1. The Section approves the proposed revision of Rule 1.16(c)(5) broadening an attorney's ability to withdraw from a case if the client fails to perform his obligations to pay legal fees or disbursements. Failure of clients to pay legal fees is a serious economic problem for the criminal bar, particularly for the non- white collar small firm or single practitioner, many of whom are struggling. The proposal broadens the ability of an attorney to withdraw by replacing a subjective standard (when a client "deliberately disregards" his obligations) with a more objective one. We note that in court cases an attorney cannot withdraw unilaterally and must request court permission.
2. The Section disapproves of the proposed revision to Rule 3.3(c) which would terminate an attorney's obligation to report to a tribunal false testimony or fraud at the end of court (including appellate) proceedings. The Section is particularly concerned with the proposal's effect on the revelation of wrongful convictions based on police or prosecutorial misconduct. Many exonerations are based on a prosecutor's learning of and reporting misconduct well after court proceedings have ended (while the effect on a convicted client continues). We believe that the justice system, and its lawyers, have an obligation to attempt to correct decisions or verdicts, criminal or civil, based on fraud without time limitation. We recognize the concept of finality, but believe the concept of justice is paramount.
3. The Section approves the proposed addition of Rule 3.4(a) which would prohibit a lawyer from counseling or participating in the unlawful destruction or deletion of potential evidence. We note that such activity likely violates existing law.
4. The Section approves that part of the proposed revision of Rule 3.4(e) that expands the prohibition against reporting or threatening to report criminal conduct to gain an advantage in civil cases to expand the ban to include reporting or threatening to report disciplinary action. The Section disapproves that part of the proposal which would permit the reporting or threatening to report such conduct as long as the conduct was related to the matter in question and the report or threat done in good faith, a revision that would essentially swallow up the rule. The Section notes that threats of reporting criminal conduct to secure an advantage may be violative of criminal statutes. See Penal Law 135.60(4) (coercion in the second degree), Penal Law 215.15 (compounding a crime), although such cases are rarely prosecuted. We do recognize that there are reasonable arguments for permitting frank and explicit discussions about the possibility of a criminal (or disciplinary) referral rather than the veiled hints that often occur in negotiations. We also realize that such threats encourage resolution of civil matters without formal and time-consuming court proceedings, and often serve the laudable

facilitating quick compensation for deserving victims. We are troubled, however, that such threats will encourage secret settlements and thereby allow wealthy (but not poor) wrongdoers, thieves and sexual offenders for instance, to escape criminal prosecution and public scrutiny that would prevent or deter further wrongdoing. We also are concerned that such threats will coerce innocent people into paying false claims. We also note that the "good faith" standard is so vague that the rule may be unenforceable. Lastly, we note that that a distinction should be made between actual reports of criminal conduct and threats to do so. As a general rule, reporting possible criminal conduct so that police and prosecutors should consider and investigate it should be the preferred model and encouraged. Conversely, unrealized threats to report and concealment of possible wrongdoing upon a monetary payment should be discouraged.

5. The Section approves the revision of Rule 3.6(c) to allow public pre-trial comment in certain particular areas. We believe those areas concern information that is of genuine public concern and will not affect a fair trial. We do question whether the revision is necessary.

Lawrence Goldman
Chair
Criminal Justice Section Ethics and Professional Responsibility Committee

Relevant COSAC Recommendations and Criminal Justice Section Response

MEMORANDUM

April 11, 2019
(excerpted from January 3, 2019 report)

To: **NYSBA Executive Committee**

Cc: **Kathy Baxter, NYSBA General Counsel**

From: **NYSBA Committee on Standards of Attorney Conduct ("COSAC")**
Roy D. Simon, Co-Chair of COSAC
Barbara S. Gillers, Co-Chair of COSAC
Joseph E. Neuhaus, Chair of COSAC Review Committee

Subject: **COSAC Proposals Regarding Rule 3.4**

Summary of Proposals

COSAC proposes the following changes to the black letter Rules, along with corresponding changes to the Comments:

- ***Rule 3.4(e)***. Amend the existing prohibition on presenting or threatening "criminal charges solely to obtain an advantage in a civil case" so that it prohibits presenting "criminal *or disciplinary* charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*"

Rule 3.4
Fairness to Opposing Party and Counsel

COSAC recommends amending Rule 3.4(e) by expanding the rule to cover disciplinary charges and by narrowing the rule via adding two qualifying phrases. As amended, Rule 3.4(e) would provide:

> A lawyer shall not ... (e) present, participate in presenting, or threaten to present criminal or disciplinary charges to obtain an advantage in a civil matter, if those charges are not advanced in good faith or are unrelated to the civil matter.

COSAC believes that, in its current form, Rule 3.4(e) is both too broad and too narrow. It is too broad because it might preclude a threat to honestly report a crime

in an effort to obtain restitution for the harm done by the crime, something that Comment [5] to Rule 3.4 expressly says would not be improper. Comment [5] says:

> [5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), *the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done.* But extortion is committed if the threat involves conduct of the third person *unrelated* to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).
> [Emphasis added.]

Since COSAC believes that Comment [5] correctly states the law, COSAC also believes that the current blanket ban on threatening to present criminal charges is too broad.

Rule 3.4(e) is also too narrow because it does not prohibit threatening meritless or unrelated *disciplinary* charges in ways that might be as improperly coercive as a threat to present criminal charges and might also pressure lawyers who are the target of such charges to act in ways that conflict with their clients' best interests. For example, a lawyer who has been threatened with disciplinary charges might seek to settle litigation or might yield to a negotiating demand in a transaction on terms unfavorable to the lawyer's client in the hope (or on the express condition) that the opposing lawyer would then drop the threat to file meritless disciplinary charges.

COSAC's proposed changes to Rule 3.4(e) attempt to rectify these two problems.

> March 22, 2019
>
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>
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>
> 1. The Section approves the proposed revision of Rule 1.16(c)(5) broadening an attorney's ability to withdraw from a case if the client fails to perform his obligations to pay legal fees or disbursements. Failure of clients to pay legal fees is a serious economic problem for the criminal bar, particularly for the non- white collar small firm or

single practitioner, many of whom are struggling. The proposal broadens the ability of an attorney to withdraw by replacing a subjective standard (when a client "deliberately disregards" his obligations) with a more objective one. We note that in court cases an attorney cannot withdraw unilaterally and must request court permission.

2. The Section disapproves of the proposed revision to Rule 3.3(c) which would terminate an attorney's obligation to report to a tribunal false testimony or fraud at the end of court (including appellate) proceedings. The Section is particularly concerned with the proposal's effect on the revelation of wrongful convictions based on police or prosecutorial misconduct. Many exonerations are based on a prosecutor's learning of and reporting misconduct well after court proceedings have ended (while the effect on a convicted client continues). We believe that the justice system, and its lawyers, have an obligation to attempt to correct decisions or verdicts, criminal or civil, based on fraud without time limitation. We recognize the concept of finality, but believe the concept of justice is paramount.
3. The Section approves the proposed addition of Rule 3.4(a) which would prohibit a lawyer from counseling or participating in the unlawful destruction or deletion of potential evidence. We note that such activity likely violates existing law.
4. The Section approves that part of the proposed revision of Rule 3.4(e) that expands the prohibition against reporting or threatening to report criminal conduct to gain an advantage in civil cases to expand the ban to include reporting or threatening to report disciplinary action. The Section disapproves that part of the proposal which would permit the reporting or threatening to report such conduct as long as the conduct was related to the matter in question and the report or threat done in good faith, a revision that would essentially swallow up the rule. The Section notes that threats of reporting criminal conduct to secure an advantage may be violative of criminal statutes. See Penal Law 135.60(4) (coercion in the second degree), Penal Law 215.15 (compounding a crime), although such cases are rarely prosecuted. We do recognize that there are reasonable arguments for permitting frank and explicit discussions about the possibility of a criminal (or disciplinary) referral rather than the veiled hints that often occur in negotiations. We also realize that such threats encourage resolution of civil matters without formal and time-consuming court proceedings, and often serve the laudable facilitating quick compensation for

deserving victims. We are troubled, however, that such threats will encourage secret settlements and thereby allow wealthy (but not poor) wrongdoers, thieves and sexual offenders for instance, to escape criminal prosecution and public scrutiny that would prevent or deter further wrongdoing. We also are concerned that such threats will coerce innocent people into paying false claims. We also note that the "good faith" standard is so vague that the rule may be unenforceable. Lastly, we note that that a distinction should be made between actual reports of criminal conduct and threats to do so. As a general rule, reporting possible criminal conduct so that police and prosecutors should consider and investigate it should be the preferred model and encouraged. Conversely, unrealized threats to report and concealment of possible wrongdoing upon a monetary payment should be discouraged.

5. The Section approves the revision of Rule 3.6(c) to allow public pre-trial comment in certain particular areas. We believe those areas concern information that is of genuine public concern and will not affect a fair trial. We do question whether the revision is necessary.

Lawrence Goldman
Chair
Criminal Justice Section Ethics and Professional Responsibility Committee

MEMORANDUM

August 13, 2019

For Public Comment

COSAC Proposals to Amend Rules 4.2, 4.3, 8.1, 8.3, and 8.4 of the New York Rules of Professional Conduct

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The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC is circulating for public comment proposals to amend various New York Rules of Professional Conduct and their Comments. We invite comments. **Comments are due at 5:00 p.m. on Friday, October 25, 2019.**

Rule 8.3 (first proposal)
Reporting Professional Misconduct

Proposed amendments to Rule 8.3(c)(1) and Comment [2]

COSAC proposes two changes to Rule 8.3 and its comments so as to refine or clarify the scope of that Rule's reporting obligation and its exceptions.

First, Rule 8.3 requires that lawyers in certain circumstances report professional misconduct, and Rule 8.3(c) sets forth certain exceptions to that requirement. While the exceptions currently apply to information confidential pursuant to Rule 1.6, they do not currently extend to information that is confidential under Rules 1.9 or 1.18.

Second, some lawyers and law firms may believe that they can escape from the duty to report another lawyer in their own firm by entering into a confidential settlement agreement (or other form of nondisclosure agreement) with an accuser.

To remedy these shortcomings, COSAC proposes both (i) an amendment to the text of Rule 8.3(c)(1) and (ii) a corresponding explanatory amendment to Comment [2] to Rule 8.3. The proposed amendment to the text of Rule 8.3 provides that there is an exception to the reporting requirement for information that is confidential under certain rules other than Rule 1.6. The proposed amendment to Comment [2] makes clear that confidential settlement agreements by themselves do not excuse otherwise

mandatory reporting. The amended versions of the Rule and Comment would provide as follows:

> **(c) This Rule does not require disclosure of:**
>
> **(1) information otherwise protected by Rules 1.6, 1.9. or 1.18; or ...**
>
> **Comment**
>
> [2] A report about misconduct is not required where it would result in violation of Rules 1.6, 1.9, or 1.18. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. If a lawyer knows reportable information about misconduct that is not protected by Rule 1.6 or other confidentiality Rules then Rule 8.3(a) requires a lawyer to report the information to a tribunal or other appropriate authority even if there are contractual restrictions on disclosing the information, such as in a settlement agreement or nondisclosure agreement. For example, if a lawyer is accused of sexual harassment, and if other lawyers in the firm come to know that such misconduct occurred and raises a substantial question about the alleged harasser's fitness as a lawyer, the other lawyers in the firm cannot avoid their reporting obligations under Rule 8.3(a) by signing a confidential settlement agreement with the accuser.

COSAC Discussion of Rule 8.3(c)(1) and Comment [2]

The proposed change to the text of Rule 8.3(c)(1) would provide that the exception includes not only information that is confidential with respect to current clients under Rule 1.6, but also information that is confidential with respect to former clients under Rule 1.9 and with respect to prospective clients under Rule 1.18. COSAC believes that the policy considerations supporting the exception apply equally no matter which of these Rules provides the basis of confidentiality. This proposal would align the confidentiality exception to Rule 8.3 with the confidentiality exception to Rule 8.1 as COSAC has proposed to amend the latter (discussed above), and for the same reasons.

The second issue addressed in this proposal concerns the relationship between Rule 8.3 and nondisclosure agreements ("NDAs") or other contractual confidentiality

provisions. This issue came to COSAC's attention in March 2018 when the Solicitors Regulation Authority in the U.K. sent lawyers a notice reminding them that lawyers are required to report potential professional misconduct to disciplinary authorities, and warning law firms that nondisclosure agreements do not negate that reporting requirement. "The authority noted that it has received `relatively few' complaints of inappropriate sexual behavior, just 21 complaints over a two-year period ending in October 2017," and noted that media reports have suggested that "the low levels of reporting may be the result of NDAs and cultural issues within some firms." Coe, *UK Regulator Sends Law Firms Gag Order Warning Shot* (Law360 Mar. 12, 2018).

The proposed amendment would clarify that a lawyer otherwise required to report misconduct cannot expand the exceptions to the reporting requirement set forth in Rule 8.3 (b) by contracting to keep the information confidential. *See* Krane, *You Can't Stop Client from Complaining*(NYPRR Sept. 2003).

Rule 8.3 (second proposal)
Reporting Professional Misconduct

Proposed amendment to Comment [3] to Rule 8.3

Many lawyers are uncertain about when Rule 8.3(a) requires them to report another lawyer's violation of the Rules of Professional Conduct. COSAC proposes to add some guidance in this area by amending Comment [3] to Rule 8.3 as follows:

> [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. For example, when a lawyer learns that another lawyer has violated the Rules through conversion or theft of a client's or third party's funds, such a violation raises a substantial question as to the accused lawyer's honesty, trustworthiness or fitness as a lawyer. For other examples of violations that would mandate reporting, see Rule 8.4, Comment [2]. A report should be made to a

> tribunal or other authority empowered to investigate or act upon the violation.

COSAC Discussion of Rule 8.3, Comment [3]

Rule 8.3(a) mandates reporting when a lawyer's known violation of the Rules "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." That standard is extremely ambiguous. None of the terms triggering a reporting obligation are defined in Rule 1.0 ("Terminology") or elsewhere in the Rules. Comment [3] to Rule 8.3 is relevant but not particularly helpful to the practitioner - it merely states that a "measure of judgment" is required, and that the word "substantial" refers to the "seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." By contrast, ABA Model Rule 1.0(*l*) defines the term "substantial" as follows: "Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." (New York has not adopted this definition and the New York Rules do not define the term "substantial.")

Comment [2] to Rule 8.4 (not Rule 8.3) says more about the types of conduct that meet the mandatory reporting test. It says:

> [2] ... Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Simon and Hyland comment that it is easy to come up with examples of violations that implicate a lawyer's "honesty" (*e.g.*, fraud, deception, misrepresentation, backdating documents, creating false evidence, and stealing funds from trust accounts), but it is difficult to come up with examples of conduct that implicates "fitness as a lawyer." *Simon's New York Rules of Professional Conduct Annotated 1681* (2019 ed.).

In Massachusetts, the Office of Bar Counsel (the Massachusetts disciplinary authority) has published an official Policy Statement that provides some additional guidance on conduct lawyers are required (or not required) to report. Of particular import here, the Policy Statement says:

> ***There are some such matters that clearly fall within the scope of "substantial" misconduct: theft, conversion, or negligent misuse of client funds resulting in deprivation to the client*** a felony conviction, or perjury or a misrepresentation to a tribunal or court. As to an impaired or disabled lawyer, certainly when a mental or physical problem results in the abandonment of clients or law practices, the lawyer with knowledge of these types of problems is required to report the situation to Bar Counsel.
>
> There are other matters that must be reported, such as when, as noted in Comment [1] to Rule 8.3, in a lawyer's judgment, there is likelihood of harm to a victim who is unlikely to discover the offense. For example, an attorney with knowledge of a lawyer's misrepresentation to a client and concomitant failure, or impending failure, to file a claim within the statute of limitations, which does not fall within the confidentiality exception, is required to report that lawyer if the client is unaware of the problem and would likely suffer substantial damage as a result of the lawyer's misconduct.
>
> There also are some violations that clearly do not fall within the scope of Mass. R. Prof. C., 8.3. For example, the failure of a lawyer to return a file as promptly as might have been optimal would not require a report, nor would knowledge that a lawyer failed to act with reasonable diligence, if the matter caused little or no potential injury to the client or others. [Emphasis added.]

Reporting Professional Misconduct: An Analysis of the Duties of a Lawyer Pursuant to Mass R. Prof. C. 8.3 (1998) (citations omitted). *See also* S. Best, *The Snitch Rule and Beyond, Mandatory and Permissive Reports of Lawyer Misconduct under Mass. RPC 8.3* (2016).

The Massachusetts Bar Counsel's Policy Statement thus "clearly" mandates reporting of misconduct involving client financial matters.

Courts in New York have also consistently emphasized the serious nature of escrow account violations and other financial malfeasance by lawyers. Each Appellate Department has in recent years disbarred lawyers who misused or misappropriated escrow funds or otherwise breached fiduciary duties regarding money. *See, e.g., In re Bloomberg,* 154 A.D.3d 75 (1st Dep't 2017) (disbarment for lawyer who

intentionally converted $200,000 of client funds); *Matter of McMillan, 164* A.D.3d 50 (2d Dep't 2018) (disbarment for lawyer who deprived sister of inheritance while acting as administrator of deceased mother's estate); *Matter of Castillo,* 157 A.D.3d 1158 (3d Dep't 2018) (disbarment for converting client funds to personal use); *In re Agola,* 128 A.D.3d 78, 6 N.Y.S.3d 890 (4th Dep't 2015) (disbarment for misappropriating client advances earmarked for expenses).

Likewise, all four Appellate Departments have suspended lawyers who engaged in financial misconduct. *See, e.g., Matter of Pierre,* 170 A.D.3d 36 (1st Dep't 2019) (five year suspension for commingling client and personal funds using escrow account to pay personal and business expenses); *Matter of Costello*, 174 A.D.3d 34 (2d Dep't 2019) (one year suspension for misappropriating client funds and failing to maintain required bookkeeping records for attorney escrow accounts); *Matter of Kayatt,* 159 A.D.3d 101 (3d Dep't 2018) (two year suspension for using escrow accounts as business and personal accounts to shield personal funds from tax authorities); *In re McClenathan,* 128 A.D.3d 193 (4th Dep't 2015) (one year suspension for misappropriating client funds and engaging in other escrow account violations).

Ethics opinions also emphasize the importance of abiding by the rules relating to honesty and escrow accounts. *See* N.Y. State Ethics Op. 1165 (2019) (under Rule 1.15, a lawyer "must not remove from the trust account those sums that the client questions until the dispute is resolved"); N.Y. City 2017-2 (a lawyer who learns that another lawyer has fraudulently billed a client must report the other lawyer pursuant to Rule 8.3 unless the report would reveal client confidences without client's consent); N.Y. State Ethics Op. 965 (2014) (under Rules 1.15 and 8.4, "[c]lient funds in a lawyer's escrow account may not be shielded from lawyer's creditor by transferring them to an escrow account held by the lawyer's lawyer").

COSAC believes it would make sense for the Comments to Rule 8.4 to include a statement recognizing the consistent treatment by courts of lawyers who convert or steal client funds, or otherwise breach their duty to maintain "a high degree of vigilance" to ensure that funds entrusted to lawyers in a fiduciary capacity are returned upon request. *See Matter of Galasso,* 19 N.Y.3d 688 (2012) (affirming finding of Rule 1.15 violation by a lawyer who had failed to supervise his law firm's bookkeeper, resulting in loss of client funds). The proposed amendment to Comment [3] to Rule 8.3 therefore makes clear that offenses such as conversion or theft of client funds must be reported. The proposed amendment also cross-

references Comment [2] to Rule 8.4, which provides additional and helpful guidance as to what kinds of misconduct reflect adversely on fitness to practice law.

Relevant New York Rules of Professional Conduct

RULE 3.4
FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

x x x

(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;

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

COMMENT

x x x

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

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.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation to cooperate with authorities empowered to investigate judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would result in violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

[3A] Paragraph (b) requires a lawyer in certain situations to respond to a

lawful demand for information concerning another lawyer or a judge. This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and corresponding provisions of state law. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide assistance program for lawyers or judges. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) encourages lawyers and judges to seek assistance and treatment through such a program. Without such an exception, lawyers and judges may hesitate to seek assistance and treatment from these programs, and this may result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

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 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;

x x x

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 4.4
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.

ABA Model Rules
Rule 3.4 and 8.3

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state 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; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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 in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Definitional Cross-References

"Knows" *See* Rule 1.0(f)
"Substantial" *See* Rule 1.0(l)

Relevant Ethics Opinions

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2015-5: WHETHER AN ATTORNEY MAY THREATEN TO FILE A DISCIPLINARY COMPLAINT AGAINST ANOTHER LAWYER

TOPIC: Threatening to file a disciplinary complaint against another lawyer

DIGEST: An attorney who intends to threaten disciplinary charges against another lawyer should carefully consider whether doing so violates the New York Rules of Professional Conduct (the "New York Rules" or "Rules"). Although disciplinary threats do not violate Rule 3.4(e), which applies only to threats of criminal charges, they may violate other Rules. For example, an attorney who is required by Rule 8.3(a) to report another lawyer's misconduct may not, instead, threaten a disciplinary complaint to gain some advantage or concession from the lawyer. In addition, an attorney must not threaten disciplinary charges unless she has a good faith belief that the other lawyer is engaged in conduct that has violated or will violate an ethical rule. An attorney must not issue a threat of disciplinary charges that has no substantial purpose other than to embarrass or harm another person or that violates other substantive laws, such as criminal statutes that prohibit extortion.

RULES: 1.6, 3.1, 3.4(a)(6), 3.4(e), 4.4(a), 8.3(a), 8.4(a), 8.4(b), 8.4(c), 8.4(d) or 8.4(h)

QUESTION: May an attorney threaten to file a disciplinary complaint against another lawyer?

OPINION:

I. Introduction

According to the Scope of the New York Rules, the purpose of the Rules is "to provide a framework for the ethical practice of law." Scope, at [8]. Compliance with the Rules "depends primarily on understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, where necessary, upon enforcement through disciplinary proceedings." *Id.* One of several tools that the disciplinary system relies on for enforcement of the Rules is the mandatory reporting obligation, which requires lawyers to report certain types of ethical violations. *See* R. 8.3(a) (requiring attorneys to report another lawyer's "violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer"). Short of reporting unethical conduct, however, many attorneys are uncertain of their obligations when they perceive that another lawyer has violated the disciplinary rules. One question that continues to plague many attorneys is whether – and under what circumstances – they are ethically permitted to *threaten* another lawyer with disciplinary charges. Here, we use the term "threat" to mean a "statement saying you will be harmed if you do not do what someone wants you to do." Merriam-Webster Dictionary, at http://www.merriam-webster.com/dictionary/threat. In our view, merely advising

another lawyer that his conduct violates a disciplinary rule or could subject them to disciplinary action does not constitute a "threat" unless it is accompanied by a statement that you intend to file disciplinary charges unless the other lawyer complies with a particular demand.

Rule 3.4(e) arguably comes closest to addressing this issue, as it prohibits lawyers from threatening "to present criminal charges solely to obtain an advantage in a civil matter." It is silent, however, with respect to threatening disciplinary charges. Accordingly, as discussed below, we conclude that Rule 3.4(e) does not expressly prohibit disciplinary threats. Nevertheless, an attorney who contemplates making such a threat should carefully consider whether doing so violates other Rules. In this opinion, we discuss several other Rules that may apply to threats of disciplinary charges, depending on the circumstances. Although we have attempted to address a variety of scenarios in which disciplinary threats arise, there may be situations that implicate other Rules, which are not addressed in this opinion.

II. Rule 3.4(e) Does Not Apply to Threats to File Disciplinary Grievances

Rule 3.4(e) states: "A lawyer shall not . . . present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Comment [5] elucidates the Rule further:

> The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done. But extortion is committed if the threat involves conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute).

Several states do have rules that explicitly prohibit threatening to file a disciplinary grievance against an adversary to gain an advantage in a civil matter. In California, for example, a lawyer "shall not threaten to present *criminal, administrative or disciplinary charges* to obtain an advantage in a civil dispute." California Rules of Prof'l Conduct, R. 5-100(A) (emphasis added). District of Columbia also prohibits a lawyer from "seek[ing] or threaten[ing] to seek criminal charges *or disciplinary charges* solely to obtain an advantage in a civil matter." D.C. Rules of Prof'l Conduct, R. 8.4(g) (emphasis added).[1] Unlike these states, New York's corresponding rule prohibits only a

[1] Other states have similar rules. *See, e.g.*, Louisiana Rules of Prof'l Conduct, R. 8.4(g) ("It is professional misconduct for a lawyer to . . . [t]hreaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter."); Colorado Rules of Prof'l Conduct, R. 4.5 ("A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter."); Ohio Rules of Prof'l Conduct, R. 1.2(e) ("Unless otherwise required by law,

threat to file criminal charges and omits any reference to disciplinary charges. Further, in an opinion analyzing the predecessor of Rule 3.4(e), the Committee on Professional Ethics for the New York State Bar Association ("NYSBA") declined to extend the rule to threats of disciplinary charges. *See* NYSBA Ethics Op. 772 (2003) (discussing former DR 7-105(A) of the New York Code of Professional Responsibility (the "Code")). Opinion 772 examined whether a lawyer could ethically threaten a stockbroker with a disciplinary complaint filed with a self-regulatory body unless he returned funds wrongfully taken from a client. The opinion states:

> In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates DR 7-105(A), we observe that the language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions . . . .
>
> Thus, we conclude that the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A).

Id. Therefore, according to the opinion, "the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer *solely to obtain the return of the client's funds*." *Id.* n.4 (emphasis added). We agree that Rule 3.4(e) does not extend to the threat of disciplinary charges.

This view is not without contrary authority. The Nassau County Bar Association Committee on Professional Ethics ("Nassau") concluded that DR 7-105 applied to threats to file disciplinary charges. *See* Nassau Ethics Op. 98-12 (1998) ("An actual threat to file a grievance if the adversary attorney would not offer a better settlement would . . . violate DR 7-105."). While we agree that this conduct may violate other New York Rules, as discussed below, we do not believe it violates Rule 3.4(e), the successor to DR 7-105. Likewise, in *Zubulake v. UBS Warburg LLC,* 230 F.R.D. 290, 293 (S.D.N.Y. 2003), Judge Scheindlin extended the application of DR 7-105(A) by analogy to "threats of regulatory enforcement," noting that the analogy was "especially apt" where "regulatory enforcement can result in industry wide 'censure' and fines upward of one million dollars." In our view, however, the plain language of Rule 3.4(e) should govern and we decline to extend the rule by analogy to threats of disciplinary action against attorneys. Our conclusion does not mean, however, that lawyers are free to threaten disciplinary charges with impunity. As discussed below, other ethical rules impose limits on making such threats.

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a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.").

III. An Attorney May Not Threaten to File a Disciplinary Complaint Where There is a Mandatory Duty to Report the Other Lawyer's Misconduct

Under Rule 8.3(a), New York attorneys are required to report certain misconduct by other lawyers. Specifically, "[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." R. 8.3(a) (emphasis added).[2] The policy behind this mandatory reporting requirement is to foster an effective system of self-regulation by lawyers. As explained in the Comments, "[s]elf-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct." R. 8.3, Cmt [1]. Even an "apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." *Id.* Further, "[r]eporting a violation is especially important where the victim is unlikely to discover the offense." *Id.*

Before concluding that there is a mandatory duty to report, an attorney must "know" that another lawyer has violated the Rules. R. 8.3(a). The term "knows" means to have "actual knowledge of the fact in question." R. 1.0(k). The attorney need not be an eyewitness to the conduct, however, because "knowledge can be inferred from the circumstances." *Id.* In addition, not every violation triggers a duty to report – only those violations that raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." R. 8.3(a); *see also* ABA Ethics Op. 94-383 (1994) (noting that the "Rules do not require the reporting of every violation of the Rules"). Subjecting every rule violation to a mandatory report would be unworkable. Not only would every insignificant or inadvertent violation be a reportable offense, but the very failure to report such violations would itself be a reportable offense, potentially creating an endless loop of reportable violations. Consequently, Rule 8.3(a) "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent." R. 8.3, Cmt [3]. For example, a lawyer who believes an attorney on the opposite side of a real estate transaction is charging an unreasonable fee is not necessarily required to report the violation. *See* NYSBA Ethics Op. 1004 (2014). Reporting is required only if the lawyer concludes "under all circumstances, that the setting of the fee reflects adversely on that attorney's fitness to practice law or involves dishonesty." *Id.*

Once an attorney concludes that she has a mandatory duty under Rule 8.3(a) to report another lawyer's conduct, failing to report the misconduct would itself violate Rule 8.4(a), which prohibits a lawyer from "violat[ing] or attempt[ing] to violate the Rules of Professional Conduct." ABA Ethics Op. 93-383. By extension, *threatening* to file a

[2] There are several exceptions and exclusions to this reporting requirement. Reporting is not required if the information is protected by Rule 1.6 (confidentiality) or was gained during participation in a "bona fide lawyer assistance program." R. 8.3(c). In addition, the "duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question." R. 8.3, Cmt. [4]. Rule 8.3(a), which refers only to the misconduct of "another lawyer," does not require a lawyer to report his or her own misconduct or the improper conduct of a nonlawyer.

disciplinary complaint unless the other lawyer accedes to some demand would, likewise, violate Rule 8.4(a). Even if the attorney who made the threat ultimately reports the other lawyer's conduct (perhaps because the lawyer does not succumb to the threat) she would still be in violation of Rule 8.4(a), which prohibits a lawyer from attempting to violate the New York Rules. That said, before making a report, an attorney is permitted to confront her adversary with evidence of misconduct to confirm that an ethical violation has occurred. *See* Roy D. Simon, "Threatening to File Grievance Against Opposing Counsel," New York Legal Ethics Reporter (Originally published in NYPRR, Nov. 2005), available at http://www.newyorklegalethics.com/threatening-to-file-grievance-against-opposing-counsel/ [hereinafter, Simon, "Threatening to File Grievance"]. As Professor Simon explains, "a lawyer has the right . . . to notify opposing counsel, as a courtesy, of the intention to file the grievance." *Id.* Further, the attorney may "confront opposing counsel with evidence of misconduct" and may "ask whether opposing counsel denies the misconduct or can cast doubt on whether it occurred." *Id.* What the attorney may not do is condition the handling of a mandatory grievance on compliance with a particular demand. So, if after confronting the opposing lawyer with evidence of the misconduct, the attorney is convinced that the other lawyer in fact committed the misconduct, it would be improper, in the words of Professor Simon, to "invit[e] the opposing lawyer to bargain away the grievance." *Id.*

Example: Defendant's lawyer submits a brief in support of his motion to dismiss, which cites several fictitious judicial opinions. Plaintiff's counsel contacts defendant's lawyer and presents him with proof that the citations are fictitious. Defendant's lawyer insists that the false citations are valid and not an inadvertent mistake. Assuming Plaintiff's counsel concludes that such conduct triggers a mandatory duty to report, she may not threaten to report the violation unless the motion is withdrawn.

IV. Threatening to File a Disciplinary Grievance Against Another Lawyer May Violate Other Rules

As discussed above, attorneys are not required to report every ethical violation. For example, an attorney is not required to report conduct that she merely suspects – but does not "know" – has been committed. Nor is she required to report conduct that does not raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." R. 8.3(a). Even where an attorney is not required to report unethical conduct, however, she is *permitted* to report such conduct, subject to confidentiality restrictions and provided she has a "good faith belief of suspicion that misconduct has been committed." *See* NYSBA Ethics Op. 635 (1992). Professor Simon refers to this type of violation as a "discretionary grievance." Simon, "Threatening to File Grievance," *supra.*

The New York Rules do not expressly prohibit attorneys from threatening to report discretionary grievances. Depending on the circumstances, such threats may be consistent with a disciplinary system that is based, at least in part, on self-regulation. For example, if an attorney suspects another lawyer is unaware that his conduct violates the Rules, it may be appropriate to educate the lawyer about the violation and give him an opportunity to change his conduct, before filing a disciplinary violation. In addition, it

may be appropriate to threaten disciplinary action in order to induce the other lawyer to remedy the harm caused by his misconduct, such as returning improperly withheld client funds or correcting a false statement made to the court.

Example: A personal injury plaintiff's lawyer receives a settlement payment on behalf of a client. A dispute arises between the plaintiff's lawyer and client concerning the amount of the lawyer's fee. Instead of retaining only the amount of the disputed fee in his trust account, as permitted by Rule 1.15(b)(4), the plaintiff's lawyer withholds the entire settlement payment. The client then hires a second attorney to assist in recouping the client's share of the settlement funds. The new attorney sends a letter to the plaintiff's lawyer demanding return of the undisputed portion of the settlement funds and stating "if you refuse to return the funds, you will be in violation of Rule 1.15 of the New York Rules of Professional Conduct, and we will report you to the appropriate disciplinary authority unless the funds are disbursed." In our view, it is permissible to include this language in the demand letter. At this stage, the attorney does not "know" that the plaintiff's lawyer's retention of the funds "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer," as specified in Rule 8.3(a). The plaintiff's lawyer may simply misunderstand his obligations under Rule 1.15 and may genuinely believe he has a right to withhold the funds until the fee dispute is resolved. If the attorney subsequently concludes, however, that the plaintiff's lawyer is intentionally and improperly withholding the client's funds, that would likely trigger a duty to report the violation.

We recognize that not all lawyers who threaten to file disciplinary complaints do so for laudable reasons. Lawyers should not interpret the Committee's opinion as an unfettered license to threaten their adversaries with disciplinary violations. Given the opportunity for abuse, we emphasize that the right to threaten a disciplinary grievance is subject to important limitations, which are discussed below.

A. Before Threatening to File a Disciplinary Complaint, an Attorney Must Have a Good Faith Belief That the Other Lawyer is Engaged in Unethical Conduct

An attorney must not threaten to file disciplinary charges against another lawyer absent a "good faith belief" that the lawyer is engaged in conduct that has violated or will violate a disciplinary rule. NYSBA Ethics Op. 635 (1992) ("[I]t would be patently improper for a lawyer to make a report of misconduct and subject another lawyer to investigation "without having a reasonable basis for doing so . . . ."). Such baseless threats would violate multiple provisions of Rule 8.4. *See, e.g.*, R. 8.4(c) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation"); R. 8.4(c) (prohibiting "conduct that is prejudicial to the administration of justice"); R. 8.4(h) (prohibiting "other conduct that adversely reflects on the lawyer's fitness as a lawyer").

Example: Plaintiff's counsel sends a letter to Defendant's counsel stating that she has been gravely injured in a car accident and requesting adjournment of an upcoming hearing date. Without taking steps to verify the accuracy of Plaintiff's statements,

Defendant's counsel accuses Plaintiff's counsel of lying about her injuries and threatens to file a disciplinary complaint against her if she seeks an adjournment from the court. Unless Defendant's counsel has a good faith basis to believe that Plaintiff's counsel has lied about the car accident or misrepresented the extent of her injuries, his threats are improper.

Given that any disciplinary threat must be based on a good faith belief, it necessarily follows that a lawyer may not make a threat she *knows* to be false. Rule 4.1 states that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." This prohibition includes threatening to file a disciplinary grievance that is based on a false statement of fact or law. Such a threat would also violate Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."

Example (false statement of fact): After a long, acrimonious negotiation over a multi-million dollar corporate acquisition, the parties finally come to terms. When the buyer's lawyer delivers the execution copy of the purchase agreement, however, the seller's attorney falsely accuses the buyer's lawyer of altering some of the negotiated language. In reality, the seller has simply had a change of heart and wants more money. The seller's attorney threatens to file a disciplinary complaint against the buyer's lawyer unless the purchase price is increased by $1 million. This threat violates Rule 4.1 because it is based on a false statement of fact: that the buyer's lawyer altered the negotiated terms.

Example (false statement of law): A class action lawyer creates a website aimed at attracting clients for a lawsuit against a large pharmaceutical company. The company's in-house lawyer, under pressure from the CEO to "do something about that lawyer," sends a letter threatening to report the class action lawyer for "multiple egregious violations of the advertising and solicitation rules" if he does not take down his website. In fact, the website complies with the advertising rules. In our view, this threat violates Rule 4.1 because it is based on a false statement of the law regulating lawyer advertising.

In addition, making such a threat in a civil or criminal proceeding may also violate Rule 3.1(a), which states that 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." According to the Rule, "[a] lawyer's conduct is 'frivolous' if," *inter alia*, "the lawyer knowingly asserts material factual statements that are false" or "the conduct . . . serves merely to harass or maliciously injure another." R. 3.1(b).

B. An Attorney Must Not Make a Threat That Has No Substantial Purpose Other Than to Embarrass or Harm Another Person

Like Rule 3.1(b), Rule 4.4(a) serves to curb misconduct that is aimed at harming third parties. Unlike Rule 3.1(b), which applies only in the litigation context, Rule 4.4(a) applies to all types of representations. Rule 4.4(a) states, *inter alia*, "[i]n representing a

client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person." Threatening to file a disciplinary complaint against an adversary in order to gain a strategic advantage violates this rule, if the threat serves no substantial purpose other than to embarrass or harm the other lawyer or his client.

Example: An attorney who represents several plaintiffs in a personal injury lawsuit discovers that a private investigator hired by defense counsel has friended the plaintiffs on social media in order to obtain evidence that their injuries are not as serious as claimed. Although this conduct violates Rule 4.2 ("Communication with Person Represented by Counsel") and Rule 8.4(a) (violating the rules "through the acts of another"), it is not necessarily a mandatory reporting violation. Plaintiffs' attorney threatens to report defense counsel's conduct to the court unless the defendant settles the case on terms the defendant is otherwise unwilling to accept. This threat may harm both the defense lawyer and his client because it could create a conflict of interest between them and interfere with the sanctity of their attorney-client relationship. The defense lawyer may face pressure to recommend a settlement that he believes is against the client's interests in order to protect the lawyer's personal and professional interests. We do not believe that the goals of the disciplinary rules are served when an attorney uses a disciplinary threat improperly to create a conflict of interest between another lawyer and his client. There are legitimate options available to the plaintiffs' attorney to address the misconduct, including seeking sanctions or disqualification.

C. An Attorney May Not Make a Threat in Violation of Substantive Law

Certain types of threats may violate the law. For example, New York Penal Law prohibits the taking of another person's property by "extortion." The statute provides, *inter alia*:

> A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . [e]xpose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or . . . Perform any other act which would not in itself materially benefit the actor but which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation or personal relationships.

N.Y. PEN. LAW § 155.05(1)(e)(v), (ix).

Under certain circumstances, threatening to file a disciplinary complaint may violate New York's law against extortion or other criminal statutes.[3] In such cases, the

[3] We reference New York's extortion statute merely as an example of the type of law that might be violated by threats of disciplinary action. Because the Committee has no jurisdiction to interpret substantive law, we offer no opinion on whether a particular threat would violate Section 155.05 or any substantive law.

lawyer's conduct would also violate Rule 3.4(a)(6) ("A lawyer shall not . . . knowingly engage in other illegal conduct") and multiple subsections of Rule 8.4, including Rule 8.4(b) (prohibiting "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"), Rule 8.4(d) (prohibiting "conduct that is prejudicial to the administration of justice"), and Rule 8.4(h) (prohibiting "conduct that adversely reflects on the lawyer's fitness as a lawyer").

V. Conclusion

An attorney who intends to threaten disciplinary charges against another lawyer should carefully consider whether doing so violates the New York Rules. Although disciplinary threats do not violate Rule 3.4(e), which applies only to threats of criminal charges, they may violate other Rules. For example, an attorney who is required by Rule 8.3(a) to report another lawyer's misconduct may not, instead, threaten a disciplinary complaint to gain some advantage or concession from the lawyer. In addition, an attorney must not threaten disciplinary charges unless she has a good faith belief that the other lawyer is engaged in conduct that has violated or will violate an ethical rule. An attorney must not issue a threat of disciplinary charges that has no substantial purpose other than to embarrass or harm another person or that violates other substantive laws, such as criminal statutes that prohibit extortion.

BAR ASSOCIATION OF NASSAU COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 1998-12

(Inquiry No.)

Topics:

Duty when confronted with information raising a substantial question as to the fitness of another attorney to practice law – – bringing fraud to the attention of a tribunal.

Digest:

An attorney who has information indicating the possibility of an adversary attorney being involved in perpetrating a fraud upon a court must make a determination whether the attorney has knowledge sufficient to require reporting of such information, and if so, when and how to make such report.

Code Provisions:

EC 1-1

EC 1-5

EC 7-1

DR 1-102(A)(4)

DR 1-103(A)

DR 7-102(A)(4), (5), (6), (7), (B)(2)

DR 7-104(A)(1)

DR 7-105

Facts Presented:

During a contested Child Support proceeding, the Inquiring Attorney learned from an investigator who independently communicated with the adversary attorney's client that the client was working (refinishing floors) off-the-books, and gave the name of the adversary attorney as his reference. Yet, the adversary attorney has submitted and notarized papers to the court representing that the client is injured and cannot work or pay more than the statutory minimum amount of child support.

Inquiry:

What are the ethical obligations of an Inquiring Attorney under the Code of Professional Responsibility upon receiving information independently obtained by an investigator about a fraud perpetrated by an adversary and possibly by his attorney in a pending matter before a tribunal?

Determination:

The information presented may indicate not only the possibility of a fraud upon a tribunal, and thus conduct in violation of DR 7-102(A) (4),(5),(6), or (7), and may raise a substantial question as to the fitness

of another attorney, but also the possibility of the adversary attorney's client's intention to commit violations of state and federal laws that may carry criminal penalties. The Inquiring Attorney has obligations regarding such a matter under the Code. However, it is also a tactical matter within the discretion of the Inquiring Attorney as to how and when to act on this information. One option that is supported by both the Code of Civility and Ethical Consideration 1-5 would be to first confront the adversary attorney to verify any assumption regarding the adversary attorney's own awareness or participation in such conduct, and provide him or her with the chance to pursue adequate corrective measures necessary to rectify any misrepresentation made. If the adversary attorney will not act to correct any inaccuracies or misrepresentation made or endorsed by the attorney to the court, then under several provisions of the Code the Inquiring Attorney is obligated to inform either the court or a disciplinary authority. Another option within the discretion of the Inquiring Attorney, if he or she determines it to be in the best interest of his or her client, would be to bring out such facts in the course of cross-examination, where the duty to report to the tribunal would also be satisfied.

Analysis:

This inquiry raises serious issues relevant to the integrity of the legal profession where an attorney may knowingly have participated in perpetrating a fraud upon a court. Under the Code, the Committee notes that there is an affirmative responsibility on all attorneys to protect the integrity, of the profession. This is consistent with the Inquiring Attorney's duty's to the Court, to the legal profession and to the public, and is further supported by the recently enacted Code of Civility adopted by New York. Yet, the Inquiring Attorney must use discretion to determine whether such course of action is advisable and consistent with pursuing the best interests of the client. It would also fulfill obligations under the Disciplinary Rules to bring out the discovery of facts showing a fraud in the course of discovery, cross-examination or otherwise during a litigated proceeding.

A necessary matter for consideration identified in the inquiry is that the Inquiring Attomey has learned from an investigator who communicated directly with a represented party, calling the party after he had done surveillance upon his activities. This involves DR 7-104(A)(1) which states: "During the course of the representation of a client a lawyer shall not. . . communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." Here, however, the Inquiring attorney did not cause the investigator to communicate with the represented party. Instead, the investigator made the communication without the advance knowledge of the Inquiring Attorney, who subsequently learned of the communication when the investigator apprised him of the results of his investigation. Had the Inquiring Attorney assigned the investigator to communicate with the represented party, this would violate DR 7-104. Here DR 7-104 does not appear to apply because the information was obtained unilaterally by the investigator, without any intentional communication initiated by, or on behalf of the Inquiring Attorney. Nevertheless, attorneys should heed the provisions of DR 7-104(A), "During the course of the representation of a client . . . [not to communicate or cause

another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter " without that lawyer's consent. (Emphasis added.)

While the information as presented appear to reasonably point in the director of a possible fraud, the Inquiring Attorney still does not know whether the adversary attorney (1) employed the client in the recent past, (2) is aware of an ongoing use of the attorney's name by the client as a work reference; and (3) knows that this employment was "off-the-books," which may have implications for violations of child support obligations. The Inquiring Attorney ought to bear in mind EC 1-5 which sets forth: "A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise." This ethical consideration suggests that the Inquiring Attorney attempt to verify or disprove any assumptions by confronting the adversary attorney.

Assuming the adversary attorney is not aware that the papers submitted to the court contain factual inaccuracies, then he should correct any misrepresentation that is now established or may wish to withdraw from the representation. The adversary attorney should work through his or her own responsibilities as governed by the Code, noting in particular that DR 4-101 (C)(3) may permit the adversary attorney to reveal the client's secrets to prevent what may constitute the future commission of crimes with regard to the Internal Revenue Code, Worker's Compensation regulations and federal law governing child support obligations. If the adversary attorney is willing and able to pursue the necessary corrective measures, the matter may be resolved without further action on the part of the Inquiring Attorney.

If the adversary attorney will not take the steps necessary to correct a knowing misrepresentation, the Inquiring Attorney has no choice but to bring the matter to the attention of a proper authority in accord with DR 1-103(A) or DR 7-102(B). DR 1-103(A) states: "A lawyer possessing knowledge, (1) not protected as a confidence or secret ... of a violation, of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." DR 1-102(A)(4) defines it as misconduct whenever lawyers "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Thus, the identified conduct here appears to trigger the reporting requirement under DR 1-103(A). See Bar Association of Nassau County ("BANC") Opinions ## 92-29, 93-34, 93-41.

While DR 1-103 leaves the Inquiring Attorney the option to report the conduct of an adversary attorney either to the court or in this county, the grievance committee, DR 7-102(B)(2) calls upon the Inquiring Attorney to act in his own capacity as an officer of the court, as it states: "A lawyer who receives information clearly establishing that ... a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal." Where the adversary attorney has for any reason failed to take steps to correct a fraudulent misrepresentation, the Inquiring attorney must take steps to inform the court, which at the same time acts to protect the integrity of the legal profession. Yet it should be clarified that both DR 1-103 and DR 7-102 have been determined to leave attorneys some discretion whether they believe there is sufficient knowledge as to fraudulent conduct that triggers a reporting

obligation, as opposed to a mere suspicion of misconduct, that triggers only an optional mandate to report on such conduct. See BANC ## 93-41 and 93-34, which examine this question in further detail.

Furthermore, DR 7-102(A) provides, inter alia, that an attorney shall not: (4) "knowingly use perjured testimony or false evidence"; (5) "knowingly make a false statement of law or fact"; (6) "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false"; and (7) "counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent." In this context, the adversary attorney's conduct implies a fraud not just upon the court but also upon society at large, when the attorney knowingly allows a client to violate tax law, worker's compensation regulations, and child support laws. In this situation, because of the seriousness stemming from the adversary attorney's apparent awareness of a client's actions, the Inquiring Attorney may choose to act in his capacity as an officer of the court in order to protect the integrity of the legal profession by reporting the knowing perpetration of fraud to a tribunal or disciplinary authority under DR 1-103. However, there is no compulsion on the Inquiring Attorney to choose to make this report to the disciplinary authority.

In the course of confronting the adversary attorney and discussing how to rectify this problem, the Inquiring Attorney may obtain a beneficial offer of settlement of the underlying dispute. As to the propriety of using such information, EC 7-1 requires that: "The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." The Inquiring Attorney may thus use the acquired information for the benefit of his or her client, while still being careful to observe DR 7-105, which sets another boundary on such discussions with the adversary attorney: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges. People v. Harper, 75 N.Y.2cl 313, 552 N.Y.S.2d 900 (1990). Thus, the Inquiring Attorney may communicate with the adversary attorney about the information and the necessity of correcting any misrepresentation which has been made. An actual threat to file a grievance if the adversary attorney would not offer a better settlement would, however, violate DR 7-105. The Inquiring Attorney has both the right and obligation to use the information however he or she deems most helpful and permissible in the attorney's professional judgment.

[Approved by the Exec. Subcomm. 10/20/98; Approved by the Full Committee 10/28 /98.]

NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion 772 – 11/14/03	Topic: Threatening and presenting criminal, administrative and disciplinary charges to obtain an advantage in a civil matter.
	Digest: DR 7-105(A) prohibits the presentation and threatened presentation of criminal charges when the purpose is to effect a resolution of a civil dispute; the disciplinary rule does not embrace administrative or disciplinary charges that may be threatened or presented in connection with a civil dispute, regardless of purpose.
	Code: DR 1-102(A)(4), 1-102, 1-102(A)(3), (4), 4-101(A), 4-101(B)(1), 7-101(A)(1),(2),(5), 7-105(A); EC 7-7, 7-15, 7-21.

QUESTION

May a lawyer representing a client seeking the return of funds alleged to have been wrongfully taken by a stockbroker ("Broker"): (a) make a demand or file a lawsuit on behalf of the client for the return of such funds and thereafter file a complaint against the Broker with either a prosecuting authority ("Prosecutor") or a self-regulatory body having jurisdiction over the Broker, such as the New York Stock Exchange ("NYSE"); or (b) send a demand letter on behalf of the client either (i) stating the client's intention to file a complaint with a Prosecutor about the Broker's conduct unless the funds are returned within a specified period of time, or (ii) pointing out the criminal nature of the allegedly wrongful conduct and requesting an explanation of the Broker's actions?

OPINION

When a client invests funds with a Broker who is an associated member of a self-regulatory body, such as the NYSE or the National Association of Securities Dealers, and the Broker then wrongfully takes a portion of those funds for his or her own benefit, the Broker's conduct can have a variety of legal consequences. Viewed as a conversion of the client's funds, the taking may become the subject of a civil liability claim asserted by the client, perhaps leading to the filing of a lawsuit or arbitration. Viewed as a theft, the taking may become the subject of a criminal complaint filed by the client with a Prosecutor, perhaps leading to a criminal prosecution. Viewed as a violation of the rules of the NYSE or any other self-regulatory body of which the Broker is associated, the taking may become the subject of a professional disciplinary proceeding to revoke the Broker's license to practice.

Consequently, when a client believes that a Broker has wrongfully taken funds, the lawyer is faced with various choices about how best to represent and promote the client's interests. Of course, it is the client who decides the objectives of the representation. See DR 7-101(A)(1); EC 7-7. If the client's primary objective is to obtain the return of such funds, the lawyer is likely to suggest first writing a letter to the Broker demanding the return of the funds. If the Broker does not return the funds within the specified time period, the client often will authorize the filing of a lawsuit or arbitration proceeding against the Broker for conversion. But if the client asks about alternative or additional ways of proceeding, a question of legal ethics is likely to arise: may the lawyer file or threaten to file a complaint or charge regarding the Broker's alleged wrongful conduct with either a Prosecutor or the NYSE?[1]

I. The Filing of a Complaint With a Prosecutor or the NYSE

A. The General Ethical Rules Regarding the Filing of any Complaint

In deciding whether to file any complaint against the Broker -- whether a lawsuit or an arbitration or a letter of complaint with either a Prosecutor or the NYSE -- there are a number of applicable disciplinary rules. DR 7-102(A)(2) prohibits a lawyer from "knowingly advanc[ing] a claim . . . that is unwarranted under existing law, except that a lawyer may advance such claim . . . if it can be supported by good faith argument for an extension, modification, or reversal of existing law." DR 7-102(A)(l) prohibits a lawyer from "fil[ing] a suit, assert[ing] a position . . . or tak[ing] other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Thus, before filing any complaint against the Broker, the lawyer must determine that the client's claim is warranted in law and in fact and that the complaint is not being made merely to harass or injure the Broker.

Two other disciplinary rules are relevant in preparing such a complaint. DR 1-102(A)(4) prohibits a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." DR 7-102(A)(5) states that in representing a client, "a lawyer shall not knowingly make a false statement of law or fact." Together, these two disciplinary rules impose additional ethical limits on what can be said in any such complaint.

Another disciplinary rule that deals specifically with the interplay of the system of civil liability and the criminal justice system, DR 7-105(A), states "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

EC 7-21 explains the purposes underlying DR 7-105(A):

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce the adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Thus, DR 7-105(A) is intended to preserve the integrity of both the system of civil liability and the criminal justice system by making sure that a lawyer's actual or threatened invocation of the criminal justice system is not motivated solely by the effect such invocation is likely to have on a client's interests in a civil matter. When, however, a lawyer's motive to prosecute is genuine -- that is, actuated by a sincere interest in and respect for the purposes of the criminal justice system -- DR

7-105(A) would be inapplicable, even if such prosecution resulted in a benefit to a client's interest in a civil matter.

Does DR 7-105(A) apply to the lawyer's filing of a complaint about the Broker's conduct with either a Prosecutor or the NYSE? [2]

B. Filing a Complaint With a Prosecutor

Whether the lawyer's filing of a complaint about the Broker's conduct with a Prosecutor violates DR 7-105(A) depends, in part, upon the meaning of the phrase "present criminal charges." If that phrase refers only to a Prosecutor's actions, then a lawyer's filing of a complaint would not qualify as either presentation of such charges, or participation in such presentation.

We have been unable to find any ethics opinions or court decisions interpreting DR 7-105(A) that address the definition of "present criminal charges." Perhaps this phrase was intended as a term of art, referring to the Fifth Amendment's requirement of a grand jury presentment or indictment for capital and infamous crimes. *See* 1 Charles Alan Wright, *Federal Practice and Procedure* § 110, at 459 (3d ed. 1999) ("The Constitution speaks also of a 'presentment' but this is a term with a distinct historical meaning now not well understood. Historically presentment was the process by which a grand jury initiated an independent investigation and asked that a charge be drawn to cover the facts should they constitute a crime."). Likewise, some criminal cases from the 1940s and 1950s refer to a prosecutor's presentation of criminal charges to the grand jury. *See, e.g., Clay v. Wickins*, 101 Misc. 75 (Sup. Ct. Spec. T. Monroe County 1957).

Despite this historical context, the fact remains that numerous ethics opinions and court decisions concerning DR 7-105(A) assume that a lawyer's conduct in reporting allegedly criminal conduct to a prosecutor, with the express or implied request that the prosecutor file criminal charges, is within the scope of DR 7-105(A). *See, e.g., Office of Disciplinary Counsel v. King*, 617 N.E.2d 676 (Ohio 1993); *People v. Farrant*, 852 P.2d 452 (Colo. 1993); *Crane v. State Bar*, 635 P.2d 163 (Cal. 1981); Virginia Opinion 1755 (2001); Nassau County 93-13; Nassau County 82-3.[3]

Based upon this authority, we too conclude that the filing of a complaint based on the Broker's conduct lies within the scope of DR 7-105(A). To fall within the scope of DR 7-105(A), such a complaint need only report the Broker's conduct to a Prosecutor; it need not expressly request that criminal charges be filed against the Broker, because such a request is implicit in the act of filing such a report with a Prosecutor.

DR 7-105(A) does not proscribe the filing of a complaint about the Broker's conduct with a Prosecutor unless the purpose of such a filing is "solely to obtain an advantage in a civil matter." The "solely" requirement makes the propriety of filing such a complaint contingent upon the client's intent. *See* §II (B) below. As long as one purpose of the client in filing such a complaint with a Prosecutor is to have the Broker prosecuted, convicted, or punished, then such a complaint would not offend the letter or spirit of DR 7-105(A). Thus, we conclude that as long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the Broker returning the client's funds and even if the client also intended that result, because the lawyer would not have filed such a complaint "solely" to obtain the return of the client's funds.

C. Filing a Complaint With the NYSE

In considering whether the lawyer's filing of a complaint against the Broker with the NYSE violates

DR 7-105(A), we observe that the language of DR 7-105(A) refers only to "criminal charges" as opposed to allegations regarding the violation of administrative or disciplinary rules, regulations, policies, or practices, such as those of the NYSE. In this respect, DR 7-105(A) differs from similar rules in other jurisdictions, such as the District of Columbia and Maine, where the language of the analogous disciplinary rule expressly refers to "administrative or disciplinary charges" in addition to criminal charges, *see* Maine Bar Rule 3.6(c), or just "disciplinary charges," *see, e.g.*, District of Columbia Rule 8.4(g); Virginia Rule 3.4(h). *See also Crane v. State Bar*, 635 P.2d 163 (Cal. 1981) (concerning §7-104 of the California Rules of Professional Conduct then in effect, which prohibited an attorney "from present[ing] criminal, administrative, or disciplinary charges to obtain an advantage in a civil action").

Thus, we conclude that the threatened or actual filing of complaints with, or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A). We recognize that there exist ethics opinions in this and other jurisdictions in which the threatened filing of a complaint with an administrative agency or disciplinary authority has been held to violate DR 7-105(A) or its analogue. *See, e.g.*, Nassau County 98-12; Illinois Opinion 87-7; Maryland Opinion 86-14. These decisions rely at least in part on the similar purposes of the criminal justice system and the administrative law system -- to protect society as a whole. However, we reject that general analogy in light of the specific language of DR 7-105(A), which concerns only "criminal charges."[4] In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges." We assume the term "criminal charges" has its ordinary meaning in New York State substantive law. *Cf.* District of Columbia Opinion 263 (1996) (finding that a criminal contempt proceeding growing out of a failure to abide by a Civil Protective Order in a domestic relations matter does not involve "criminal charges" under the substantive law of the District of Columbia).

II. Sending a Demand Letter

DR 7-105(A) not only prohibits a lawyer from presenting or participating in the presentation of criminal charges, but also prohibits a lawyer from threatening to do so. Thus, even if a lawyer were to send a letter to the Broker expressing a conditional intent to file a complaint, or even if a lawyer were to send a letter arguing that the Broker's conduct violates the criminal law and asks for an explanation or justification of the Broker's conduct, the lawyer could arguably be in violation of DR 7-105(A) if (i) such communications "threaten to present criminal charges,"[5] and (ii) do so "solely to obtain an advantage in a civil matter."

A. Threats

Some letters contain unambiguous threats to present criminal charges. In *In re Hyman*, 226 App. Div. 468 (1929), the First Department censured a lawyer who wrote a letter to the driver of an automobile that hurt his client, Miss Horn, stating:

> Unless you show some substantial evidence of your willingness to compensate Miss Horn [the attorney's client] for her injuries, I shall have no alternative but to immediately criminally prosecute you for assault against my client. In addition to that I shall institute civil action for the amount of the damages which Miss Horn has suffered.

226 App. Div. at 469. Four years after *In re Hyman*, the First Department censured another lawyer who sent a letter stating that unless money was paid immediately he "would present the matter to the district attorney upon a charge of larceny and embezzlement." *In re Beachboard*, 263 N.Y.S. 492 (N.Y. App. Div. 1933).[6] More recently, the Third Department

censured a lawyer for sending a letter to a workman which stated that unless the workman returned a sum of money to his client the lawyer would "have a warrant issued for [the workman's] arrest;" "you will return the money or go to jail." *In re Glavin*, 107 A.D.2d 1006- 1007 (1985).

In each of these cases, the letter refers to future criminal prosecution, but provides the recipient with the opportunity to avoid such prosecution by taking certain remedial action. The recipient is given a choice: either act to remedy the alleged civil wrong or face a criminal prosecution. The fear of criminal prosecution provides the leverage by which the lawyer hopes to coerce the recipient's decision.[7]

Based on these cases, we conclude that a lawyer would violate DR 7-105(A) by sending a letter to a Broker stating the client's intention (conditional or otherwise) to file a complaint with a Prosecutor relating to the Broker's conduct, assuming that the sole purpose of the letter were to obtain the return of the Funds. In reaching this conclusion, we consider it immaterial under DR 7-105(A) whether the Broker actually owed the client the requested funds or whether the client had good grounds for believing the funds were owed. As stated below, DR 7-105(A) prohibits a letter that threatens to file a complaint with a Prosecutor solely to obtain a civil advantage, regardless of whether the threat is extortionate or justifiable. *See* § II(C) below.

Other letters are more ambiguous in their intention to present criminal charges. Ethics opinions and courts in other jurisdictions are split on whether such ambiguous communications constitute a threat to present criminal charges. Some ethics opinions and court decisions interpret the mere allusion to a criminal prosecution or criminal penalties or even the use of criminal law labels to describe the opposing party's conduct in a letter as a veiled threat to present criminal charges to a prosecutor. *See, e.g., In re Vollintine*, 673 P.2d 755 (Alaska 1983); Virginia Opinion 1755 (2001). *Cf.* District of Columbia Opinion 220 (1991) (finding no relevant distinction "between threats and hints of threats" to file disciplinary charges encompassed within D.C. Rule 8.4[g]). *See generally* Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5, at 717 (1986). Other authorities have held that the mere mention of criminal penalties or the violation of criminal laws does not necessarily show the specific intent to threaten. *See, e.g., In re McCurdy*, 681 P.2d 131, 132 (Or. 1984).

In our view, there is no universal standard to determine whether a letter "threaten[s] to present criminal charges." Such a determination requires the examination of both the content and context of the letter. In our view, a letter containing an accusation of criminal wrongdoing likely constitutes a threat, especially when coupled with a demand that the accused wrongdoer remedy the civil wrong. Whether the accusation is general (simply stating that the Broker's conduct violates the criminal law) or specific (stating that the Broker's conduct violates particular provisions of the criminal law), such an accusation serves the undeniable purpose of coercing the accused wrongdoer. We point out, moreover, that a lawyer who sends a letter containing such a communication is exposed to professional discipline based upon the disciplinary authorities' interpretation of the lawyer's intent in sending the letter or statement.

B. The "Solely" Requirement

DR 7-105(A) does not prohibit all threats to present criminal charges; it prohibits only those that are made "solely to obtain an advantage in a civil matter." For that reason, ethics opinions and court decisions in other jurisdictions have found no violation of DR 7-105(A) or its counterparts when the threat of presenting criminal charges is intended for a purpose other than obtaining an advantage in a civil matter.

Consider, for example, the letter sent by the lawyer in *Decato's Case*, 379 A.2d 825 (N.H. 1977):

In New Hampshire, it is a crime to obtain services by means of deception in order to avoid the due payment therefore (sic). Without any proof on your part, you have chosen to stop payment on a check after it was made for the payment of services. Unless you communicate directly with me and give me some proof that the damages sustained to your son's International Harvester were the result of the failure of Decato Motor Sales, Inc., I shall consider filing a criminal complaint with the Lebanon District Court against your son for theft of services.

379 A.2d at 826. The New Hampshire Supreme Court imposed no discipline based on that letter, holding that the purpose of the lawyer's letter was not to gain leverage in a civil action by the threat of filing criminal charges, because Decato made no demand or request for payment from the letter's recipient – he only asked for information about the recipient's legal position.

Similarly, ethics committees in several other jurisdictions have opined that a letter referring to the criminal sanctions imposed for stopping payment on a check was not sent solely for the purpose of gaining an advantage in a civil matter. *See, e.g.*, Florida Opinion 85-3; Georgia Opinion 26 (1980); Utah Opinion 71 (1979). These opinions rested on the fact that state law imposes a requirement of such notification before bringing a civil action. *But see* New Mexico Opinion 1987-5 ("threats or references to criminal sanctions in demand letters for payment of supplies or recovery of worthless checks would have been improper under former Rule 7-105[A]").

Thus, if the lawyer sent a letter to the Broker stating that the Broker's conduct appeared to violate certain criminal statutes or appeared to carry certain criminal penalties and requesting an explanation or justification of the Broker's conduct, such a letter would not violate DR 7-105(A) if the lawyer intended merely to determine whether the Broker's conduct was actionable, either civilly or criminally, because it was not "solely to obtain an advantage." We acknowledge that basing our conclusion on the lawyer's intent in sending the letter renders the ethical assessment of the lawyer's conduct very fact-specific. However, we think there is no alternative if the "solely" requirement of DR 7-105(A) is to be taken seriously. *See* Connecticut Informal Opinion 98-19 ("Such an examination [of a lawyer's motivation] is very fact specific"); Florida Opinion 89-3 ("The motivation and intent of the attorney involved obviously will be a major factor in determining whether his or her actions are ethically improper. The Committee believes that such determinations necessarily must be made on a case-by-case basis").

We point out, however, that when a lawyer threatens criminal charges unless the recipient takes specified action, the threat is likely to have one clear purpose – the doing of that specified act. Thus, when a lawyer threatens to present criminal charges unless an action is taken which remedies a civil wrong, a presumption is likely to arise that DR 7-105(A) has been violated.[8]

C. DR 7-105(A)'s Relation to Illegal Conduct

Under New York law, proof of a threat to present criminal charges unless a certain specified action is performed constitutes a *prima facie* case of criminal coercion in the second degree, *see* N.Y. Penal Law § 135.60(4) (Consol. 2003), and, if property is obtained, makes out a *prima facie* case of extortion, *see* N.Y. Penal Law §155.05(2)(e)(iv) (Consol. 2003). However, New York law provides that such conduct is not unlawful if the person making such a threat "reasonably believed the threatened [criminal] charges to be true and that his sole purpose [in sending the letter] was to compel or induce the [recipient] to take reasonable action to make good the wrong which was the subject of the threatened charge." N.Y. Penal Law § 135.75 (Consol. 2003) (affirmative defense to criminal coercion). *Accord* N.Y. Penal Law § 155.15(2) (Consol. 2003) (affirmative defense to extortion).

Thus, if the lawyer sending a threatening letter to the Broker reasonably believes that the threatened criminal charges are true and the letter only demands that the Broker take an action that is reasonably calculated to remedy the wrongful taking, such a letter would not be unlawful. However, DR 7-105(A) still would apply, because it is immaterial to the literal language of DR 7-105(A) and its purpose whether the threatened criminal charges are true or whether the action demanded is reasonably related to rectification of the allegedly criminal conduct.

CONCLUSION

For the reasons stated above, the lawyer would not violate DR 7-105(A) by the actual or threatened filing of a complaint against the Broker with the NYSE. The filing of a complaint about the Broker's conduct with a Prosecutor would not violate DR 7-105(A) unless the lawyer's sole purpose in filing such a complaint was to obtain the return of the client's funds in dispute. A letter from the lawyer that threatened the filing of such a complaint unless the Broker returned the funds to the client would violate DR 7-105(A). Under the circumstances described above, a letter from the lawyer that threatened the filing of such a complaint unless the Broker provided information about his or her conduct would not violate DR 7-105(A) because obtaining an advantage in a civil matter would not be the sole purpose of such a threat.

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[1] In focusing this opinion on questions regarding the lawyer's actual or threatened filing of a complaint on behalf of a client, we choose not to opine on any related questions regarding whether it would be permissible for a non-lawyer client, who is not bound by the constraints of the New York State Lawyer's Code of Professional Responsibility (the "Code"), to file such a complaint on his or her own behalf. In this opinion, we are concerned only with the lawyer's professional responsibilities regarding the lawyer's own conduct.

[2] We assume throughout this opinion that the lawyer's client has consented to the lawyer filing or threatening to file a complaint about the Broker's conduct. Such consent would be necessary under the Code if the disclosure of the Broker's conduct would be embarrassing or detrimental to the client or the client expressly asked the lawyer not to disclose the Broker's conduct, because the lawyer is prohibited from revealing to third parties the client's "secrets,"*see* DR 4-101(B)(1), and, by definition, the Broker's conduct would be a "secret" under DR 4-101(A).

[3] These ethics opinions and court decisions contain no discussion and, therefore, provide no guidance as to whether the filing of such a complaint is construed as the presentation of criminal charges or participation in the presentation of criminal charges.

[4] We also reject the specific analysis underlying Nassau County 98-12 (1998). In that opinion, the Committee concluded that DR 7-105(A) prohibits an attorney from threatening to file a report with disciplinary authorities against another attorney. Citing *People v. Harper*, 75 N.Y.2d 313 (1990), the Committee stated: "Threatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges." But *Harper* did not find that DR 7-105(A) covered threats of filing or the actual presentation of disciplinary charges. *Harper* was an appeal from a jury verdict that a witness had received a bribe. The *Harper* Court referred to DR 7-105 solely with reference to the People's argument that "it is improper to use the threat of criminal prosecution as a means of extracting money in a civil suit." 75 N.Y.2d at 318. The *Harper* Court rendered no opinion about the actual or threatened reporting of disciplinary violations by lawyers.

[5] Because, for the reasons stated above, the filing of a complaint against the Broker with an administrative or disciplinary authority, such as the NYSE, is not within the scope of DR 7-105(A), the lawyer's threatening to file such a complaint would not violate DR 7-105(A), even if such a threat were intended by the lawyer solely to obtain the return of the client's funds.

[6] This short decision does not make it clear whether the respondent lawyer was acting on behalf of a client or for himself in sending the threatening letter. In our view, however, that does not matter. We agree with the numerous decisions in other jurisdictions holding DR 7-105(A) or its counterparts applicable where the respondent lawyer is acting on his or her own behalf. *See, e.g., Somers v. Statewide Grievance Committee*, 715 A.2d 712, 718-19 & n.19 (Conn. 1998); *In re Yarborough*, 488 S.E.2d 871, 874 (S.C. 1997); *In re Strutz*, 652 N.E.2d 41, 48 (Ind. 1995); *People v. Farrant*, 852 P.2d 452, 454 (Colo. 1993).

[7] As stated below, in some circumstances such a threat in itself may violate New York's Penal Law because it constitutes criminal coercion or extortion. *See* § II(C) below. In those circumstances, the threat not only violates DR 7-105(A); it also violates DR 1-102(A)(3)'s prohibition against "engag[ing] in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

[8] The Model Rules have no analogue to DR 7-105(A). The drafters of the Model Rules apparently believed that to the extent DR 7-105(A) serves legitimate purposes, the conduct it proscribes is prohibited by other ethical rules, such as Model Rule 8.4 (which is analogous to DR 1-102), Model Rule 4.1 (which is analogous to DR 1-102[A][4] and DR 7-102[A][5]), Model Rule 4.4 (which is analogous to DR 7-102(A)(1)), and Model Rule 3.1 (which is analogous to DR 7-102[A][2]). *See* ABA 92-363. To the extent that DR 7-105(A) prohibits conduct other than that prohibited by those Rules -- such as the actual or threatened presentation of criminal charges in a civil matter to gain relief for a client when the criminal charges are related to the civil matter, the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the facts and the law, and the lawyer does not attempt to exert or suggest improper influence over the criminal process, *see* ABA 92-363, -- the drafters of the Model Rules appear to have believed that DR 7-105(A) was overbroad because it "excessively restrict[ed] a lawyer from carrying out his or her responsibility to 'zealously' assert the client's position under the adversary system." *Id. See also* Geoffrey C. Hazard, Jr. & W. William Hodes, 2 *The Law of Lawyering*, § 40.4, at 40-7 (3d ed. 2000) ("rules like DR 7-105[A] . . . are overbroad because they prohibit *legitimate* pressure tactics and negotiation strategies") (emphasis in original).

2005 FORMAL ETHICS OPINION 3 (North Carolina)

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IMMIGRATION PROSECUTION TO GAIN AN ADVANTAGE IN A CIVIL MATTER

Adopted: July 14, 2005

Opinion rules that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations.

Inquiry:

During the discovery phase of a civil lawsuit, the defense lawyer learns that the plaintiff may be in the country illegally. Some of the plaintiff's witnesses may also be in the country illegally. The plaintiff's immigration status is entirely unrelated to the civil suit.

May the defense lawyer threaten to report the plaintiff or a witness to immigration authorities to induce the plaintiff to capitulate during the settlement negotiations of the civil suit?

Opinion:

This is a matter of first impression. The Rules of Professional Conduct and the ethics opinions have previously addressed only the issue of threatening criminal prosecution to gain an advantage in a civil matter.

Before 1997, Rule 7.5 of the Rules of Professional Conduct made it unethical for a lawyer "to present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter." The rule was not included in the Rules of Professional Conduct when they were comprehensively revised in 1997. Nevertheless, a lawyer may not use a threat of criminal prosecution with impunity. Threats that constitute extortion, compounding a crime, or abuse of process are already prohibited by other rules. See Rule 3.1 (meritorious claims); Rule 4.1 (truthfulness in statements to others); Rule 4.4 (respect for rights of third persons); Rule 8.4(b) and (c)(prohibiting criminal or fraudulent conduct). Moreover, 98 FEO 19 provides that a lawyer may present or threaten to present criminal charges in association with the prosecution of a civil matter but only if the criminal charges are related to the civil matter, the lawyer believes the charges to be well grounded in fact and warranted by law, and the lawyer does not imply an ability to improperly influence the district attorney, the judge or the criminal justice system.

The present inquiry involves the threat, not of criminal prosecution, but of disclosure to immigration authorities. Whether making such a threat is criminal extortion is a legal determination outside the purview of the Ethics Committee. If it is, the conduct is prohibited under Rule 8.4(b). Even where a lawyer may lawfully threaten to report a party or a witness to immigration authorities to gain leverage in a civil matter, the exploitation of information unrelated to the client's legitimate interest in resolving the lawsuit raises some of the same concerns as threatening to pursue the criminal prosecution of the opposing party for an unrelated crime.

In ABA Formal Opinion No. 92-363, threats of criminal prosecution are permitted only when there is a nexus between the facts and circumstances giving rise to the civil claim, and those supporting criminal charges. As explained in the opinion, requiring a relationship between the civil and criminal matters

> tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and discourages exploitation of extraneous matters that have nothing to do with evaluating that claim. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim furthers no legitimate interest of the justice system, and tends to prejudice its administration.

ABA Formal Op. No. 92-363; see also Rule 8.4(d)(prohibiting conduct that is prejudicial to the administration of justice).

There is no valid basis for distinguishing between threats to report unrelated criminal conduct and threats to report immigration status to the authorities: the same exploitation of extraneous matters and abuse of the justice system may occur. Rule 4.4(a) prohibits a lawyer, when representing a client, from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. In addition, the prohibition on conduct that is prejudicial to the administration of justice "should be read broadly to proscribe a wide variety of conduct including conduct that occurs outside the scope of judicial proceedings." Rule 8.4, cmt. [4]. The threat to expose a party's undocumented immigration status serves no other purpose than to gain leverage in the settlement negotiations for a civil dispute and furthers no legitimate interest of our adjudicative system. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.

NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

To: Committee on Standards of Attorney Conduct

From: Deborah Masucci, Chair of the Dispute Resolution Section

Re: Proposed Changes to New York Rule 3.4 (e)

Date: January 7, 2019

The Executive Committee of the New York State Bar Association's Dispute Resolution Section ("the Section"), and the Section's Ethics Committee, reviewed the Committee on Standards of Attorney Conduct's ("COSAC") proposed change to New York Rule 3.4(e).

The Section lauds the efforts of COSAC to clarify the obligations of counsel under the Rules of Professional Conduct. This area involves competing considerations. On one hand, principled bargaining, whether in negotiation or mediation, can involve coordinated discussions with an eye towards satisfying the interests of all parties. On the other hand, threatening disciplinary or criminal action could generate a counterproductive culture of coercion, manipulation and recrimination.

Rule 3.4(e) is significant to the field of Dispute Resolution, which includes negotiation and mediation. It is the experience of members of this Section that threats of this kind do, in fact, surface, at times, during negotiations and mediations. For purposes of regulating the culture of negotiation and mediation in which counsel are involved, and to retain or enhance the civility of those proceedings while also furthering the interests of all parties and the legitimate interests of counsel, the Section provides the following comment.

First, the Section supports the inclusion of the phrase "***or disciplinary***" in the Rule. Prohibition of a threat of this kind is entirely apt. In this context, it can be helpful to consider all pertinent and material information, including the risk of discipline or criminal action.

Second, the Section recommends that the balance of the proposed change should be withdrawn for further study. Recognizing that there are challenges on either side of this equation -- and that this is an area with serious impact on the domains of dispute resolution with potentially criminal legal implications -- the Section recommends that the additional changes be withdrawn for further study. The Section, in particular, recommends study and comment by the Criminal Justice Section of the NYSBA. The Section offers a representative to study the potential changes and its impact on negotiations within the context of mediation and settlement discussion.

Speaker Biographies

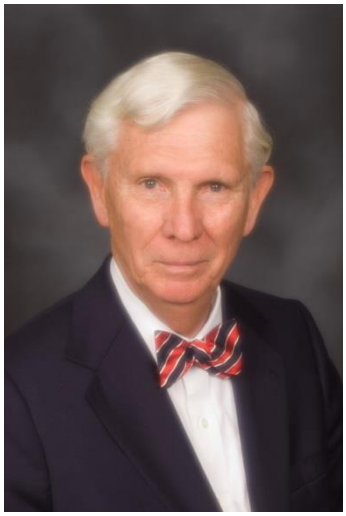
Marcia L. Adelson, Esq.

Marcia Adelson's practice is limited to alternate dispute resolution. She is an active mediator and has mediated more than 50 cases, primarily employment and commercial disputes.

She is on the Southern District of New York, New York City Supreme – Commercial Division, Westchester County Supreme – Commercial and Civil divisions and FINRA mediation panels. As a member of the Eastern District of New York's Mediation Advocacy Program, she serves as counsel for pro se plaintiffs for the limited purpose of mediation. She recently completed a two year term as a member on the Southern District of New York Mediation Advisory Council where she is working to improve the structure and outcomes in the use of mediation by the court.

She is also on the American Arbitration Association Commercial and Consumer Arbitration Panels, is a non-public arbitrator for FINRA and is on the NFA Panel of Arbitrators. Prior to focusing on alternate dispute resolution, Ms. Adelson was a commercial litigator for more than ten years. She represented customers and employees of financial services organizations.

She also ran a successful financial planning business in which she achieved a 95 percent client satisfaction rating, among the highest ranking of the more than 10,000 financial planners in the organization. She is admitted to the New York State bar and is a graduate of Swarthmore College, Columbia University, Graduate School of Business and Pace University, School of Law. Her contact information is marcia@marciadelsonlaw.com and website is www.marciadelsonlaw.com.



HON. WILLIAM G. BASSLER, FCIArb
130 Bodman Place, Suite 15
Red Bank, NJ 07701
Tel: +1 732 842 8658
judgewb@comcast.net
www.wgbdisputeresolution.com

After 24 years in private legal practice and nearly 20 years as a judge -- on the New Jersey Superior Court and then on the United States District Court -- Judge Bassler now specializes as a mediator (IMI Certified) and arbitrator of complex domestic and international commercial disputes. Representative matters include patents, trademarks, copyrights, license agreements, trade secrets, securities, insurance/reinsurance, environment, corporate governance, real estate, partnerships, joint ventures, contracts, franchises, pharmaceutical co-ventures, and professional malpractice.

While on the federal bench, he was appointed to preside over the historic resolution of the Holocaust slave labor cases: *In re Nazi Era Cases Against German Defendants Litigation*. More recently, he co-arbitrated a much-publicized arbitration, reputed to be the largest arbitration in the history of the United States, under the 1998 Master Settlement Agreement with various tobacco companies and U.S. States and Territories in which tobacco company signatories sought an over $1 billion reduction in their 2003 settlement payments.

Judge Bassler has been an adjunct professor at Seton Hall University Law School, Rutgers University Law School and Fordham University Law School teaching courses in wills, trusts, and estate planning; trial practice and procedure; judicial process; and arbitration. He is an active member of many influential organizations including ALI's Consultative Group on the Restatement Third, The U.S. Law of International Commercial Arbitration. He is also a member of the American Arbitration Association's Board of Directors of the American Arbitration Association. His arbitral and mediation experience, as well as his publications and speaking engagements, are listed on his website (http://www.wgbdisputeresolution.com/).

Judge Bassler received his BA degree from Fordham University (1960), JD from Georgetown University Law Center (Law Review, 1963), and LLMs, New York University Law School (1969) and the University of Virginia Law School (1995). In 2006, he completed the Program on Negotiation (PON) at Harvard Law School.

Resolve Mediation Services, Inc.
1211 Avenue of the Americas, 40th Floor
New York, NY 10036-8704
(212) 355-6527 (tel.)
(212) 753-0396 (fax)
info@mediators.com
(www.mediators.com)

Simeon H. Baum
President

Simeon Baum, President of Resolve Mediation Services, Inc., has successfully mediated over 1,000 disputes. He has been active since 1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, Trump's $ 1 billion suit over the West Side Hudson River development, and Archie Comics' shareholder/CEO dispute. Since 2005, he has consistently been listed in "Best Lawyers" and "New York Super Lawyers" for ADR, was the Best Lawyers' "*Lawyer of the Year*" for ADR in New York for 2011, 2014, 2018 and 2020; and in International Who's Who of Commercial Mediation Lawyers 2012-19.

An attorney, with over 30 years' experience as a litigator, Mr. Baum has served as a mediator or ADR neutral in a wide variety of matters involving claims concerning business disputes, financial services, securities industry disputes, reinsurance and insurance coverage, property damage and personal injury, malpractice, employment, ERISA benefits, accounting, civil rights, partnership, family business, real property, construction, surety bond defaults, unfair competition, fraud, bank fraud, bankruptcy, intellectual property, and commercial claims.

Mr. Baum has a longstanding involvement in Alternative Dispute Resolution ("ADR"). He has served as a neutral for the United States District Courts for the Southern and Eastern Districts of New York Mediation Panels; New Jersey Superior Court, Civil Part, Statewide; Commercial Division, New York State Supreme Court, New York & Westchester Counties; U.S. Bankruptcy Court, Southern & Eastern Districts of New York; the New York Stock Exchange; National Association of Securities Dealers; the U.S. Postal Service, the U.S. Equal Employment Opportunity Commission, CPR, AAA, and National Academy of Distinguished Neutrals (NADN), among others.

Mr. Baum's peers have appointed him to many key posts: e.g., Member, ADR Advisory Group, Commercial Division, Supreme Court, New York County; ADR Advisory Group and Mediation Ethics Advisory Committee, N.Y. State Unified Court System. Founding Chair of the N.Y. State Bar Association's Dispute Resolution Section, he was also subcommittee chair of the N.Y. State Bar Association's ADR Committee; Legislative Tracking Subcommittee Chair of the ADR Committee of the Litigation Section of the American Bar Association; Charter Member, ABA Dispute Resolution Section Corporate Liaison Committee; President, Federal Bar Association's SDNY Chapter, and Chair of the FBA's national ADR Section. He is past Chair of the New York County Lawyers Association (NYCLA) Committee on Arbitration and ADR. Besides serving on the NYCLA's Committee on Committees, he is past Chair of the Joint Committee on Fee Dispute and Conciliation (of NYCLA, ABC NY, and Bronx County Bar Associations), and is on the Board of Governors, NYS Attorney-Client Fee Dispute Resolution Program. He is also a Fellow of the American Bar Foundation. He is a Director for the New York NADN panel.

Mr. Baum has shared his enthusiasm for ADR through teaching, training, extensive writing and public speaking. He has taught ADR at NYU's School of Continuing and Professional Development, and he teaches Negotiation, and Processes of Dispute Resolution (focusing on Negotiation, Mediation and Arbitration) at the Benjamin N. Cardozo School of Law. He developed and conducts 3-day programs training mediators for the Commercial Division, Supreme Court, New York, Queens, and Westchester Counties. He has been a panelist, presenter and facilitator for numerous programs on mediation, arbitration, and ADR for Judges, attorneys, and other professionals. Mr. Baum is a graduate of Colgate University and the Fordham University School of Law.

Lucas Bento is a senior associate at Quinn Emanuel Urquhart & Sullivan LLP where he specializes in international disputes. Mr. Bento has taught international arbitration and transnational dispute resolution course at NYU and Insper (Brazil) and has written and lectured extensively on the use of AI in dispute resolution. He is a Visiting Scholar at Columbia Law School, a Fellow of the Chartered Institute of Arbitrators, and President of the Brazilian-American Lawyers Association. He is the founder of LegalAI and is currently writing a book about AI and the law (to be published in 2020).

Sasha Carbone, Esq.
Associate General Counsel and Assistant Corporate Secretary

Sasha Carbone is the Associate General Counsel and Assistant Corporate Secretary of the American Arbitration Association. Her responsibilities include providing legal counsel to the American Arbitration Association and its international division, the International Centre for Dispute Resolution, on a broad range of issues, particularly in the areas of dispute resolution, corporate governance, cybersecurity, data privacy, employment and contract management.

Ms. Carbone was the Chair of the AAA's Diversity Committee from 2009-2018. In 2009, she launched the AAA Higginbotham Fellows Program in order to provide training, mentorship and networking opportunities to up and coming diverse alternative dispute resolution professionals. Prior to joining the American Arbitration Association in 2003, Ms. Carbone worked as a litigation associate in law firms in Washington, D.C. and New York, where her practice focused on commercial litigation. She graduated from the University of Southern California cum laude with a B.S. in Business Administration in 1993 and graduated cum laude from Harvard Law School in 1996, where she was an editor of the Women's Law Journal.

Professor Alyson Carrel is a Clinical Associate Professor at Northwestern Pritzker School of Law and Assistant Director of their nationally-ranked Center on Negotiation and Mediation. For the past two years, she led the law school's legal technology & innovation initiatives as the Assistant Dean of Law & Technology. She is a tech curious legal educator and mediator with over 20 years of experience in a variety of contexts, including courts, non-profits, and law schools. She has received grants to purchase wearable cameras for negotiation simulation courses, a fellowship to integrate the A2J Author platform in her mediation advocacy clinic, and launched TEaCH LAW, a demonstration series for instructional technology. Today, as part of a small working group of individuals from Thomson Reuters, Michigan State, Suffolk, and Vanderbilt law schools, she is developing a new client-driven lawyering model for the 21st century that recognizes the importance of technology fluency and emotional intelligence in the delivery of legal services called the Delta Model.

Hon. Vito C. Caruso
Deputy Chief Administrative Judge for Courts Outside NYC

Hon. Vito C. Caruso was appointed as Deputy Chief Administrative Judge for Courts Outside New York City effective July 1, 2019. He is responsible for managing the day-to-day operations of all trial-level courts in the 57 counties outside of New York City and for oversight of New York's local Town and Village Courts.

Judge Caruso is the son of the late Leonarda and Pellegrino Caruso and was born in Boston, Massachusetts. He received a Bachelor of Arts Degree in Political Science and Economics from SUNY New Paltz and was one of the last lawyers certified and admitted to the practice of law after reading for the New York Bar.

Judge Caruso was elected to the New York State Supreme Court in 1994, and was re-elected in 2008. He was appointed as Administrative Judge for the Fourth Judicial District in June, 2004 and served in that capacity for fifteen years.

He is a member of the New York State Bar Association, Judicial Section, a Member and Past Director of the Schenectady County Bar Association, and a Charter Member and current President of the New York State Greater Capital District Italian American Bar Association. He has served on the Board of Trustees of the Schenectady County Community College, is a Past District Deputy of the New York State Elks Association, is a member of the Order of Sons of Italy, the Rotterdam Knights of Columbus and a former volunteer firefighter.

Judge Caruso was the first recipient of the Pro Bono Distinguished Service Award of the Legal Aid Society of Northeastern New York and has been honored by the Schenectady County Bar Association for outstanding service to the community. In 2018, he received the Hon. Anthony V. Cardona Award for Judicial Excellence from the Italian American Bar Association.

Judge Caruso is married to Judith (Juracka) Caruso. They have one daughter, Mary Elizabeth, and reside in Rotterdam, New York. He is a communicant of St. Gabriel's Roman Catholic Church where he serves as Eucharistic Minister.

Diana Colón is Assistant Deputy Counsel to the NYS Unified Court System, Office of Court Administration. Diana works within OCA's Division of Professional and Court Services, where she oversees the development of the Small Claims Online Dispute Resolution project for the NYC Civil Court. Diana served on the National Center for State Courts' ODR focus group to provide guidance for state court systems throughout the US on how to develop and implement ODR processes. Diana is a dispute resolution professional, whose primary focus is on increasing access to justice through various technology and court-based initiatives. In addition to focusing on solutions which utilize technology to transform court processes, Diana also specializes in continuous quality improvement in the Juvenile Justice System in NYS and in the provision of legal services for children. Diana started her career in corporate law and is a graduate of the Harvard Law School and Columbia University.

Lisa M. Courtney, Esq. is the Statewide Alternative Dispute Resolution ("ADR") Coordinator for the NYS Unified Court System, where she works to promote the growth of alternative dispute resolution programs throughout New York State. Lisa oversees the Community Dispute Resolution Centers Program, the Attorney-Client Fee Dispute Resolution Program, the Collaborative Family Law Center, and the Part 146 training program approval process. She assists courts in developing ADR programs, teaches mediation and settlement skills workshops for judges, court attorneys, legal services attorneys and private practitioners, and coaches attorneys and law students in bar-sponsored mediation training programs. She is an advisor to Chief Judge Janet DiFiore's and Chief Administrative Judge Lawrence Marks's Statewide ADR Advisory Committee, and co-chair of the New York Women's Bar Association's ADR Committee.

Lisa first joined the Statewide ADR office as Special Projects Counsel, where she set up the nation's first Collaborative Family Law Center, and mediated court-referred cases. Previously, she coordinated the NYC Civil Court's Mediation Program, the NYC Housing Court's Volunteer Lawyers Project, the Community Seminar Series, and Help Centers. Lisa has worked as a Court Attorney, as a legal writing instructor, and as a

litigation associate. Lisa has also served as a volunteer mediator with the NY Peace Institute. She received her J.D. from the Columbia University School of Law, where she was a Harlan Fiske Stone Scholar, and graduated *cum laude* from Columbia College. She speaks Spanish and Hebrew.

Lisa Denig

Special Counsel for ADR Initiatives in New York City

Lisa Denig has been appointed as Special Counsel for ADR Initiatives in New York City, working under the direct supervision of Deputy Chief Administrative Judge, George Silver. Ms. Denig is tasked with overseeing the implementation of the Chief Judge's Presumptive ADR Initiative in the five boroughs. She has served previously as the Bureau Chief of Special Litigation in the Westchester County District Attorney's Office, law clerk to the Honorable Lisa Margaret Smith, United States Magistrate Judge, in the United States District Court, Southern District of New York and as Chief of Staff to Putnam County Executive Robert J. Bondi.

She has also served as President of the Westchester Women's Bar Association and of Habitat for Humanity of Putnam County, and as a member of the Pace Law School Board of Visitors, the Pace Women in Law Committee, the Westchester Community College Alumni Council and Secretary for the Mount Pleasant Democratic Committee. She administers the children's program at First Baptist Church of Brewster and is a regular volunteer for Hillside Food Outreach and Compassion International and teaches six spin classes a week at local area gyms.

Lisa is the proud parent of two grown daughters and three lovable, but poorly trained dogs.

Lawrence S. Goldman, Esq.

Lawrence (Larry) Goldman recently closed his practice after almost 48 years as a New York City criminal defense lawyer, but continues as a member of the bar as a consultant to attorneys. He is currently chair of the Criminal Justice Section's ethics committee. He has received that Section's Outstanding Defense Practitioner award. He was president of three criminal bar associations, including the National Association of Criminal Lawyers (NACDL), where he also was chair of its ethics advisory committee. Mr. Goldman served as a member of the New York State Commission on Judicial Conduct for 16 years, the last two as its chair. He was co-editor of the Law Professors White-collar Blog for five years and has written articles and lectured on various areas of criminal law and ethics. He is a graduate of Brandeis University and Harvard Law School.

CAROLYN E. HANSEN

ATTORNEY AT LAW & MEDIATOR

www.HansenLawMediation.com
AttyHansen@earthlink.net
Tel: (845) 687-8440

Carolyn E. Hansen is an experienced mediator, arbitrator, and attorney with a J.D. from the University of Michigan and an LL.M. in international and comparative law from the University of Brussels, Belgium. She had a law practice in Taiwan for over 11 years and has one in New York State for the past 20 years. Her early experience as a lawyer included 14 years as in-house counsel to Fortune 100 and Fortune 50 US corporations (S.C. Johnson: A Family Company, Schering-Plough Corporation and head of the law department of Ralston Purina Company's international division (RPI). In those positions she specialized in international investments, commercial contracts, intellectual property licensing and international trade law related to business in over 60 countries. Carolyn was an advisor to the US. Dept. of Commerce and the Office of the US Trade Representative on international trade negotiations. She then went into private practice in Taiwan and then New York, where she developed extensive experience advising non-profit organizations and in probate and real estate. From 2013 to 2018 she served on the Executive Committee of the Dispute Resolution Section of the NY State Bar Association, and co-chaired its Diversity Committee and International Mediation Subcommittee. She is a speaker and panel moderator for New York State Bar Association programs on cross-cultural communication in Alternative Dispute Resolution. For a December 2018 webinar arranged by the Dispute Resolution Section, Ms. Hansen presented an analysis of the new United Nations Convention on International Settlement Agreements Resulting from Mediation, (the Singapore Convention).

Carolyn is on the approved panels of mediators and arbitrators for the World Intellectual Property Organization (WIPO), and the International Chamber of Commerce (ICC). She is also on the approved panels of mediators for the New York State Supreme Court, Commercial Divisions for Nassau, New York (Manhattan), Westchester and Kings Counties.

She speaks Mandarin Chinese, has a working knowledge of Spanish and a reading knowledge of French. While living in Taiwan from early 1988 through late 1999, she founded and led Hansen International Company, Ltd., an international law advisory firm. Many of her clients were North American and European firms and entrepreneurs doing business in greater China. She is currently in private practice in the Hudson Valley focusing on international and domestic commercial mediation and arbitration, commercial law and non-profit organizations.

A member of the International Academy of Law and Mental Health she is active in the international therapeutic jurisprudence movement, which brings an understanding of psychology into the training and practice of law. She also has a B.S. in complementary medicine and completed graduate studies in psychology.

Christina Hioureas is a Counsel in International Litigation & Arbitration at Foley Hoag LLP and is Chair of the firm's United Nations Practice Group, a group which she co-founded. Based in New York, Hioureas represents States, State-owned and private entities, and individuals in international commercial (ICC, ICDR, AAA, LCIA, UNCITRAL) and investment arbitrations (ICSID, UNCITRAL) and public international law matters. She also advises States on matters before the United Nations and its bodies. She serves as sole and co-arbitrator in international commercial arbitration claims and is a certified mediator.

Hioureas has been recognized in *Chambers Global*, *Global Arbitration Review*, *Legal 500*, and *Who's Who International Arbitration*.

Laura A. Kaster.

Laura is Chair-Elect of the NYSBA Dispute Resolution Section; From 2015-2017, Laura was the President of the Justice Marie L. Garibaldi ADR Inn of Court, the first ADR Inn in the country. She is also a past Chair of the NJSBA Dispute Resolution Section and a Co-Editor in Chief of the NYSBA's journal, Dispute Resolution Lawyer. She is the 2018 recipient of the Garibaldi Inn's (the first ADR Inn of Court in the US) Richard K. Jeydel Award for ADR Excellence and Civility and the 2014 recipient of the NJSBA's Boskey Award for the ADR practitioner of the year.

She is a co-editor and chapter author of the CCA Guide to Best Practices in Commercial Arbitration (4th Ed 2017); author of a chapter on Confidentiality in Singer, Arbitrating Commercial Disputes in the US (PLI 2018);co- author "Arbitrating Technology Cases: Considerations for Businesspeople and Advocates", in Samaras (Ed) ADR Advocacy, Strategies, and Practices for Intellectual Property and Technology Cases.

She was a founding member of the executive committee of the NJ Academy of Arbitrators and Mediators and on the Roster of the National Academy of Distinguished Neutrals. She is on the Tech List of the Silicon Valley Arbitration and Mediation Center, an arbitrator and mediator for the American Arbitration Association, for the International Institute for Conflict Prevention and Resolution (CPR), and an arbitrator for FINRA. She is a member of the Global Panel for the Center on Dispute Resolution (CEDR), and a mediator for the Global Mediation Exchange Center and ICDR . She is CEDR accredited and an IMI Certified mediator. She is a master mediator for the American Arbitration Association. She is a fellow of the College of Commercial Arbitrators and a member of the Pepperdine, CCA and IMI Task Force on Mixed Modes.

She has spoken and trained widely for the AAA/ICDR conferences, CCA, PLI, ABA Dispute Resolution Section annual meetings, NJSBA, NJAPM, NYSBA, NJICLE. She is listed as one of three New Jersey mediators in Who's Who Legal, Mediation (2016-2017).

Hughes Hubbard & Reed

James B. Kobak, Jr.

General Counsel

New York City

james.kobak@hugheshubbard.com

+1 (212) 837-6757

Education

University of Virginia School of Law, LL.B, Order of the Coif, The Associate Editor, Virginia Law Review, 1969

Harvard University, A.B., magna cum laude, 1966

Bar Admissions

New Jersey, 1995

New York, 1972

Areas of Focus

Antitrust & Competition

Appellate

Arbitration

Corporate Reorganization & Bankruptcy

Life Sciences

Patent & Trademark Litigation

Professional Services

James B. Kobak, Jr. served as the Firm's first General Counsel and is a member and former Chair of its Antitrust Practice Group and member of its Corporate Reorganization, Arbitration and Litigation Departments. A Hughes Hubbard partner for 35 years, Mr. Kobak has had a long and varied career. He served as lead counsel to the trustee for the SIPA liquidations of Lehman Brothers Inc. and MF Global, Inc. and in similar roles for other liquidations almost from the inception of the SIPA statute. Mr. Kobak litigates in many forums at every level, including state and federal courts, from Bankruptcy Court to the Supreme Court of the United States as well as arbitral bodies. He has lectured and written widely, particularly on antitrust and intellectual property matters, has taught substantive antitrust and intellectual property courses at leading law schools for nearly two decades and is a former President of the New York County Lawyers' Association.

Areas of Concentration

- Arbitration and Mediation (IP, Entertainment, General Commercial)
- Professional Responsibility
- SIPC Liquidations
- Antitrust and IP Litigation and Counseling

Daniel F. Kolb

Senior Counsel, Davis, Polk & Wardwell LLP

Dan Kolb has over 45 years' experience as a Davis Polk Litigation Partner handling matters in federal and state courts throughout the United States. Over the past ten years he has served regularly as a neutral in significant arbitrations and mediations.

Dan has been appointed to serve as a Mediator in the U.S. District Court for the Southern District of New York and New York's Supreme Court Commercial Division and as a Special Master in the Appellate Division for the First Department. He is also a member of the AAA Commercial and Accounting Panels of Arbitrators and CPR's Panel of Distinguished Neutrals. He has served as Chair of the Dispute Resolution Section of The New York State Bar Association and is currently serving as Co-Chair of the New York City Bar's President's Committee for the Efficient Resolution of Disputes and as a Member of Chief Judge DiFiore's Advisory Committee on ADR in the Courts.

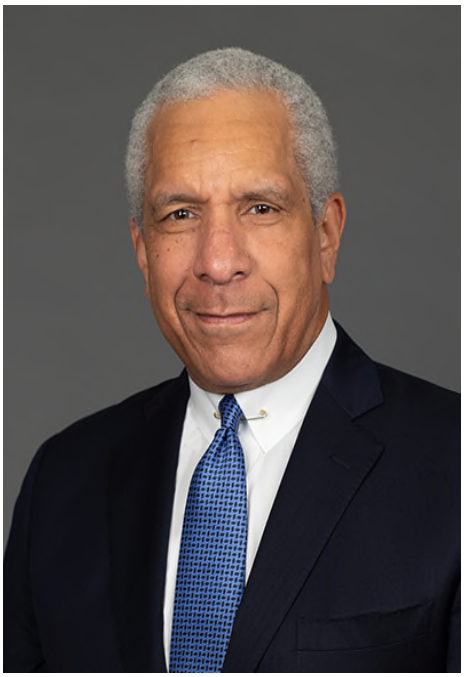
Since he became Senior Counsel at Davis Polk in July of 2011, Dan has devoted himself primarily to service as an arbitrator and mediator and to handling impact cases for those in need.

Hon. Joel R. Kullas

Alternative Dispute Coordinator for the 3rd, 4th, 9th and 10th Judicial Districts

Hon. Joel R. Kullas is the newly appointed Alternative Dispute Resolution Coordinator for the 3rd, 4th, 9th and 10th Judicial Districts, acting under the supervision of the Hon. Vito C. Caruso, the Deputy Chief Administrative Judge for Courts Outside of New York City. He sat on the Housing Court bench in New York City from 2011 to earlier this year. He has been Certified as a Mediator at the Institute for Mediation and Conflict Resolution in the Bronx, has volunteered as a community mediator with both Safe Horizon and the Institute for Mediation and Conflict Resolution and has served as a Court Attorney in Housing Court to Judges Joseph A. Capella and Bruce Scheckowitz. He has litigated in Housing Court, most recently with Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C. and has served as Chair of the Housing Court Committee of the New York City Bar Association and as a Small Claims Administrator..

Judge Kullas obtained his bachelor's degree at the College of the Holy Cross and his Juris Doctorate degree from the University of Connecticut School of Law.



Hon. Timothy K. Lewis is counsel at Schnader Harrison Segal & Lewis, where he focuses on domestic and international complex commercial litigation as an arbitrator, mediator, settlement counselor and appellate advisor. He is co-chair of the firm's ADR Practice Group and a past co-chair of its Appellate Practice Group. Before entering private practice, Tim served on the United States Court of Appeals for the Third Circuit and the United States District Court for the Western District of Pennsylvania. At the time of both appointments, he was the youngest federal judge in the United States.

A relentless advocate for equal justice, Tim is a Director of the American Constitution Society for Law & Policy (ACS); a Board member of the Constitution Project, where he is co-chair of the National Committee on the Right to Counsel; and a Commissioner on Pennsylvania's Interbranch Commission for Gender, Racial and Ethnic Fairness. He co-chairs the International Institute for Conflict Prevention and Resolution's National Diversity Task Force, and is a co-founder of the Higginbotham Fellows Program at the American Arbitration Association. He speaks throughout the country on issues of equality, diversity and inclusion.

Tim frequently writes and speaks about threats to judicial independence and the need for a civil discourse among the three branches of government. In July of 2016, he and Vice President Joe Biden delivered President Obama's "Weekly Address to the Nation", in which they discussed the implications of the Senate's refusal to take up the then-pending nomination of Judge Merrick Garland to the United States Supreme Court.

Tim is a member of the American Law Institute, a Fellow of the American Academy of Appellate Lawyers and the College of Commercial Arbitrators, a Board member of the Georgetown Supreme Court Institute, a former Board and Executive Committee member of the American Arbitration Association and the International Institute for Conflict Prevention and

Resolution, and has served on the Boards of the Public Interest Law Center of Philadelphia, the Peter Jennings Project for Journalists and the Constitution at the National Constitution Center, and the National Jazz Museum in Harlem.

A 7th generation Pittsburgher, Tim began his career as an Allegheny County Assistant District Attorney and spent 8 years as an Assistant United States Attorney. He is a former member of the House of Delegates of the Pennsylvania Bar Association and has served on various Allegheny County Bar Association committees. He currently serves on the Duquesne University School of Law Dean's Advisory Committee and as a Trustee of The Kiski School in Saltsburg, PA. In 2014, Tim was inducted into the Kiski Athletic Hall of Fame, and he continues his athletic pursuits today as a competitive triathlete and open-water endurance swimmer.

Tim is a graduate of Tufts University and the Duquesne University School of Law.

ROBERT E. MARGULIES, ESQ.

Robert E. Margulies is the Managing Principal in the law firm of Margulies Wind, P.A. He is admitted to practice in New Jersey (1975), New York (1980), Massachusetts (1977) (inactive status), the United States Supreme Court and the Second and Third Circuit Courts of Appeals. He maintains a full service law practice with concentration on litigation, commercial matters, personal injury, civil rights, employment and discrimination, insurance, products liability and Appellate practice. He has tried numerous civil, chancery, probate, family and criminal cases and has participated in at least twenty cases with published opinions. He has also developed an active mediation and arbitration practice. Since 1995 he has presided over at least fifteen hundred mediation cases in a variety of areas from class actions, to condominium disputes, employment/discrimination, personal injury and commercial claims. He is a member of the NJ Chapter of The National Academy of Distinguished Neutrals ("NADN"). He received accreditation as a Mediator from the prestigious, London based, Center for Effective Dispute Resolution (CEDR) in 2011. He was nominated by peers to be listed in the International Publication, Who's Who Legal Mediation 2015.

A member of the American and New Jersey State Bar Associations, Mr. Margulies is a Past President of the Hudson County Bar Association, a former Master of the Hudson American Inn of Court, a former Master of the Family Law American Inn of Court and Executive Director and Past President of the Justice Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution. He serves on both the Supreme Court of New Jersey Arbitration Advisory Committee and the Supreme Court Complementary Dispute Resolution Committee, serving as Chair of the Civil Mediation Sub-Committee. Mr. Margulies formerly Chaired the NJSBA Dispute Resolution Section and Executive Committee of the State Bar General Council, as well as a past President of the Association of County Bar Presidents. He served for 7 years on the NJSBA Judicial and Prosecutorial Appointments Committee. He is on the rosters of the American Arbitration Association and the Superior Court of New Jersey as a mediator. He serves as a Mediator Mentor and Co-Chairs the Facilitating Committee for Mediation by appointment of the New Jersey Supreme Court. He is also a Fellow of the American Bar Foundation.

Mr. Margulies received the Boskey Award as ADR Practitioner of the Year in 2003. In 2006 the New Jersey Institute for Continuing Legal Education presented him with their Distinguished Service Award. He has been the principal lecturer for N.J. ICLE in the areas of Mediation and Arbitration for almost two decades. He received the Jeydel Award in 2011 for ADR Excellence from the Garibaldi Inn of Court. He has been recognized by the independent rating organizations as a Super Lawyer, Best Lawyer in America and the New York Area's Best Lawyers in Alternative Dispute Resolution and has consistently maintained an AV rating from Martindale-Hubbell. He has taught negotiation at Peking University in Beijing for EMBA students

and taught Advanced Mediation as an Adjunct Professor at Seton Hall Law School, as well as Negotiations at Rutgers Law as an Adjunct Professor since 2013.

He serves on the Boards of RWJBarnabas Health and Jersey City Medical Center-Barnabas Health, where he is Chairman.

Mr. Margulies received his A.B. degree from Duke University in Durham, North Carolina and his J.D. degree from Suffolk University Law School in Boston, Massachusetts. He served in the U.S. Army as a 1st Lieutenant in the Medical Service Corps from 1968 to 1971, with a tour of duty in Viet Nam.

LUIS M. MARTINEZ
Vice President
International Centre for Dispute Resolution, (ICDR)
The International Division of the American Arbitration Association
Martinezl@adr.org

Luis M. Martinez is Vice President of the International Centre for Dispute Resolution, (ICDR) the international division of the American Arbitration Association, (AAA) and is an Honorary President of the Inter-American Commercial Arbitration Commission, (IACAC).

Luis M. Martinez as the Vice President of the ICDR located in New York serves as an integral part of the ICDR's international strategy team and is responsible for international arbitration and mediation business development for the East Coast of the United States (from Maine to Florida), Central and South America, the Caribbean, Spain and Portugal. Mr. Martinez is also responsible for case administration of international cases that focus on Latin America out of the ICDR-AAA's Miami office.

Mr. Martinez joined the AAA in 1996 as the first attorney hired to staff the newly created ICDR and later served as the ICDR's first director. Mr. Martinez worked as the Vice President responsible for the ICDR's international administrative services and prior to that held the position of a staff attorney for the AAA's Office of the General Counsel before assuming his current position.

Mr. Martinez received a Bachelor's Degree from Georgian Court College and a Juris Doctor degree from St. John's University School of Law. He has had numerous articles published on international arbitration and has appeared as a speaker in programs throughout the world. Mr. Martinez is admitted to practice law in the State of New York and the State of New Jersey. He is a dual citizen of Spain and the United States and is fluent in Spanish.

Publications & Interviews

Editor and Co-Author of the ICDR Newsletter, Volumes 1, 2, 3, 4 and 5.
"The GDPR and Privacy Shield," Dispute Resolution Journal, Vol. 73, / No. 1, 2018.
"Cyber Security Concerns in International Arbitration," Corporate Disputes Jul.-Sep., 2018.
"Resolving International Disputes," Business Resource Series, Financierworldwide.com, 2016.
"Arbitration in the Americas," Corporate Disputes Jan-Mar., 2016.
"In Conversation with Luis Martinez." Clyde & Co. International Arbitration, Issue 3 2015.
"The ICDR's Arbitrator Appointment Process," ABA Section of International Law 2013.
"Introduction for the Americas 2012," Global Arbitration Review.
"A Guide to ICDR Case Management," International Centre for Dispute Resolution – Awards and Commentaries," JuristNet LLC, 2012.
"ICDR/AAA's System and International Conflict Management Efficiencies," American Arbitration Association Handbook on International Arbitration & Adr, JuristNet, LLC in 2011.
"Review of the ICDR System," Chapters 43 and 55, Co-Author, Horacio A. Grigera Naón and Paul E. Mason, International Commercial Arbitration Practice: 21st Century Perspectives, LexisNexis in 2010, updated 2015.
"The ICDR's Mediation Practice, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010," Co-Author, Marinus Nijhoff Publishers in 2010.
"Introduction for the Americas 2009," Global Arbitration Review.
"Introduction for Asia 2008," Global Arbitration Review.
Numerous other international ADR articles published.

Deborah Masucci is a full-time mediator and arbitrator.

She has been appointed as an arbitrator or mediator in matters covering employment, insurance coverage, business interruption, commercial business, and breach of contract. She is on the American Arbitration Association Commercial, Large and Complex, International, and Employment panels, the American Health Lawyers Association panels, a fellow of the Chartered Institute of Arbitrators, a member of the American College of Civil Trial Mediators and the International Arbitration Club of New York.

She is a global expert in alternative dispute resolution and dispute management with over thirty years' experience in promoting the effective use of ADR. She is a published author on ADR issues and frequently speaks on the topic.

She is the immediate past Chair of the NYSBA Dispute Resolution Section and Co-Chair and Board Member of the International Mediation Institute. She is a former Chair of the ABA Section for Dispute Resolution where she was a founding member of Women in Dispute Resolution and co founder of Minorities in Dispute Resolution. She was a delegate to UNCITRAL's Working Group II that developed the Singapore Convention.

Deborah is a member of the Board of Editors for the Securities Arbitration Commentator and serves on the Board of Advisors for "Arbitrator Intelligence". She is an adjunct professor at Fordham Law School.

She is co-author of a Chapter on ADR Providers for *ADR in Employment Law,* and author of a Chapter on Securities Dispute Resolution for the *Dispute Resolution Handbook*.
For more information go to www.debmasucciadr.com

Bridget M. O'Connell works as the Alternative Dispute Resolution Coordinator for New York State's 8th, 7th, 6th and 5th Judicial Districts through the office of Deputy Chief Administrative Judge, Hon. Vito C. Caruso. She previously served as Law Clerk to Hon. John F. O'Donnell in New York State Supreme Court. She was born and raised in Western New York, and after graduating from John Carroll University, in Cleveland, Ohio, returned to Buffalo to attend the State University at Buffalo Schools of Law and Social work where she acquired a Juris Doctor and Masters in Social Work.

Her path, which has included private practice in family law, alternative dispute resolution, teaching and program development and administration, has given her a deep appreciation for the many things to do with a law degree and the diversity of interests, needs, practices, roles and people that make up our legal community.

Bridget is President of the Bar Association of Erie County and a past chair of their Matrimonial and ADR committees. She is also a Past President of the Western New York Chapter of the Women's Bar Association of the State of New York where she has also co-chaired their State level Arbitration and Mediation Committee and served as the chair of Public Relations.

She has lectured on various aspects of matrimonial practice and mediation for the New York State Bar Association, the Bar Association of Erie County, the Women's Bar Association and WNY Collaborative Law Professionals. She has also joined colleagues on behalf of the Child Welfare Court Improvement Project to provide continuing education about Vicarious Trauma, Trauma Informed Practices and Solution Focused strategies in Erie, Chautauqua and Albany Counties. She has assisted in coordinating two multi-day Commercial Mediation trainings in support of the expanded use of mediation in the Commercial Division, and has taught both 'Law and the Family' and the Pro Se Civil Litigation Practicum for the University at Buffalo School of Law.

The Buffalo Law Journal has named Bridget to their Who's Who in Law and WNY Legal Elite. She has received the Athena Young Professionals Leadership Award and has been recognized as a VLP VIP by the Volunteer Lawyers Project for her work with the Pro Se Practicum and Help Desk programs.

Bridget is a proud and life-long Buffalonian.

Rebecca Price is the Director of the Alternative Dispute Resolution (ADR) Program at the U.S. District Court for the Southern District of New York. Prior to this position she directed the Mediation Clinic at Brooklyn Law School, was a Supervising Attorney in the Mediation Clinic at CUNY School of Law, and taught ADR at the New York University School of Continuing Professional Studies. Rebecca has also taught lawyering/legal writing and interviewing and counseling at Cardozo Law School, and was supervising attorney in the Economic Justice Program at CUNY School of Law. Rebecca is the former Coordinator of the Special Education/Early Intervention and ACCES VR Mediation Programs for Safe Horizon Mediation Program (now the New York Peace Institute). Before turning her focus to ADR, Rebecca was the Assistant Director of Visual AIDS, created and oversaw the Children's Mental Health Project at New York Lawyers for the Public Interest, and was a Senior Attorney in the Special Litigation and Appeals Unit of Mental Hygiene Legal Service. Rebecca is certified as an Initial Mediation Trainer for the Community Dispute Resolution Centers Program of the Unified Court System of the State of New York. Rebecca currently teaches an ADR Survey at New York University School of Law and is a frequent speaker and trainer about mediation, conflict resolution, and communication. Rebecca was named as one of the 2017 honorees for Distinguished Leadership as part of the New York Law Journal's Professional Excellence Awards. She lives in Brooklyn with her partner and a much adored dog.

M. Salman Ravala, Esq.

Attorney | Arbitrator | Mediator

Attorney M. Salman Ravala, Esq. is a New York City litigator and Harvard Law School trained mediator. An Adjunct Professor of Law at New York Law School, he practices in the areas of domestic and international business law and commercial litigation; and represents both Plaintiffs and Defendants in New York state, federal, and appellate courts, as well as, in mediation and arbitration forums across the United States and globally.

In 2018, he served as a delegate on behalf of the International Mediation Institute to the United Nations Commission on International Trade Law (UNCITRAL) Working Group on Dispute Settlement which formulated the legal framework and model law surrounding the Singapore Convention.

Mr. Ravala also serves as a neutral on various ADR rosters including FINRA, NYS Part 137 Fee Dispute Panel, NYS Commercial Division, CPR Panel of Distinguished Neutrals, and U.S. District Court for the Southern District of New York. Mr. Ravala is a 2016 American Arbitration Association Judge Higginbotham Fellow and a graduate of Syracuse Law School.

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250 Park Avenue, 7th Floor, New York, NY 10177
T: 1.212.920.7142, E: SRavala@lawcrt.com, W: www.lawcrt.com

 Effective Mar 19

Colin Rule

Colin Rule is Vice President of Online Dispute Resolution for Tyler Technologies. In 2011 Colin co-founded Modria.com, an ODR provider based in Silicon Valley, which was acquired by Tyler Technologies in May 2017. From 2003 to 2011 he was Director of Online Dispute Resolution for eBay and PayPal. Colin is the author of *Online Dispute Resolution for Business* and *The New Handshake: ODR and the Future of Consumer Protection*. He serves on the boards of the Consensus Building Institute and the PeaceTech Lab at the United States Institute of Peace. He is currently Co-Chair of the Advisory Board of the National Center for Technology and Dispute Resolution at UMass-Amherst and a Fellow at the Gould Center for Conflict Resolution at Stanford Law School. Colin co-founded Online Resolution, one of the first online dispute resolution (ODR) providers, in 1999 and served as its CEO and President. Colin also worked for several years with the National Institute for Dispute Resolution in Washington, DC, the Consensus Building Institute in Cambridge, MA, and Mediate.com in Eugene, OR.

Kathleen M. Scanlon, Esq.

Kathleen Scanlon is the Chief Circuit Mediator for the United States Court of Appeals for the Second Circuit. She is a graduate of Brown University and Fordham Law School. She began her career as a law clerk to Judge Louis L. Stanton of the Southern District of New York, and she practiced as a litigator at Simpson Thacher & Bartlett and Heller Ehrman. She was Senior Vice President at the CPR International Institute for Conflict Prevention and Resolution and is a long-standing Adjunct Professor at Fordham Law School.

Hon. George J. Silver
Deputy Chief Administrative Judge For New York City Courts

Justice Silver is a native Bronxite attending public schools from elementary school until his graduation from Christopher Columbus High school. Justice Silver attended New York University where he received an M.S. in Accounting and Management and then Hofstra University School of Law, graduating with a J.D. in 1983. He received an M.B.A. in Finance from New York University Stern Graduate School of Business in 1992. While working full time as in house counsel for five private bus companies he joined Fields & Rosen, and then became an equity partner in Fields, Silver & Santo, L.L.P. and ultimately Silver & Santo, L.L.P.

In 2004, Justice Silver was elected to the Civil Court of the City of New York, serving first in Kings County and then as of April 2009 on the Family Court bench in Bronx County. In January 2010, Judge Silver was appointed a Supreme Court Judge for New York County, first presiding over approximately two thousand motor vehicle cases, then over a Trial Assignment Part and then, as part of a specialized grant program, he focused on early settlement of Medical Malpractice Cases. He was elected to the Supreme Court in 2012, initially presiding over a newly created Mediation Part, in addition to other assignments.

In 2016, Justice Silver was appointed Deputy Chief Administrative Judge for New York City Courts. He is responsible for managing the day-to-day operation of all trial level courts in the five boroughs.

Justice Silver is a member of the NAACP, the International Association of Gay and Lesbian Judges and the Jewish Lawyers Guild. He is currently Co-Chair of the Ethics and Professional Committee of The Torts, Insurance Compensation Law Section of the New York State Bar Association.

Honorable Jeffrey Sunshine, J.S.C., is the Statewide Coordinating Judge for Matrimonial cases having been appointed by Chief Administrative Judge Lawrence Marks on June 1, 2018. He continues to serve as Chair of the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee. Justice Sunshine is also the Supervising Judge for Matrimonial Matters, Supreme Court, Kings County having been appointed in March of 2007. In April 2016, he was appointed the Chair of the Center for Children, Families and the Law at the Maurice A. Deane School of Law - Hofstra University. During the 2014-2015 legislative session, he successfully negotiated the passage of a permanent maintenance guidelines bill that was signed by Governor Andrew Cuomo on September 25, 2015. He sat in the matrimonial part in Richmond County, Supreme Court from January 2001 – February 2003 (where he eliminated a multi-year back log in the matrimonial parts) and has sat in Kings County, Supreme Court since February 2003. Prior to sitting in Supreme Court, Judge Sunshine sat in Kings County Family Court term in a hybrid custody/child protective part. Previously [October 2013 to May 2014], he served as Co-Chair of the OCA Matrimonial Practice Advisory Committee.

Justice Sunshine was elected as a Justice of the Supreme Court of the State of New York in the Second Judicial District in 2010 for a 14 year term commencing January 1, 2011. He was initially appointed to the Family Court by Mayor Rudolph Giuliani in July 1998 and was reappointed in December 2003, by Mayor Michael Bloomberg. He was designated as an Acting Supreme Court Justice in January 2001, by then Chief Administrative Judge, Honorable Jonathan Lippman and served as an Acting Supreme Court Justice from 2001 until he was elected in 2010.

A life-long resident of Brooklyn, New York, he attended the New York City Public Schools, graduated *summa cum laude* from Brooklyn College of the City University of New York in June 1977, and received his J.D. degree from Hofstra University of Law in June 1980. As a college student, he served as a part-time member on the personal staff of the Chancellor of the New York City Public Schools. He served as the principal law clerk to an Acting Justice of the Supreme Court (1980-1983). Thereafter, Judge Sunshine was engaged in the private practice of law (1983-1998) in Brooklyn, New York, until his appointment to the Family Court.

He is a former President of the Brooklyn Bar Association (1995-1996) and served as Chair of the Family Law Section for over ten years. He was the first matrimonial lawyer ever elected president of the then 123-year old Brooklyn Bar Association. He was involved in the matrimonial field extensively for nearly 18 years before becoming a judge. He was a member of the House of Delegates of The New York State Bar Association where he has served a total of 16 years. He served as the Chair of the New York State Bar Association Special Committee on Judicial Discipline (1996-1998). He is also a member of the Brooklyn Women's Bar Association, the Columbian Lawyers Association of Brooklyn, the New York State Trial Lawyers Association, the New York City Bar Association and the Executive Committee of the Family Law Section for OCA matters.

As a practicing attorney, Judge Sunshine was a member of the Grievance Committee (Attorney

Disciplinary) for the Second and Eleventh Judicial Districts. He is a member of the OCA Statewide Family Violence Task Force and the New York State Judicial Committee on Women in the Courts. He served as a member of the "Matrimonial Commission" established by former Chief Judge Judith Kaye. Judge Sunshine was the co-chair of the Commission's subcommittee--"The Role & Function of the Judiciary and Court Administration". He also served as a member of the "Best Practices Committee for Matrimonial Judges". Judge Sunshine is presently a member of the Judicial Hearing Officer, Advisory Committee for the Second Judicial Department.

In May, 2003, Judge Sunshine received the "Ecumenical Award" from the Catholic Lawyers Guild, Kings County, and in December, 2005, he received the Brooklyn Bar Association's highest award, the "Annual Award for Outstanding Achievement in the Science of Jurisprudence and Public Service" at the Bar Association's annual dinner. In March, 2009, he received the "In the Trenches Award" from the Lawyers Committee Against Domestic Violence at the Annual Domestic Violence Forum sponsored by the Appellate Division First Department and the New York State Committee on Women in the Courts at Fordham University School of Law. He was the sole recipient of the 2010 annual award of the New York Chapter of the American Academy of Matrimonial Lawyers on May 1, 2010, at the Museum of Modern Art. In January 2015, Judge Sunshine gave the keynote address at the Annual Meeting of the Family Law Section of the New York State Bar Association. In March 2018, he received the Distinguished Alumni on the Bench award from the Hofstra University Maurice A. Deane School of Law.

Over 110 of his decisions have been published as reported and unreported written opinions and he has presented over 100 lectures and/or panels for judicial training seminars and various bar associations throughout the State of New York including to the New York State Bar Association, Brooklyn Bar Association, the Richmond County Bar Association, New York County Lawyers Association, New York City Bar Association, Nassau County Bar Association, Suffolk County Bar Association, Academy of Matrimonial Lawyers and the Erie County Bar Association. He has given guest lectures and presentations at Columbia Law School, Brooklyn Law School and Fordham Law School. He has conducted judicial training programs throughout New York City, Long Island, Westchester, Buffalo, Rochester, Syracuse, Albany and Saratoga.

He is married to the Hon. Nancy T. Sunshine, Esq., the County Clerk of Kings County.

Edna Sussman
SussmanADR LLC, Mailing Address: 20 Oak Lane, Scarsdale New York 10583
E-mail: esussman@SussmanADR.com Tel: 212-213-2173

Edna Sussman is a fulltime independent arbitrator and mediator and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She was formerly a litigation partner at the law firm of White & Case LLP. Ms. Sussman has served as the chair, sole and co-arbitrator in over 200 complex commercial disputes and over 200 complex commercial mediations, both international and domestic, under various institutional rules and ad hoc involving contract interpretation, commercial transactions, financing and banking transactions, energy, franchises/distributorships, partnership and joint venture, insurance, intellectual property, mergers/acquisitions, accounting, environment, securities, real estate, pharmaceuticals, hospitality, aviation and professional liability. Ms. Sussman is a member of the panel of many of the leading dispute resolution institutions including the AAA, ICDR, AAA/ICDR Energy Arbitrators list, CPR, Hong Kong, Singapore, South China, Shanghai, Australia, Swiss, Vienna, Korea, Kuala Lumpur, Vietnam, Brazil, British Columbia, Dubai, and Kigali, U.S. Institute for Environmental Conflict Resolution, Financial Industry Regulatory Authority, and the National Futures Association and is listed by the ICC. Ms. Sussman serves on mediation panels of courts in NYC.

Ms. Sussman is a past President of the College of Commercial Arbitrators and sits on the Board of the American Arbitration Association. She is the chair of the AAA-ICDR Foundation and is the Chair of the New York International Arbitration Center. Ms. Sussman is a fellow of the Chartered Institute of Arbitrators and certified by the International Mediation Institute. She is a former Chair of the Dispute Resolution Section of the NYS Bar Association and serves as co-editor-in-chief of the NY Dispute Resolution Lawyer. She is a past co-chair of the Arbitration Committees of the ABA's International and Dispute Resolution Sections and served as the chair of the Renewable Energy Committee and the Alternative Dispute Resolution Committee of the ABA's Section of Environment Energy and Resources. Ms. Sussman served as the chair of the NYC Bar Association's Energy Comm. and the ADR Comm. of the Energy Bar Association. Ms. Sussman is recognized as Band I by Chambers Global and Chambers USA for International Arbitration, in the International Who's Who of Commercial Arbitration and Commercial Mediation and by SuperLawyers and Best Lawyers. She was named as one of the ten outstanding international mediators by Who's Who Legal 2013 world-wide and selected as Best Lawyer's "2012 New York City Mediation Lawyer of the Year" and recognized in Chambers USA for mediation. A graduate of Barnard College 1970, and Columbia Law School 1973, Ms. Sussman has lectured and published widely on arbitration, mediation, energy and environmental issues.

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