

VOLUME 23, NUMBER 3
SPRING 2017

DISPUTE RESOLUTION MAGAZINE

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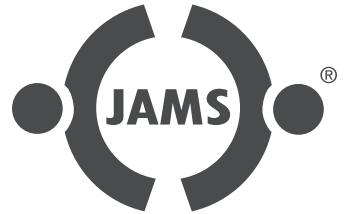
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From The Chair *By Nancy Welsh*

These are not exactly comfortable times. While there is substantial turbulence on the international and national fronts, many of you also are aware that change is afoot in the legal profession, legal education, and the American Bar Association. Indeed, our Section Council is in the midst of reexamining our Section's structure and operations to ensure that they are as high-quality, effective, and efficient as possible. I hope that in my column in the Summer issue, I can share some of the exciting results of this work, because these times also demand that we answer some important questions: Why does our field exist? Why does our Section exist? What do we offer that is unique and valuable to our field and to society? To our members?

Here are my personal thoughts about some of these questions, particularly regarding our Section. I have been a member of this organization for a very long time. Nearly four years ago, I was asked whether I was interested in becoming a Section officer. At the time, I was serving as a member of the Section's Council and as Co-Chair of the *Dispute Resolution Magazine's* Editorial Board (along with Josh Stulberg). I was already contributing plenty of time and energy to the Section, and I knew that being an officer would represent an even more significant commitment.

There are two major reasons I decided to say yes.

First, our Section is one of the leading dispute resolution organizations in the world, and responsibility comes with that position. I wanted to play my part (with many others) in enabling the Section to use its and the ABA's stature to make a difference in developments in the dispute resolution (and procedural law) field. I have written before about the role we're playing in policy development and best practices, including projects to promote online dispute resolution for the courts, greater inclusion of women and people of color as mediators and arbitrators, international dispute resolution, and greater transparency in pre-dispute consumer arbitration. (See the Section News in this issue of the *Magazine* for more ongoing projects.) This is just a tiny sample of what the Section is doing, all with the aim of promoting the principled, appropriate use of dispute resolution procedures in the United States and around the world.

The second reason I agreed to become a Section officer is that I believe very strongly in the value of our role as a "big tent" in the field of dispute resolution. A

multitude of dispute resolution organizations exist now, but in my view many of them have a narrow focus, are by-invitation only, or cater to a very particular segment of the field. In contrast, we are the organization that consists of mediators *and* arbitrators *and* ombuds *and* conflict coaches *and* court administrators *and* online dispute resolution entrepreneurs *and* public policy facilitators *and* academics *and* lawyers *and* community organizers *and* judges *and* researchers *and* ... well, you get the idea. We are the organization of neutrals whose practices focus on employment *and* intellectual property *and* public policy *and* family *and* commercial *and* community *and*... again, you get the idea.

Our Membership Officer, Ava Abramowitz, recently pointed out that the Section's identity as a big tent represents both its strength and its weakness. Of course, she's right. The weaknesses? We do not have a narrowly cohesive vision of who we are, what we care about, and who matters to us. Because there are so many of us and we have such varying interests, probably no segment within our Section feels that it gets all the attention it deserves. It can be hard to decide which opportunities to grab and which to let go.

But there is such strength in the unruly diversity that makes up our Section. The key is valuing, and being ready to learn from, others in our tent. Just look at how we benefit from each other. Our Section has a wealth of charismatic, visionary, and savvy founding leaders who fought for us to become a Section more than 20 years ago, and in recognition of their continuing contributions, the Section recently established a Distinguished Emeritus Committee that will hold its first meeting at our spring conference in April. At the same time, the Section has welcomed many new entrants to our field, and in order to provide them with opportunities and mentoring, we have developed a wonderful Fellows program. The members of our Young Lawyers/Professionals Committee are contributing by helping the Section embrace the world of social media, and they also stand ready to assist more "seasoned" members of the Section — yours truly included — to navigate new technologies (such as our Spring Conference app). Finally, our Section has innovators who are developing new and exciting processes or experimenting with the use of existing processes to offer them in new forms or through new media. We are honoring one of those innovators, Ethan Katsh, the Director of the National

Center for Technology and Dispute Resolution and Professor Emeritus of Legal Studies at the University of Massachusetts/Amherst, with the D'Alemberte-Raven Award for his pioneering work in online dispute resolution. We're honoring another, disability rights lawyer Lainey Feingold, with a Lawyer as Problem Solver Award for her development of "structured negotiation" (which you can read about it in her book with that title, published by the Section). The JAMS Foundation will receive the institutional Lawyer as Problem Solver Award for its work supporting innovators all over the world. And Andrea Kupfer Schneider, who teaches at Marquette University Law School and is a co-chair of this magazine's Editorial Board, will receive the Scholarly Work Award for her work as an innovator and significant collaborator in academia.

Of course, we know that innovations bring both benefits and unanticipated problems. In our field, there are concerns that because people cannot afford lawyers, procedural innovations could lead to agreements (or the imposition of awards) that are not

consistent with the rule of law. This is a legitimate concern — and another reason we need to be a big tent. As I've noted, people involved with ODR are already inside the tent. Now it is time to welcome members of the legal services community who have been innovating for years and have developed amazing online tools to customize their services, provide clients and self-represented litigants with access to legal information, and even to some extent, engage in artificial-intelligence-assisted dialogue.

You may notice that this column is not tightly constructed around just one point. That is because I want to convey to you the multitude of opportunities I see for our Section, for our field, and for you, as we all find our places within this big tent of ours. I hope to see you in San Francisco. ■

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Show Me the Money

Whether launching a new career as a mediator or arbitrator or continuing in an established practice, every practitioner faces challenges in developing and managing the practical dimensions of the business of ADR.

We all recognize the basic prerequisites for working in this relatively new field, and most mediators and arbitrators seem to understand the importance of keeping their skills fresh through training, networking, and being open to new ideas. Some, with a little diligence and research, even have detailed plans for marketing their services.

Much less understood, however — and even more rarely discussed in any substantive fashion — are the complex issues of compensation. What should you charge for your services? Is there a rate that is too high — or too low? Should you charge by the hour? By the day? By the case? What are the business and fee-related challenges of developing an ADR practice while you remain in your law firm? Should you affiliate with an ADR provider or practice solo? Are there gender, cultural, or community-specific issues that you should consider? How do clients want to pay for your services?

Perhaps because they consider compensation a private matter, few mediators or arbitrators are comfortable sharing their attitudes and practices about what they charge, and few academic researchers report on the topic. Even the best ADR training is not likely to provide any answers to questions about compensation. As a result, when they make decisions about fees

or even think conceptually about how to approach compensation in an effective way, most neutrals are in the dark.

Hoping to demystify the financial aspects of an ADR practice, we have invited some of the nation's most distinguished neutrals and ADR practitioners to share their thoughts, insights, and suggestions.

Deborah Rothman and Jeffrey Krivis share their respective perspectives on pricing and billing in arbitration and mediation, with Rothman discussing the economic idea of price elasticity in arbitration fees and Krivis issuing a challenge to mediators. John Bickerman, recalling his many conversations with practitioners just beginning their ADR practices, reminds us of the importance of finding a niche and devising a comprehensive business plan. Frederick Hertz, who confesses to being a traditional bill-by-the-hour neutral, talks with seven practitioners who have developed creative and unconventional billing methods. Last (and certainly not least), Deborah Masucci and Phil Armstrong, former in-house counsel who hired many arbitrators and mediators for their companies, discuss the impact of price on their selection decisions.

We thank all the contributors for candidly sharing their views and shedding light on these important — and little discussed — issues of pricing and fee practices.

– The *Dispute Resolution Magazine*
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Trends in Arbitrator Compensation

By Deborah Rothman

Arbitration — and the fees practitioners charge for it — have changed much in the past 40 years. In its early days, arbitration was often a relatively straightforward adjudicative process involving two parties who wanted someone with expertise in their industry whom they both trusted to give them a quick determination of who was at fault and what the compensation to the other side should be. Today arbitration is generally a much more complex process involving rules tailored to different kinds of industries and disputes in the commercial, international, labor, employment, construction, and consumer arenas.

This new world requires much of its practitioners: today's arbitrators need not only a clear understanding of process but managerial skills and substantial expertise in particular areas of the law. Not surprisingly, compensation has increased considerably, reflecting the expertise, experience, and skill that parties and their counsel expect arbitrators to bring to the process.

Rates and the Price Elasticity of Demand

Setting an appropriate rate is one of the most vexing issues arbitrators face in running their practices. Price yourself too high, and you risk pricing yourself out of the market or, at a minimum, having a great deal of spare time. Price yourself too low, and you're leaving money on the table. Some arbitrators wonder whether by pricing themselves just a bit lower than others with comparable experience and expertise, they will get more work.

This is a great example of the economic idea of price elasticity, a measure of how much demand decreases (or increases) in response to higher (or lower) rates. Price elasticity in this context is particularly interesting because arbitrators' fees intersect with many factors that affect demand, including the magnitude of the case, the geographic area where

the parties and their counsel live, the case type, the amount of arbitrator experience and expertise parties and their lawyers want, and even the market's perceptions of arbitrators at certain price points.

So how much do arbitrators charge? Do judges tend to command higher rates than attorney arbitrators? Do women charge the same as men?

Comprehensive data is hard to come by. In terms of safeguarding data about its neutrals, the American Arbitration Association is a kind of Fort Knox, making this data available only when a party has opened an arbitration case. Anecdotal and off-the-record conversations suggest that AAA arbitrators charge as little as \$300 and as much as \$1,150 an hour (with a few "superstars" charging significantly more) and that rates tend to be highest in the largest markets of New York, Los Angeles, and San Francisco. At JAMS, which also does not publish its arbitrator rates, there is a great deal of variance, with fees ranging from \$400 per hour to \$15,000 or more per day.

ADR Services, a West Coast provider of mediation and arbitration services, is one of the few providers that publicizes its neutrals' rates on its website. A quick review of the rates suggests that its attorney arbitrators charge about the same as the retired judge arbitrators at the low end (\$400 or so) and in the mid-range (\$500 to \$600) but that a few retired judges charge more than the rest (as much as \$875 per hour). That is not the case at JAMS. According to Kimberly Taylor, senior vice president and chief legal and

“Setting an appropriate rate is one of the most vexing issues arbitrators face in running their practices.”



operating officer at JAMS, “The rates tend to rise with experience and prominence, but retired judges do not necessarily have higher rates than attorney arbitrators, even at the high end.”

A rule of thumb is that the most in-demand arbitrators’ rates tend to mirror the rates of the most skilled litigators in their respective jurisdictions. My anecdotal research suggests that for the most part, the market has come to understand that judicial experience does not necessarily translate to arbitration acumen, so arbitrators are evaluated on more relevant factors, including subject matter expertise and case management skills. I imagine that for some retired judges, accustomed to thinking of the judiciary as serving the public, charging very high rates might be challenging, whereas an arbitrator coming from a successful career as a business litigator would think nothing of charging rates commensurate with senior attorneys at the law firms that appear before him or her.

Economic theory predicts that lowering one’s rate will result in increased business, but that is not

“ Economic theory predicts that lowering one’s rate will result in increased business, but that is not necessarily borne out in the arbitration market. ”

necessarily borne out in the arbitration market. In larger (seven-figure and higher) cases, which are significantly fewer in number, the fees of the arbitrator are a small fraction of the total arbitration budget, and sophisticated litigants understand that expertise comes at a price that pays off in the end. I learned about one case where the dispute involved a claim of more than \$1 billion; the arbitration panel’s fees to render a final award were \$1.1 million. Indeed, in these very large cases, counsel have been known to specify that they do not want to see CVs of arbitrators who charge less than \$500 an hour. At the high end, apparently, managerial proficiency, subject matter expertise, and availability

are more important than price. On the other hand, in smaller cases (under \$1,000,000), parties tend to be more sensitive to the arbitrator's hourly or daily rate.

Economic theory also would encourage arbitrators to segment the market by charging a lower rate for smaller cases and a higher rate for larger, more complex ones, but for the most part, this is not done, at least not through the major providers. Arbitrators ordinarily have a single, published rate of pay regardless of the size of the case. There are a few institutional exceptions, when providers such as JAMS and the AAA take on certain large caseloads that pay less than what experienced arbitrators ordinarily charge. Additionally, anecdotal information suggests that arbitrators who conduct *ad hoc* arbitrations sometimes depart from the rate they charge through institutional providers, occasionally decreasing them when they have plenty of work but want to work at full capacity, but usually increasing them when the complexity and amount in controversy can support a higher rate.

Seasoned arbitrators are closer to retirement age than many of the litigators who appear before them. As a result, rather than just considering price elasticity and lowering rates, some arbitrators' calculus of how much to charge might incorporate the value of being able to travel, play golf, work *pro bono*, and pursue other emotionally rewarding activities to make up for many work-focused decades. On the other hand, some experienced arbitrators want to keep busy, even if the pay is lower than they usually make, and enjoy arbitrating so much that they make themselves available for expedited, consumer, and other types of cases where the pay is significantly lower than usual. In the interest of staying busy, these arbitrators may also keep their published rates lower than they could command in light of their experience and reputations.

“ In response to demand from large corporate clients trying to control spiraling legal budgets, law firms have been working for years on alternative pricing structures. ”

In response to demand from large corporate clients trying to control spiraling legal budgets, law firms have been working for years on alternative pricing structures. While arbitrators occasionally discuss the concept of providing a fixed fee for an arbitration, I am not aware of this becoming a reality in the field of commercial arbitration. Should the time come when arbitrators are asked to submit fixed-price bids on individual cases, efficient, case-management-savvy arbitrators stand to gain the most business and come out at least as well as if they had charged a straight hourly fee.

A discussion of arbitrator compensation from the point of view of the arbitrator requires a recognition that most providers build an administrative fee¹ into their arbitrators' rates, so what these arbitrators charge and what they net can be quite different. The rule of thumb I have heard is that one-third goes to providers such as JAMS, although arbitrators who bill more than \$1 million dollars a year reportedly get a larger cut of their revenues. The AAA, as far as I know, is the only provider that does not retain any portion of arbitrators' fees. Instead, the AAA charges its arbitrators a fairly nominal fixed annual roster fee and charges the parties an administrative fee that factors in the size of the case.

Do Male and Female Arbitrators Charge Comparable Rates?

Far fewer women than men are on the major arbitration providers' rosters; by most estimates, women comprise only about 20% of arbitration rosters. It should come as no surprise, too, that women are more hesitant than their male counterparts when it comes to pricing their services, as well as charges for expenses related to serving as an arbitrator, including meals and travel. At the AAA, for example, women on the commercial arbitration roster tend to charge less than their male counterparts. Based on available information about West Coast (including Guam and Hawaii) arbitrator rates, women's fees range from a low of \$300 to a high of \$550 per hour, while men's rates range from \$375 to \$850, with the average in the \$450 to \$550 per hour range. Off-the-record interviews suggest, however, that women who charge higher hourly rates are not stricken from rank-and-strike lists based on price; some parties, in fact, actually strike the lowest-charging women for fear they are not as competent.

At ADR Services, female judges charge less than their male counterparts in the upper ranges, at least according to the Los Angeles roster, where women judges charge \$425 to \$700/hour, while male judges charge \$400 to \$875. Female attorney arbitrators, on the other hand, charge in the same range as their male counterparts.

For reasons not immediately apparent to me, women arbitrators at JAMS command virtually the same rates as their male counterparts.

Cancellation Fees

My impression is that cancellation fees were initially more prevalent on the West Coast, where arbitrators were more likely to be full-time neutrals, than on the East Coast, where the majority of arbitrators were practicing at law firms. Since the latter often had other billable work to keep them busy if a two-week hearing canceled, they had no need to impose cancellation fees. Now that both coasts have enough arbitration work to support full-time arbitrators, the East Coast is catching up with California in terms of cancellation fees.

More than half of cases scheduled for arbitration settle before the arbitration hearing. And parties really, really dislike paying cancellation fees to arbitrators, viewing these fees as punitive or at least unnecessary. As JAMS' Kim Taylor explains, "Arbitrator cancellation policies vary but exist because time reserved and later canceled often can't be replaced."

So how do arbitrators handle cancellations? A cancellation policy that is decidedly lenient imposes a fee only if the parties cancel within seven days of the scheduled arbitration; some arbitrators impose fees if



Deborah Rothman is an arbitrator with the American Arbitration Association, where she serves on the Large Complex Commercial, Employment, Real Estate, and Healthcare Panels as well as ICDR, AAA's international roster. She is a Past President of the College of Commercial Arbitrators (CCA), was a co-editor of the CCA's "Protocols for Expedious, Cost-Effective Commercial Arbitration," and was a contributor to several editions of the College's Guide to Best Practices in Commercial Arbitration. A graduate of Yale College, she holds a JD from NYU Law School and a Master's in Public Affairs from the Woodrow Wilson School at Princeton University. She can be reached at drthmedarb@aol.com.

“ A number of approaches can reduce party pushback on cancellation fees. ”

the parties cancel as many as 60 days in advance of the arbitration.

A number of approaches can reduce party pushback on cancellation fees. I make sure that my cancellation fees are noted on my bio so the parties are aware of them before I am selected, I ordinarily highlight these fees when setting the hearing dates in the course of a case management conference, and I incorporate them into a scheduling order. One good practice is to have the case manager contact the parties by phone right before the cancellation fee window starts to make sure that they intend to go forward with the arbitration. If the time demands for the hearing change, many arbitrators will reduce the cancellation fee, for example, charging for the canceled hours at a reduced rate, cutting the billable hours in half, or not charging for the last day of a scheduled hearing if the parties use only four of the five days. And yet even with all these precautions, there is still the possibility that if you impose a cancellation fee, the parties will never hire you again.

The arbitration market is different from most other professional service markets. Expertise, experience, and the ability to diplomatically corral senior litigation partners are what matter most. Because clients correlate arbitrators' rates with level of expertise, arbitrators who charge lower rates are not necessarily going to get more business, and particularly not challenging cases. Rather than pricing themselves lower than established arbitrators, newcomers to the market would probably do well to take on expedited and other fixed-rate low-pay cases, but publish hourly rates within the mainstream of established arbitrator fees. ■

Endnotes

1 Administrative fees vary significantly from provider to provider. Some are stated separately; others, as noted, are partially built into the arbitrators' compensation. Other variables include the items covered by the fees, and how the fees are charged. AAA, for example, has initiated an à la carte option, whereby parties pay only for the services they want.

A Commentary on Billing in Mediation

ADR practitioners
should get with
the gig economy

By Jeffrey Krivis

Technology has not only created efficiencies; it has propelled a culture of simplicity.

Take, for example, the task of getting a ride to the airport. Until recently, you probably hailed (or telephoned for) an old, run-down taxi that reeked of mysterious odors and had sticky upholstery. The driver then turned on a meter that triggered palpable tension, as quarter-miles transformed cents into dollars in real time. As if all this weren't difficult enough, you probably also had to deal with a menu of indecipherable surcharges and tolls and taxes as well as posters with confusing rules and regulations. That's a lot of complexity just to get to a plane on time.

Enter the "gig" economy, in which people are hired to work on demand through digital means and software is exploited to cut unnecessary costs and expenses. Now people with certain basic skills can advertise, aggregate, and market their services at a reasonable rate directly to the consumer, bypassing the middleman completely.

Need to catch a plane in two hours? Press an app on your smartphone, and moments later a car will show up and take you to the airport at a pre-determined cost, one that you accept (or reject and look for another option) ahead of time. No surcharges, taxes, toll, stickers, or meters. It's simple, it's elegant, and it was designed to serve its purpose.





Transportation is not the only area where consumers have new and different expectations; today on-demand, fixed-price services are available just about everywhere we work and play. Isn't it time that lawyers and mediators joined the gig economy in providing and billing for their services?

Conventional Wisdom (a.k.a. "the Taxi approach")

Historically mediators, just like lawyers, have billed hourly for time spent reviewing case files, planning and conducting a mediation session or sessions, writing up agreements, and doing post-mediation follow-up. Because they often have no idea how long the process will take and because moving from the beginning to the end of a case takes some mediators more time than others, when they hire a mediator, most people are not exactly sure what they are getting for their money.

Another big variable complicates the picture: billing rates vary widely, depending on the experience of the mediator, what the marketplace can absorb, and where the mediation takes place. When certain similar types of disputes can be quantified in highly predictable economic values, market forces, like insurers, drive prices down and push up mediocre services.

In routine personal injury cases, for example, insurers enter the market because they can forecast settlements through actuarial tables. They then price their insurance on the product (general liability insurance) and find vendors (lawyers, mediators, court reporters, and others) to service the product at costs that fit within their actuarial tables. Generally speaking, insurers hire providers who are willing to work at discounted rates in exchange for a large volume of cases. Such discounted rates necessarily exclude

“ Now people with certain basic skills can advertise, aggregate, and market their services at a reasonable rate directly to the consumer, bypassing the middleman completely. ”

higher-end service providers (such as silk-stocking law firms) from handling these cases because their business model cannot absorb lower rates, leaving the work to discount providers who must work on a large-volume basis. And that reduces the quality of the service.

The same can be true for mediators. In exchange for a large number of cases, a mediator might charge less, handle cases more quickly than usual, and generally be pushed economically to run his or her business with a smaller profit margin. This could lead the mediator to follow formulaic patterns of process to manage disputes more quickly and within the boundaries assigned by the insurer. The unintended consequence of this business model is that it encourages the delivery of routinized mediation services.

With these market forces in mind, to fit into the institutional framework developed by their clients and succeed financially, some mediators are forced to create layers of administrative fees, reduced hourly rates, cancellation fees, rescheduling costs, and travel expenses. While this model is successful in many ways, here's what it looks like from the perspective of the ADR provider organizations, lawyers, mediators, and clients.

- **Hourly rates.** Billable rates in major urban cities range from \$250 to \$1,000 per hour depending on the complexity of the case, the mediator's experience, the nature of the dispute, and the market demands of the region. Often billed as a "retainer" against hourly increments spent on the case, this system can cause accounting and administrative issues for mediators, not to mention confusion in the marketplace. Clients often don't understand the "additional hours" that are allotted to a case, and lawyers who don't feel as if they got a "good deal" might question the value of the charges. Many ADR providers are set up like law firms and are equipped to deal with billing but still have to spend significant resources trying to collect on cases that don't settle. Because of concerns and uncertainty about such open-ended billing arrangements, many clients and their lawyers end up taking the path of least resistance, working with a mediator they have used before, knowing that person will be flexible on the billing. This can put the mediator in the unenviable position of waiving or reducing fees.

“ Isn't it time that lawyers and mediators joined the gig economy in providing and billing for their services? ”

- **Cancellation charges.** Whether the client cancels seven, 14, or 21 days before a scheduled session, many mediators charge if they cannot replace the case. This is a sensitive issue, since respect for the mediator's time is critical to the success of the case. (Also, a client who cancels and reschedules several times at the last minute is usually sending the wrong message to the other side — and is challenging to do business with.) ADR providers of mediation service have to be more diligent than boutique firms because of fixed overhead and other considerations. Clients hate the charges and often ignore them.
- **Administrative Fees.** In reality this is the institutional revenue the ADR provider makes over and above its split of the mediator fees. Mediators don't like it because they generally don't share in it. Lawyers view it as an added service charge that doesn't provide value to them. And in the mind of the client, there is no reason for it. While the ADR provider encourages the fees to assist with the bottom line, this doesn't work well for the solo practitioner or boutique firm with mediators who build their practices based on relationships.
- **Travel Expenses.** This often-confusing expense comes about because talented mediators are spread all around the country, and many clients develop loyalties. When a client wants a particular mediator for her expertise or simply because the client is familiar and comfortable with that person, the client usually expects and is willing to pay the mediator's travel expenses. The key is making sure the client and lawyers know what these expenses will be before they sign up for the case.

Non-Conventional Wisdom (a.k.a. the “Uber” approach)

As recent national and global events show, applying time-honored formulas, principles, and predictions across the board is not always a good idea. This certainly could be true for mediators’ and lawyers’ billing practices.

Better, perhaps, to embrace the gig economy and think of the mediator (or the lawyer) as an Uber driver providing premium service that can be understood in a simple way. This method can eliminate confusion, uncertainty, and inconsistency and give customers a much better experience than the old methods did.

Viewed through this lens, billing can respond to clients’ desire for simplicity in a much friendlier way, even when the mediator charges more for her services. This approach generally relies on a flat fee for the day that includes review of materials and a certain amount of follow-up work. Parties know what they are getting in advance, and many are willing to pay a premium for the certainty and the simplicity. If the mediator can get the job done in less than the predicted time, most parties will consider this an efficient use of their time. Because everything is frontloaded and budgeted, this approach resonates with purchasers of mediation services in the gig economy.

- **Flat fees.** This could be the most elegant approach to billing. It generally includes review of materials and a few hours of follow-up if necessary. Fees range from \$3,000 per day to \$15,000 per day. While some charge even more, they are outliers. The more common range of billing is in the \$5,000 to \$8,000 dollars per day, depending on the geographic location. Certain kinds of disputes, however, such as class actions, command \$10,000 to \$15,000 per day because they are so complex.
- **Cancellation charges.** Time is valuable, and clients need to respect it. Getting paid in advance avoids problems with cancellation fees. (Some clients will want to apply their payment to the next session, but that is generally a bad practice because it can condition clients to take advantage of the mediator’s time.)

- **Administrative Fees.** These are not well received in the gig economy, which sees them as just another expense that doesn’t make sense to the end user. Your best option is not to charge them.
- **Travel Expense.** The better approach is to absorb this in the flat daily fee, but there are exceptions for unusual travel and excessive hotel costs. That said, it is much better for the client to have a simple bill with one cost that doesn’t include extraneous expenses.

We live in a world where people expect services to be efficiently delivered, priced consistently, and free of surprises. The old way of charging for our services tends to work for old-school ADR providers — but not so much for clients, lawyers, and mediators. Eventually, the new gig economy will probably force most ADR providers to streamline their practices and simplify the experience. While they might charge more for flat-fee arrangements, doing so will reduce administrative costs and improve the clients’ experiences.

That said, no specific formula fits for every case, and sometimes time-honored systems make sense. A large, complex case that lasts for days, weeks, or months might need to be managed — and billed — differently from the less complex tort, workplace, divorce, or employment cases. The important thing is to pay attention to market forces, choose a fee system that fits the case, and avoid letting billing become a cause for criticism. Mediators are not immune from the transformation of our society and workforce, and we should not be surprised that clients who value mediation as a flexible, party-driven process also value a billing system with the same features.

A long-term practitioner, I try hard not to get stuck in my ways, including how I deliver and charge for my work. My goal is to pay attention to societal trends and adapt them to my practice, especially when it comes to compensation for services. Staying a step ahead of the trends eliminates criticism over billing and, I believe, helps provide positive experiences for my clients. ■



Jeffrey Krivis practices complex commercial mediation with an emphasis on class-action, labor, and employment disputes. He has taught at Pepperdine Law School and the Straus Institute for Dispute Resolution and is Past President of the International Academy of Mediators. He can be reached at jkrivis@firstmediation.com.

How to Succeed in Business

With a lot of careful planning and attention

By John Bickerman

In my more than 25 years of practice as a neutral, I've been approached by dozens of would-be mediators and arbitrators, some young, some not so young. Some have been counsel or parties in my mediations. Others have had distinguished legal or judicial careers. I can usually predict who will be successful — and who will not. Those who will succeed have an understanding of the business of mediation and arbitration, which is different from possessing the skills needed to be a good neutral. They have a good sense of where their work will come from, how they are going to reach their future clients, and the economics of running a business. Most important, they have an intangible quality or instinct about how to make it happen. Whether that's drive, personality, or self-confidence, they have an air that they can and will succeed.

Even with those intangibles, however, the sad, hard truth is that just as it is in any small, undercapitalized business, without careful planning, failure is much more likely than success. The median income of mediators — the amount of income that divides the profession, with half earning more and half earning less — is believed to be \$0. Stated differently, more than one-half of the professionals who call themselves mediators do not make any money in their chosen profession.



Deciding to Become a Neutral

Becoming a mediator or arbitrator requires forethought and planning. Among the questions I field often are: Should I jump into the deep end and become a full-time practitioner, or dip in my toe and try it out part-time? If I'm with a law firm, should I cut my ties — or try to maintain my affiliation and perhaps some of my legal practice? Where will my cases come from? Should I affiliate with a national or local alternative dispute resolution provider or should I be independent?"

While these are all important questions, they should be addressed only after careful construction of a business and marketing plan. Well-conceived plans may help drive many of these practical decisions.

Working as a neutral is a business, and you should treat it as one from the moment you decide that's what you want to do. Imagine going to a bank to seek a line of credit. The bank officer will want to see a business plan showing your anticipated sources of income and projected expenses as well as some consideration about how you will find your clients and meet your income projections. He or she will want to know how quickly you think you can turn a profit and some assurance that your assumptions are realistic. The Internet has many good examples of business and marketing plans; completing one is a good way to get a sense of the many challenges of starting a mediation/arbitration practice.

Expecting the money you make in your new practice to equal what you earned before is usually unreasonable, which prompts an important question. Do you have the resources to survive on limited income until your practice catches fire? After deducting your living expenses, chart out your practice expenses. Initially, you may be able to keep those costs down, but they are never inconsequential. You will need a good website, a cell phone, and access to office and/or conference space. You will also need to finance your receivables — the fees you've earned but haven't yet collected. Most important, you need to set aside money to market your practice. It helps to have a reasonably comprehensive marketing plan.

Finding a Niche and Selling Yourself

First, what's your target audience? Neutrals who have a specific practice area are much more likely to develop a clientele. Do you have special expertise or contacts that would lead to your being hired to resolve disputes? Are you especially well-respected or known in a particular area of the law or community? Once you have identified your target audience, how do you plan to reach it? Marketing plans need not be overly complicated. Start with whom you know and who might know you. Let all of them know you're going into a new area of practice. Asking for advice is often much more welcome than trying to "sell" yourself or your services, so meet with potential clients to find out what they need and get their guidance.

Several years ago, a friend of mine saw that the health-care industry was likely to become a hotbed of disputes and fertile ground for dispute resolution. He identified this niche market, learned the issues that might be relevant, marketed himself to potential consumers of his service, and carved out a thriving health-care dispute resolution practice. Many other niche practice areas are waiting to be discovered.

“ [T]he sad, hard truth is that just as it is in any small, undercapitalized business, without careful planning, failure is much more likely than success. ”

I subscribe to the pinball theory of marketing. The more times you bounce off a bumper — get your name in front of a potential client — the more likely people are to give you a try. Write articles, give speeches, and use social media such as LinkedIn and Facebook to get your name out to potential clients. Even sending change-of-address notices, with mention of your new practice, to all your contacts and friends can help. Be systematic about marketing. Set up a calendar with tasks and deadlines and treat starting your new practice as a full-time job — because it can be and usually is.

Being professional from the moment you launch your practice is also crucial. You are probably going to ask clients to pay you hundreds of dollars an hour for your services, so everything about your presentation should reflect a high degree of professionalism. Be thoughtful about where to economize and where to spend to create the kind of appearance that you want for your business.

Staying or Leaving the Firm

I often meet accomplished lawyers who see mediation as a suitable steppingstone to retirement and want to remain with their law firm as they transition to a neutral practice. I also see successful attorneys with substantial financial needs who can't forgo the income of their practice while they try to launch a new career. The question of whether to stay with a firm or go it alone has no one answer, but here are some broad generalizations from personal experience.

For lawyers in firms contemplating starting a practice, the advantages of maintaining affiliation are obvious. The firm has office space, secretarial support, phones, conference space, a reception area — in short, all the creature comforts of a highly professional setting. But there are both obvious and hidden costs of remaining with a firm. The economics of a mediator's or arbitrator's practice are vastly different from those of a successful partner. With some rare exceptions, the billing expectations and income generation at a firm will not change just because your practice has. Because being a neutral does not generate leverage from employing other attorneys in your work, the income you generate for the firm will almost always decline as your practice shifts toward dispute resolution. The flip side is that most of the firm's

overhead for which you are paying isn't necessary for a dispute resolution practice. You won't need lots of support staff or dawn-to-dusk reception services. While the importance of mailrooms has declined as more communications have become electronic, you will have even less need for these services. In short, the economics of a large or even a medium-sized firm just don't fit the practice of a neutral.

In addition to the economics, there is a more important drawback to firm affiliation: conflicts. As most firm lawyers know, under your state's rules of professional conduct, the clients of one partner and the ethical conflicts connected to them are imputed to all partners. In theory, with client consent, it may be possible to screen your neutral practice for these potential conflicts, but the reality is different. First, clients may not be willing to grant consent. Second, there are many potential retentions that you will never even learn about for which you were rejected because a party was uncomfortable with your firm affiliation. After I left my firm, I learned that I'd been proposed for and rejected for many matters solely because of my firm affiliation. In addition to the known conflicts, your fellow partners may resist your taking certain matters because of the future downstream conflicts such a retention would create for them. Once someone from the firm has been hired as a neutral by a major corporate client in a particular line of business, the firm may be precluded from taking on work from that client in the future. I experienced the problem of a putative downstream conflict firsthand I was being considered to mediate a billion-dollar, nationwide class-action matter. My law firm did not allow me to serve as the mediator in the case because the firm did not want to be precluded from future opportunities to represent one of the parties in the dispute. This experience convinced me that it was time to move on.

Affiliating with Private ADR Providers

The few national and many local providers of dispute resolution services generally follow the same model. These providers affiliate with neutrals as independent contractors. The full-service firms provide name recognition (of the firm), marketing, and, most important, office and support staff for a neutral. While you may not get your own office, you will have a place to hang your hat and access to phones, a receptionist, conference rooms, catering services, billing services, and all the support services a neutral could need. These firms will also provide varying degrees of marketing services to help promote your practice, but these come with a substantial cost, often starting out at 50% of your fees. (As your fees increase, the firm's share may decline.)

Even if you decide to affiliate with a provider, the ability to be successful will still rest with you and your ability to market yourself as a neutral, especially when you're starting out. Before a firm will be willing to welcome you into its fold, the business people there will assess the likelihood that you will be successful. That assessment may be based on your prior legal experience. In some states, bench experience will be an excellent credential. However, often the firm will want to see how you've done on your own generating clients and income. The admonitions about finding a niche and developing a plan apply with equal force to joining a dispute resolution firm. Of course, the obvious advantages of affiliating with a full-service firm are that you don't have to worry about running the business or collecting your fees. The firm will do all that work for you, and your association with the firm may help you generate business. The downside is that you pay a substantial price and give up some control over your practice. Especially for accomplished lawyers and jurists, provider affiliation may be a very attractive and profitable alternative.

“ I subscribe to the pinball theory of marketing. The more times you bounce off a bumper — get your name in front of a potential client — the more likely people are to give you a try. ”



Going Solo

Many of the most successful mediators in the United States are solo practitioners. Being independent has many rewards but substantial challenges. Without the support of a firm, you will have to set up your business from scratch, and at first you may not be able to afford an assistant to help with scheduling, billing, marketing and other support tasks. Until then, you're on your own performing all those tasks, but you won't have to share your fees, and you will have complete control over your practice. You will need fewer assignments to become "profitable."

For many neutrals, having this kind of control from the initial call to the final bill is important. As you become successful and can afford your own support system, the payoff will be considerably higher than if you affiliate with a firm. Successful solo practitioners are usually able to keep 75 percent or more of their fees. Also, the transition to part-time work is easier because the reduction in hours is cushioned by the higher percentage of fees retained.

Solo practice does require great attention to many details, particularly setting and collecting adequate retainers and fees. In the last several years, some clients, especially insurers, have been very slow to pay.

Mediation is a Process — Not an Event

As most good mediators know, mediation is a process, not an event. As you start your practice, you should realize that how you present yourself and your business from the moment someone encounters you or your name — whether he or she is looking at your website, calling your office, or seeing your marketing material — affects that person's perception of you and your work. If every contact that a client has with you and your office is crisp and professional, this will be to your benefit. However, the opposite is equally

true: if you meet a client in a messy office, your communications or your bills contain mistakes, or you are late, you risk harming your business. Make sure that when you go live, you're ready to provide the type of service that you would want to receive. If you're affiliated, make sure that the organization is providing the level of efficiency and professionalism you want for your practice.

Working Full or Part-Time?

Some lawyers nearing retirement view a dispute resolution practice as the perfect part-time practice to make the transition from their firms. While a fortunate few can make that transition, for most attorneys the start of a dispute resolution practice requires intense effort to develop a demand for services. For the latter group, after the proper groundwork has been laid, a part-time practice is a worthy goal.

Because it draws on your intellectual and creative abilities and helps clients achieve resolutions efficiently, creatively, and constructively, a dispute resolution practice can be very rewarding. While the competition is fierce, if a mediation practitioner has strong skills, passion, and a deep understanding of how the business works and exactly what's needed to start up a business, success is possible. ■



John Bickerman is an internationally recognized neutral, specializing in complex, multi-party insurance coverage and general commercial disputes who left his firm 20 years ago to form a solo practice and has never looked back. He teaches negotiation and mediation courses at Cornell University and is a past Chair of the ABA Section of Dispute Resolution. He can be reached at jbickerman@bickerman.com.

Two Perspectives on Compensation



At his company,
fees weren't a big factor

By Phil Armstrong

I spent 34 years with a very large Fortune 100 company. The company was among a handful of large, multinational corporations that in the mid-1990s “institutionalized” the use of ADR processes and early-case assessment in managing its litigation, and for more than half of my time there, I managed the ADR program. A large part of the company’s program, which was nationally recognized, included the vetting and hiring of mediators, primarily for commercial cases. Over the course of my career, the company hired hundreds of mediators.

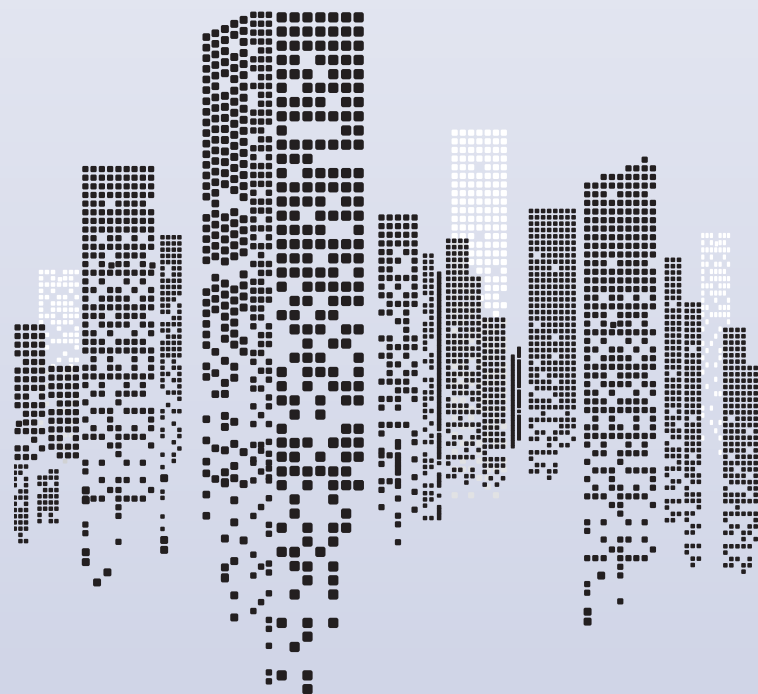
Our standard was straightforward: we wanted the mediator best suited for the dispute at hand. Although decision-makers did consider information on a neutral’s website or list of achievements, the primary reason for hiring a neutral was his or her reputation for “getting a deal done.” We obtained that information largely by word of mouth: over the years, the company had forged relationships with many regionally-based law firms, so when we needed a neutral, we called the relationship partner in one of those firms, usually the one located closest to where the dispute arose, for help in identifying good mediators. We asked one simple question: “Who is the best mediator in your region?” In short, in selecting neutrals, the company tended to rely on local knowledge more than the standard selection processes such as those offered by CPR, the AAA, JAMS, or other ADR service providers.

Phil Armstrong is a former Senior Counsel for ADR and Litigation and a member of the American, Georgia, and Atlanta Bar Associations. He has served as the vice chair of the American Bar Association’s Dispute Resolution Section; chair of the State Bar of Georgia Dispute Resolution Section; and chair of the Atlanta Bar Association Dispute Resolution Section. He can be reached at pmarmstr1@gmail.com.

Readers may be interested to learn that the company placed far less importance on the mediator’s hourly or daily rates – unless they were way out of the norm. Often, in a classic example of negative psychology, a neutral who charged more than his or her peers appeared more desirable, someone who must be exceptional skilled.

Why weren’t fees more of a deciding factor? At least in my experience, it was a matter of perspective: the amount in controversy in the case was always significantly higher than most mediators’ one- or two-day rates, so mediating would always save money, even with higher mediator fees.

I think a company that spends an inordinate amount of time reviewing fees instead of the mediator’s reputation for obtaining a mutually satisfactory outcome is a company with short-sighted values. Perhaps scrutinizing rates in smaller-dollar cases makes sense, but any large organization involved in a typical commercial case should focus on getting not the cheapest mediator but the right one.



from Corporate Counsel



But she finds that some companies are price-conscious

By *Deborah Masucci*

Before beginning my career as a mediator and arbitrator, I worked in the securities industry and in a large insurance financial services company. The financial services industry is the largest consumer of alternative dispute resolution services in all forms, and the insurance industry is the most sophisticated purchaser of legal services as well as the most innovative and creative in its approach to ADR.

In my experience, companies choose a mediator based on who can get the job done, and the vast majority are chosen because the selector has had personal experience with or has heard great reports of their work. Many companies and law firms create databases containing information about their experiences with mediators, information that can be shared across the company as a starting point to understand how individual mediators work, what areas they specialize in, and how much they charge.

Many companies make an effort to hire mediators with diverse backgrounds, so women and people of color who are looking to increase their chances of being selected should always highlight their specific areas of expertise in their bios and cultivate references who have strong connections to corporations and law firms. These references are the “go-to” people to get you in the door, so make sure you know what your references will say about you and keep your list up to date.

Deborah Masucci is a former Chair of the ABA Section for Dispute Resolution. During her career of more than 30 years, she has championed best practices in dispute management and resolution in the business/commercial, employment, insurance, and securities sectors. She writes and regularly speaks on the topic of dispute resolution. She is Chair of the International Mediation Institute and Chair Elect of the New York State Bar Association Dispute Resolution Section. She can be reached at dm@debmasucciadr.com.

Can a mediator’s fee be a barrier to selection? Although the mediator’s fee is the smallest part of the total expense on a case file, companies are often price-sensitive. The mediator’s fee should be in proportion to the amount at risk and the complexity of the case. If a mediator’s rate is not in line with the case value or the company’s risk exposure, his or her name may well be struck from the list of potential mediators for that case.

There are other concerns. In single-party cases, many companies prefer an hourly fee because the parties can predict and manage the cost. Experienced mediators who raise their fees when their business increases may find that business drop because their clients migrate to lower-cost practitioners. Mediators who nickel-and-dime parties by charging for minor services or follow-up work the parties perceive as unproductive may not be called again. Many companies will seek reduced negotiated fees to bundle cases, selecting, for example, mediators willing to handle multiple cases for one daily rate.

Mediator fees are not as price-sensitive in large, complex, or “bet the house” cases, in which mediators can usually exercise substantial latitude in their rate structure. This is particularly true in multiparty mediations, where the number of acceptable mediators may be small. But even in these cases, there are limitations, as companies are increasingly negotiating rates to manage their legal expenses. And any mediator who commands a high fee and then demands that the mediation be held at a specific remote location with an expensive caterer may see such cases disappear.

Understanding my corporate clients, their business model, and the companies’ desire to control legal expenses has helped me structure my own approach to pricing the mediation services I provide. I listen to what the parties are looking for and am flexible, packaging my services and fees to meet their needs and provide the highest value. ■

Billing Outside the Box

By Frederick Hertz

Billing by the hour is a practice I've dutifully followed for nearly 35 years; indeed, keeping track of my time runs parallel to my other daily activities of eating, sleeping, and breathing. As the primary determinant of what clients pay me and how much money I receive, hourly billing is integral to how I conceive of my law and mediation practice.

Nonetheless, I know there are numerous other billing models. Some mediators charge a flat fee for the case, others charge hourly rates with creative variations. I figured that there was no better way to challenge my own practices than to speak with mediators I know who use other methods. Admitting that my approach to charging my clients is a conventional one, I set out to learn some new ideas from those who bill "outside the box."



Stewart Levine

Stewart Levine has been mediating conflicts involving families, companies, partners, and organizations for nearly 30 years. Levine, who is based in the San Francisco Bay Area, also teaches, trains, and writes on the topic of reaching agreement, so he's thought a lot about how humans resolve conflicts — and about barriers to resolution. Levine says that he's never billed by the hour, preferring to set a flat fee for each mediation based upon the time it will probably take, the complexity of the issues, the emotional tenor of the people, and their ability to pay, as well as his own interest (or disinterest) in the assignment. He proposes a different flat fee for each dispute, generally between \$2,000 and \$10,000, imposing a maximum number of hours for the pre-arranged fee. If he believes that either or both parties will be overwrought, hard to deal with, rigid, or excessively angry, he probably won't work with them at all.

For Levine — and, he believes, for his clients — this system is far preferable to billing by the hour or day; it skirts the tension of watching the clock and allows everyone to focus on resolving the conflict with whatever process works best. It fosters creativity and an expanded mind, removing the pressure that hourly billing can impose on the process. He rarely invokes his time-limit condition except in extreme situations, so even that's not a major constraint, and he's confident that he can accurately estimate the probable duration of the process in the first session. His clients pay the flat fee in advance, he says, and they appreciate the certainty about fees — and, he says, no one has ever asked for a refund if they've resolved the dispute more quickly than he anticipated. In the end, Levine senses that he makes less money using this method, as he often spends more time than he had predicted, but that doesn't motivate him to change his approach. For him, peace of mind and simplicity of process are more important than maximizing revenue.



Judy Williams

Judy Williams has been practicing family law and mediation in California's Orange County for more than 20 years, and she's convinced that flat-fee billing is the way to go for mediating divorces. It frees her from the dreary task of time-keeping and offers financial predictability to her clients. Her flat fee is not a bargain, she notes, as it reflects her experience as well as document preparation, a checklist of tasks, guides for completing the court forms, and a set number of sessions to resolve the issues. Her rate varies based on the number of sessions likely to be required and includes the mediator's preparation time for each session.

From Williams' perspective, her approach to fees offers benefits for her and her mediation clients. She's able to sleep better knowing what her revenues will be each month, and she can focus on the work instead of being distracted by time-keeping and billing. But perhaps more important, the parties know exactly what their divorce mediation process will cost, which is calming and reassuring at a time of great uncertainty. Even if her net revenues are less than if she charged by the hour, she's convinced that the higher level of client satisfaction warrants the financial sacrifice.



David Stein

In his Bay Area family law mediation practice, David Stein is in the process of adopting an approach similar to Judy Williams'. He used to bill hourly, but he eventually realized that most of his mediations settled within a predictable range of hours, so he's shifting to the flat-fee model. He undertakes a rigorous evaluation of prospective clients at the outset, and he lays out ground rules for couples he is considering working with. He recognizes that his system works only for couples who can demonstrate mutual trust, have shared goals for their futures and for their kids, and can listen in a non-adversarial manner. If he senses that the levels of distrust and conflict are too high, he won't offer them the flat-fee option but instead will revert to hourly billing.

Like Levine and Williams, Stein sees abundant benefits to this approach: he's freed up from the drudgery of hourly billing, and he says his clients really like it. They can manage their mediation expenses in a predictable manner, and they have far less anxiety about the duration of the process. As other mediators have emphasized, Stein expects that his net revenue will be lower with this approach, but the increased client benefits should lead to a higher volume of work, making up for the reduced income.



Stephen Hochman

New York City-based Stephen Hochman, who previously practiced corporate and securities law, started mediating commercial and financial disputes more than 20 years ago. He has always loved mediating, especially appreciating the win-win solutions that can emerge through the mediation process. Many years ago he implemented a system by which he offered the parties the option of getting a discount of 50% on his regular hourly rate if the dispute did not resolve as a result of the mediation but paying a 25% bonus above his hourly rate if it did. When his hourly rate reached a level that was itself over the market rate, he continued to offer a 50% discount if the dispute did not settle, but he no longer charged a premium if it did. Even though he continues to follow up with parties as the litigation progresses, he has difficulty determining whether the settlement occurred “as a result of the mediation,” so he deems the mediation a success if the dispute settles at any time before a final judicial determination.

Hochman acknowledges that the ABA’s Model Standards for mediators frown on charging in any way that gives the mediator a financial stake in the outcome, but Hochman is convinced there’s a positive benefit to his fee structure. He says it projects a confidence in the likely settlement and puts his financial reward on par with the results of his efforts. In effect, he’s offering a “failure discount” if the mediation process doesn’t lead to a resolution, which, he says, sends the clear message that he’s as interested in a positive outcome as the parties are.



Patricia Prince

Patricia Prince is a seasoned employment and commercial mediator working in the San Francisco Bay Area who uses a flat-fee billing structure — although for certain cases she gives clients an hourly option. Her flat-fee service is a blend of time and “whole matter” considerations, as most of her clients prefer a one-day mediation to minimize travel time and time away from work. Her fee includes preparation, pre-mediation calls, administrative and travel time, one full-day session (even if it lasts long into the night), and a limited amount of follow-up time. If extra sessions are needed or a lot of follow-up is required, she either bills that time hourly or asks for an additional flat fee, depending on the needs of the case.

For Prince, the benefits of this approach are the elimination of hourly time-keeping and billing — and the freedom to spend more time in preparation or mediation without risking clients worrying about the extra billing hours. On the negative side, she, like others, senses that her overall income is less than what she would earn if she charged on an hourly basis. Ironically, she’s noticed, less experienced parties and lawyers, unaware of how much they are probably saving by paying a flat fee, sometimes balk at what seems like a high up-front charge. Most clients, however, seem to prefer the flat-rate approach.



Larry Rosen

When he opened his Oakland, California-based family and business relationship mediation practice 15 years ago, Larry Rosen's first priority was gaining experience, so he offered his services on a "pay what you wish" plan. He received some fine wine and dinners but insufficient money to cover his costs, so he shifted to inviting a fee proposal from his clients. Over the past decade and a half he has moved to presenting a rate based on the local market — but as a proposal that is open to negotiation. He's found that most parties offer to pay close to his suggested fee, which he readily accepts. Over time, although he has raised his proposed fee, his workload has increased — and the quality of his client base has improved.

Rosen says his proposed rate hovers close to what he considers to be the high end of the range for family law mediators in the area, but he still invites his clients to make an offer to pay what they think is fair. He reserves the right to reject their offer if it seems too low but says that's rarely a problem and that in most instances the fee ends up being about 90% of his proposed rate. As awkward as the fee-negotiation process can sometimes be, Rosen embraces this unconventional approach. It allows for a range of fees — all hourly, but flexible enough to meet the varying clients' needs — and it accommodates periods of economic recession and potential slowdowns in client traffic. But what he likes most, he says, is that it engages the parties in an open and transparent discussion of the threshold financial dimension of the mediation process, encouraging a sense of openness, appreciation, and authenticity at the outset of the relationship. This engagement, he finds, sets the right tone for the ensuing process.



Janelle Orsi

Janelle Orsi, a Bay Area lawyer and mediator who resolves business disputes and provides formation agreements for workers' cooperatives and shared-housing groups, is the co-founder and director of the Sustainable Economies Law Center, a nonprofit focused on cultivating a new legal landscape that supports community resilience and grassroots economic empowerment. Orsi deeply believes that lawyers' high fees disenfranchise those who most need legal services, so she typically reduces her hourly fee for low-income clients who are building cooperatives or sharing communities. In her mediation services, Orsi takes a contrarian approach: for the first few hours of mediation, when the demand on her attention is the most intense and the parties are gaining the greatest benefits of her involvement, she charges a reasonably high hourly rate. For the rest of the process, her hourly rate drops significantly.

The rate shift, she says, is partially an acknowledgement of the reduced "psychic" demands that the latter phase of mediation puts on her and also a reflection of her desire to reduce her clients' anxieties about mounting fees as the process unfolds. But because she's still charging for her time, she notes, clients are motivated to keep moving toward resolution. Her one exception to the variable rate: a flat fee for her work for when she is working for innovative organizations. She charges the low flat fee through her nonprofit organization.

Creative Options

So there are many options. For several mediators, charging a flat fee based on their view of the complexity of the dispute and the clients' situation is standard procedure, one that allows everyone to focus on mediating rather than watching the clock. Others usually charge a standardized flat fee (although they may switch to charging hourly for some cases), finding that clients appreciate knowing their costs upfront. One offers a discount on his hourly rate if the mediation ends in agreement, which he says shows clients he's committed to their success. Another negotiates his hourly fee with his clients, considering this the first important engagement of the case. Still another mediator starts with an hourly fee that goes down as the process moves toward resolution, reflecting her keen interest in helping her clients save money. All these approaches reflect an openness to thinking differently — and creatively — about how to charge as a mediator and how the billing method affects the feelings and behavior of clients. These are priorities all of us should bring to our practices, whatever billing system we use.

Even if you aren't sufficiently adventurous to try any of these techniques, embracing their focus on the parties' responses to traditional hourly-based billing is worth considering. Perhaps even I will have the courage to try this out sometime soon. ■



Frederick Hertz is an attorney and mediator with offices in Oakland and San Francisco. A graduate of the University of California/Berkeley School of Law who also holds a master's degree in urban geography from UC Berkeley, he works as a mediator and arbitrator, with a special emphasis on real estate disputes, co-ownership, and other disputes between married and unmarried couples, business partners, tenants-in-common, co-owners, family members, and domestic partners. He is a member of the Editorial Board of Dispute Resolution Magazine. He can be reached at fred@frederickhertz.com.

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On Professional Practice



New Sequences, Techniques, and Approaches for Commercial Mediation

Guided Choice and Mixed Modes Mediation

By Judith Meyer and Ty Holt

In this issue's "On Professional Practice," two of our contributors examine how the early involvement of a mediator creates the most nuanced result for the parties and how mixing the techniques of mediation and arbitration can produce a more satisfactory resolution. Ty Holt and Judith Meyer believe that professional responsibility principles require understanding of these techniques.

"A rose is a rose is a rose" Gertrude Stein famously wrote in 1913, poetically evoking the commonplace notion that a thing is what it is. Mediation is mediation. Arbitration is arbitration. However, mediation often takes place just before the parties start to climb the courthouse steps, after months or years of discovery and numerous depositions, motions to compel, motions for sanctions, and motions for partial or full summary judgment. Every stone has been overturned. Every e-mail has been exhumed and examined. Then the case settles in mediation.

But can professional neutrals use their skills to intervene at other stages of the process and in other ways? Would mediator involvement benefit the parties from the time the issue is joined? When an answer is filed? When the parties have asserted claims and cross-claims?

Advocates of two new approaches, Guided Choice Mediation and Mixed Modes, believe the answer to all these questions is yes. Guided Choice, which was formulated by Paul Lurie, a former contributor to this column, in cooperation with mediation colleagues and corporate clients of mediation, uses the mediator in ways that shape the process of the mediated

dispute, not just its final resolution.¹ Mixed Modes was formulated by the International Task Force on Mixed Mode Dispute Resolution, a joint initiative of the International Mediation Institute, the College of Commercial Arbitrators, and the Straus Institute for Dispute Resolution at Pepperdine Law School. Mixed Modes endorses exactly what its name implies: it toggles among mediation, arbitration, and court intervention, often running simultaneously on three parallel tracks. Both Guided Choice Mediation and Mixed Modes are ways of steering parties efficiently, and with the laser-focus and precision of surgery, to a mutually satisfying end.

Consider, for example, a case in which the parties in mediation came up with a resolution that would work, except that one party insisted that the contractual clause waiving consequential damages was unenforceable and therefore the resolution based on his decision-tree analysis was far too pricey. Rather than opining that the waiver clause was enforceable, the mediator in that case did something different. She suggested that if the mediation did not resolve all matters, the parties could take the single issue of the validity of the damage-waiver clause to the appointed arbitrator waiting in the wings. The parties (to her surprise) agreed and teed up that one legal issue for arbitral resolution. The arbitrator agreed to resolve the issue and after hearing the dispute, ruled the consequential damage-waiver clause enforceable. The case returned to the mediator after the single-issue arbitration and quickly ended with an agreement. The mediator learned, after the fact, that referring an issue or issues to an arbitrator is one of the techniques of Mixed Modes

What is different about the conventional mediator's role in Guided Choice? Mediators play an early and proactive role. They are invited by the parties to involve themselves early in the dispute — at the very beginning of litigation — to hold informal conversations with parties, counsel, and their experts, distilling from those conversations suggestions for the exchange of just enough information so that the parties can make a rational decision about resolution and the terms of settlement. The parties agree, with the direction of the mediator, on what information is essential to a risk analysis and an informed business decision regarding what is at stake. Discovery becomes focused and limited. The mediator, with the parties and counsel, selects the representatives on each side who are best able to evaluate risk, negotiate with each other without hot-button or emotionally invested issues derailing productive conversation, and see the forest without becoming distracted by the number and diversity of the trees. The mediator works to identify issues or people that can lead to impasse or stalemate and suggests work-arounds.

The mediator also works with the parties and counsel to create an agreed-upon menu of essential questions for experts, should experts be identified, and the experts, when they respond to these questions, are able to do so in a confidential, collaborative setting, with the result that the parties and counsel engage in a discourse focusing on practical and workable solutions. In traditional litigation, litigants pay experts to offer opinions on sometimes extreme and party-driven conclusions. In Guided Choice Mediation, experts collaborate and come to a working solution the conflicting parties can endorse. Experts, after all, are usually experts in solving problems, not only in proving that the opinion of another expert is wrong. Guided Choice Mediation can include nonbinding evaluation by the mediator on issues of fact and law, or, if the parties allow, some limited arbitration to determine hotly disputed legal claims such as the above-referenced waiver of consequential damages clause. (Note the crossover with Mixed Modes.) For some experienced mediators, the tools expounded by Guided Choice Mediation may simply seem common sense.

Here are two real-world examples of how some of our most creative mediators have used Guided Choice Mediation:

- A general contractor was in dispute with a large US city, and the case went to mediation. The GC had installed windows in a historic City Hall that were now leaking. The GC, who had a very large outstanding bill, expressed unenthusiastic willingness to do limited repairs. After the city's expert responded that the GC's promises were inadequate, the mediator, strategizing and worrying about impasse, suggested the city and the general contractor hire an expert to weigh in on the scope of needed repairs. The mediator's suggestion foresaw two realities — the political process would not allow the city to accept a negotiated number lower than that suggested by its own expert, but both sides could and probably would consider a neutral expert opinion. The upshot was that the neutral expert persuaded the parties to accept a sound solution to stop the leakages at a lower cost than the city had originally demanded.
- At a well-known university, a young man died of alcohol poisoning during fraternity pledge week. The university attempted to settle the family's wrongful death lawsuit unsuccessfully, and the parties agreed to mediate. Assessing the needs of the family and the desire of the university to settle, the mediator suggested the mediation take place at a location of the family's choosing and that the president of the university — who until that point had not been involved in the negotiations — attend. The mediation took place in the family's home state, far from the university, with the president at the table. The president offered the family a heartfelt apology, a \$1.25 million scholarship in the young man's memory, and \$4.75 million, an amount that could have been awarded by a jury but probably would not have been accepted by the family without the personal involvement of the university president. The mediator's suggestions — holding the mediation in the family's own state and requiring the president to be there — set the stage for settlement. The president's presence, his

apparently sincere distress about a tragedy that never should have happened on his watch, and an offer that acknowledged the pain of the family and the risk the university faced at trial, allowed the family to back away from its anger and begin the difficult process of healing.

(For more examples of Guided Choice Mediation possibilities, check out the webinar sponsored by the American Arbitration Association.²⁾

Practitioners who use Mixed Mode processes explore the interplay among mediation, evaluation, and arbitration in commercial disputes. They look at all the dispute resolution processes available to parties — mediation, nonbinding early neutral evaluation, mediator proposals, mediators becoming arbitrators, arbitrators becoming mediators, arbitrators setting the stage for settlement, and all kinds of other creative interactions. They take all the dispute resolution tools available to parties and counsel and mix and match those most appropriate to the issue that needs to be resolved. Their processes are wholly fluid and flexible, truly “fitting the forum to the fuss.”

Professor Thomas Stipanowich at Pepperdine University School of Law and Veronique Fraser, Pepperdine Scholar in Residence, have imagined various scenarios involving the interplay between mediators and adjudicators, such as mediators not just mediating the substantive dispute but bringing their facilitative skills to process management. When mediation fails to resolve all the issues in a dispute, a mediator may suggest arbitration of unresolved legal issues — the interpretation of a contract clause, the applicability of a consumer fraud statute with triple damages to the facts alleged, or the viability of a punitive damage claim.

Or what about a business-partnership dispute in which arbitration can decide the issues only in a way that leaves both parties with a resolution that works for neither one and results in the crippling of their business venture? Mixed Modes allows the arbitrator to suggest mediation as a better process to: (a) preserve the value of their intellectual property, or (b) keep a business venture alive but prevent legal issues from being decided in arbitration in a business-damaging way.

The London-based mediation institution CEDR, which developed procedures for facilitating settlement in the context of arbitration, has sketched out an arbitration-to-mediation process. In 2009, CEDR rules envisioned, “the Arbitral Tribunal may, if it considers it helpful to do so, where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation, or chair settlement meetings attended by party representatives at which terms of settlement may be negotiated.” This would be unorthodox practice in the United States.

Another possibility: arbitrators frequently come to preliminary views on issues in dispute. Should they ever provide a draft or oral version of the tribunal’s award to promote the opportunity of a party-driven settlement? Often arbitrators wish to signal to parties their thinking or the direction in which they are heading, to give the parties an opportunity to craft a resolution that better fits their needs and ultimate goals. This is not the practice in the United States. But might it be considered?

When parties find themselves in litigation, arbitration, or mediation, it’s important to remember that these are default options (or in the case of ADR, pre-selected options) that may not fit their needs at the moment. Consider what happens in the world of medicine. Before a patient suffers an injury or gets sick, no doctor decides whether the best treatment would be medication, physical therapy, surgery, or hospice. Only after the injury, in consultation with the patient, does the physician evaluate, adapt, and try options. Shouldn’t this be our approach to conflicts, too?

Ultimately it is the parties’ needs that ADR is committed to serve. The whole point of ADR is to take commercial and other disputes out of the “what cause of action do these facts fit?” litigation paradigm and move them into the “what do the parties need to do to reach a resolution that serves their interests?” realm.

This is a messy and *ad hoc* process. It does not follow traditional rules. But keep in mind that the traditional rules of litigation were adopted in medieval and renaissance England to keep parties from resorting to private justice, where power trumped right. It is crucial that we acknowledge that the rule of law keeps

civil societies civil. Acceptance of the legitimacy of law prevents chaos.

While acknowledging the rules — and being grateful for them — Mixed Modes invents and deploys processes in unfamiliar ways. Mixed Modes imagines the combining of processes, e.g., start with an early neutral evaluation, and then process the dispute into mediation; begin the arbitration, but with a mediator in the wings; if issues arise in arbitration that the arbitrator senses are better decided by negotiation, send those issues to the mediator, the default being that if the parties cannot settle, the arbitrator will resolve the issues; on construction projects, appoint a Dispute Resolution Board that can settle disputes in real time, subject to a party later contesting the resolution in an arbitration or in court; let a court work with a mediator on an agenda of issues raised by the parties, the default being that if the parties cannot agree on certain issues, the court will rule on each one.

Mixed Modes and Guided Choice are two fairly recently popularized brand names for approaches to dispute resolution that when applied to mediation represent additional tools for use by commercial mediators. While we highly recommend that the reader consider using Mixed Modes and Guided Choice Mediation in appropriate circumstances, we note that experienced and forward-thinking practitioners have been using these kinds of mixed or hybrid techniques,

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Judith Meyer, who has served as a mediator and arbitrator for more than 25 years, resolves commercial mediations and arbitrations involving contract, environmental, employment, construction, tort and personal injury, professional liability, business and commercial, employment, environmental, intellectual property, and insurance disputes. She taught negotiation, mediation, and arbitration at Cornell Law School. She can be reached at judith@judithmeyer.com or www.judithmeyer.com.

and other variations, for many years. Our recognition of colleagues who advocate for the techniques and procedures that characterize Guided Choice Mediation and Mixed Modes is in no way meant to ignore or downplay the work of other colleagues who have applied similar approaches without attaching names to them.

ADR allows the parties to create their own creative, bespoke processes for resolution, and Guided Choice Mediation and Mixed Modes allow even more nuanced choices in ADR. While operating always in the shadow of the law, these cutting-edge philosophies allow parties to landscape their paths to the most mutually beneficial resolution they can reach and to illuminate each area of those paths with the appropriate lighting for the appropriate amount of time. In honoring the individual nature of each dispute, they give that dispute the respect and creativity it deserves.

Endnotes

- 1 For more information, go to www.gcdisputeresolution.com.
- 2 View the examples at <https://www.aaau.org/courses/using-guided-choice-to-increase-satisfaction-with-the-value-of-mediators/15prw042/>.

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Douglas Van Epps

Editor's Note: "Profiles in ADR" introduces readers to people who have compelling insights into ADR. These interviews are edited for space and clarity.

Doug Van Epps is the Director of the Michigan Office of Dispute Resolution, based in the State Court Administrative Office. The first and only director of that office, he has shaped the position in the 28 years he has held it, moving from creating a system of volunteer mediation centers around the state to being a force for dispute resolution within state government and throughout the Michigan court system.

Q: What did you do before you got to the Office of Dispute Resolution?

Out of law school I went to the prosecutor's office in the state capitol and stayed three years. Back then, the natural progression after that was to move to a law firm, but listening to attorneys in the courthouse halls gave me the impression that practicing law would be increasingly acrimonious and contentious. Lawyers were settling cases on the courthouse steps but not solving problems, which is what I went to law school to do: help people solve problems. Treating every problem as if it's a war just isn't my nature.

So not seeing a place for myself in practicing law, and I suppose to take stock of things, I sold everything and went to Europe for a year. While there, I heard the first CDs on the market, and returned home to start a music store called the Compact Disc Emporium. It was the second CD-only store in the country and for its novelty was featured on the cover of *Billboard*. What I loved most there was talking to people about music and introducing them to new types of music. The business grew very quickly, and when it was time to consider opening more stores, it occurred to me that doing that would likely distance me from what I most liked: just talking with people



Douglas Van Epps

and playing music. So instead of expanding, I sold it, and fortuitously just in time before the music business changed so radically. And traveled again (are you picking up a theme here?), this time to various points in the Pacific, Asia, and Australia.

Q: What makes travel so compelling for you?

I like to put myself in places I'm unfamiliar with, where I don't have the control we typically have when we're in familiar surroundings. It's not uncommon for me to fly into a country with no plan whatsoever and just ask what's around. Examples? About to leave Australia, I was at the airport ready to head to Fiji to scuba dive. While waiting to board the plane, there was an announcement that because of a coup there, flights were indefinitely canceled, so I asked around about places to scuba dive, and Bali was suggested. So I bought a ticket to Bali and have been back to Indonesia many times. Last year I ended up at the Borobudur temple in Eastern Java and a yoga retreat in northern Bali. Another time I had a layover in Tahiti and ended up on a freighter going through the Marquesas Islands.



Since this kind of travel is uncomfortable for most people, I typically end up traveling solo. Sometimes I'll hook up with other travelers who are headed to a place of interest.

Maybe my most meaningful takeaway from travel is an appreciation for what we, across the world, have in common, whether interests in art, music, dance, food, justice, and peace. Our daily news feeds remind us where we differ, perhaps, but on the ground, it's always amazing to discover the array of the things we share.

Q: How did you end up at the Office of Dispute Resolution?

I was in the process of starting another business when a friend sent me the job description for the Director of the Community Dispute Resolution Program with a note that said "You can't run from the law forever!" While I was at the prosecutor's office I had taken a mediation training and helped start a local mediation center, the first I knew of in Michigan. Like people in most local mediation nonprofits, everyone involved was passionate about solving problems, and the experience seemed to directly respond to my concerns about the practice of law in the first place. So when I received the job application, I thought the position might afford me the opportunity to actually do something about the sad state of affairs in the profession. Somewhat ironically, for not having practiced law for a number of years, I was hired chiefly because of my entrepreneurial experience. They wanted someone who could build a statewide program from the ground up. So it was a zigzag way into the profession, similar to the way many of us got into ADR. I thought I might help launch the program and then leave, but I'm still here 28 years later.

Q: What drew you to the job?

Initially I was drawn to the job to help improve the profession of law, to move it from the "sue the bastards" approach that was common back then to a more problem-solving approach among lawyers and with the clients themselves. I wanted to help improve the field of law, not necessarily develop mediation.

But it was clear from the beginning that the mediation process worked. I felt it was a process we could

market and sell. It's taken a long time, but that has proven to be true. I'm also thrilled that we now have collaborative practice as an option, and I'm working to bring that into general civil cases, beyond family law. I had thought in law school that collaborative problem-solving was what the practice of law was about, only to find that it was a bit of fiction at the time. In retrospect, I've spent my career building what I had mistakenly thought existed 35 years ago.


Q: What has made the job fulfilling for you over such a long period of time?

First, working with remarkable people. I work with people who have a sharp focus on making dispute resolution processes accessible and high quality and who want to help clients avoid ruining their lives in the traditional adversarial processes. I know there's a certain stigma about "state employees" being unhappy and automaton-like, but I'm blessed to work with great people in the State Court Administrative Office — the justices, judges, court administrators, and law school professors. And I'm in awe of the volunteer mediators who complete all the training requirements we've put in place just so they can take time off from work to help people in their communities manage their conflicts. I also have many great friends and colleagues who are connected through the state bar, the ABA, and other professional organizations.

Second, there are so many people benefitting from ADR processes. Mediation in particular has been proven time and again to result in so many positive outcomes for people. Litigation takes such a terrible toll on people — in time, money, relationships, stress, and even health. People now have a choice of processes for managing their dispute.

I'm also excited about working on "next-generation" issues. Experienced litigators may not see the negative effects of litigation so much, but law students seem to perceive them already, many from personal experience like a family divorce. They're understanding that most of them will not be trial attorneys, simply because less than 2 percent of cases are disposed through trial these days.¹

They also understand the value of developing negotiation skills and finding solutions for clients that are both quick and economical. While I don't think most students are aware of the nuanced aspects of



future practice yet, like unbundling, online dispute resolution, and outsourcing of document management, they do seem to understand that posturing every case as if it will be tried is no longer the predominant practice model.

Finally, I enjoy participating in a number of efforts to design the judicial system of the future. As to ADR, this means making far greater use of ADR processes and injecting them earlier in the litigation. For example, we are studying a special track for civil claims up to \$150,000 or so that litigants could opt into that would include mandatory ADR, and if not successful, a summary jury trial, all within three months. We're hoping that this might respond to the concerns about access to justice and the affordability gap in people being able to afford the traditional litigation process. We're also on the verge of bringing online dispute resolution to courts — with parties having access to any judge in the state who has time to hear a case, and the ability of parties to negotiate a resolution online with the court. Currently, 18 courts already provide the opportunity for people to participate in an online negotiation of traffic tickets. It's clear that we can expand this service to other types of cases.

Q: It sounds as if your job today is very different from the one you applied for.

Definitely. And that's another reason I've stayed. There is boundless enthusiasm in my office for improving the justice system, sharing ideas, and implementing and evaluating new services. I think just because of my years here, I can help "connect the dots" between state offices, legal organizations, and the courts. One thing I'm increasingly interested in is parties' engaging a neutral far earlier in the litigation. Typically, we parachute a mediator in the weeks before trial, but the cost and time savings are minimal since even without mediation, only a very small number of cases will be tried. I'm sensing a growing consensus around the notions of earlier judicial involvement and earlier engagement of a neutral to help identify the best trajectory for a particular dispute and to resolve contested discovery issues prior to convening to reach an omnibus settlement. Put differently, we want to get people talking to each other earlier.

In contrast to traditional court case management practices that automatically send every filing toward

the trial event, increasingly, soon after filing, we'll be asking parties which judicial resources they need to reach a disposition. It's the multi-door courthouse, all over again.

Q: You do a lot of group and meeting facilitation. And I have to mention you're one of the most highly skilled facilitators I've had the pleasure of observing.

Thank you. It's really just taking my mediation background and applying it to larger groups. I'm always looking to help people educate each other in a safe space — to express interests and needs with each other and to hear better ideas. It's fascinating to create this space to put everything on the table and come up with a consensus recommendation. Sometimes the group doesn't even know what outcome we're looking for. Is it a standard? A guideline? A court rule? And then sometimes we're very clear on that from the beginning.

It's also very fulfilling for me to help groups identify and use a process for coming to decisions and making policy. In developing court rules, for example, a consensus-based process is much better than up-or-down voting. Instead of half the people leaving the table unhappy after a split vote, with a facilitated process, people walk away with a recommendation to the Supreme Court that they can live with. And I try to get disparate viewpoints at the table. Zena, you're familiar with that process from the experiences we've had creating a Domestic Violence Screening Protocol and training in that protocol. The mediation and domestic violence groups started out with very disparate points of view, but through discussion and understanding, people turned around and we came up with documents and approaches everyone could live with.

Q: Since you've been an observer of the field over such a long period of time, what are the some of the changes you've seen?

For one, I don't see the heated disagreements about mediation models that there used to be. In my first decade, that was a major discussion in the field

and a point of great disharmony. Now mediators make personal choices and market themselves that way. Prospective clients find the type of process and neutral they suspect best suit the dispute. The market figures it out, and there's not much discussion about it, at least not in Michigan. There are exceptions, of course, but the fixation on claiming which process is better than another seems to have subsided.

Another change is the complexity of the cases that community mediation centers are involved with. They started with small claims and landlord-tenant types of cases, but now they're involved in debt collection, consumer-merchant, domestic relations, child and adult guardianship — you can see almost anything at the centers these days.

Mediation is everywhere these days, from elementary schools to college campuses, in hospitals, in employee manuals, in standard contract language, and so on. I even recently observed prison inmates in a mediation "competition" with Michigan State University Law School students. Throughout the day, I heard from many inmates that mediation training not only changed their lives and their community but that by sending mediators into middle-of-the-night conflicts between inmates, the process also saved lives. Oh, by the way, while the MSU students won the competition by a few points this year, I hear the inmates won last year.

Finally, there's a significant change in the mediator dynamic. Mediators who have been volunteers at dispute resolution centers over a period of time want more challenge, and they want to work on cases involving relationships. They tell us that it's the non-economic issues that are most important to them, and to a large degree, to the parties. Despite the fact that many volunteers now pay to take the training, a clear trend is for the centers to migrate away from the typical small claims and money-damage cases toward cases involving non-economic issues. That's OK, I



Zena Zumeta has been a mediator based in Ann Arbor, Michigan, since 1982. A nationally known trainer of mediators, she is a past president of the Academy of Family Mediators and a past board member of SPIDR, the Society of Professionals in Dispute Resolution, which was merged into what is now the Association for Conflict Resolution. She is a former member of the Editorial Board of Dispute Resolution Magazine. She can be reached at zzumeta@igc.org.

think, because we'll be offering parties online options for resolving money-only disputes, akin to what eBay offers its customers.

Q: Any final thoughts for our readers?

I've truly been privileged to work in the early days of our field, when we were just trying to figure out how to get courts to try mediation in one or two cases. Now things are changing and happening so quickly. We have a lot to learn from psychology and brain science about how they apply to the work we do. And let's not forget technology. Online dispute resolution will be a major development in courts offering citizens more efficient dispute resolution options in the years ahead.

Beyond the courts, we should be thinking more about how we manage decision-making in other contexts. Think about facilitated town meetings or municipal or county ordinance development instead of a voting process. Use mediation for property tax dispute resolution. In Michigan, we have a lot of land-use disputes and environmental issues that could be facilitated. Water use, wind farms, copper mine disputes, public transportation issues. We still use old adversarial processes for a lot of these things. Why not apply the principles of mediation and ADR instead? I say think big about how to apply facilitative processes.

So many people believe they don't have time to think about doing things differently. I've had the privilege of being able to do that in this job. The reason I left law at the beginning was because I felt helpless in a process that really isn't designed to solve a problem. With mediation, we have the ability to creatively help people resolve the most challenging issues in their lives. ■

Endnotes

1 "A 2015 study of civil litigation found that the jury trial rate had decreased to just 0.1 percent of nearly 1 million nondomestic civil cases filed in state courts in 10 urban counties." Paula Hannaford-Agor, Jury System Management in the 21st Century: A Perfect Storm of Fiscal Necessity and Technological Opportunity, NATIONAL CENTER FOR STATE COURTS 3, http://www.ncsc-jurystudies.org/~media/microsites/files/cjs/what%20we%20do/koe54908_23_c23_505-518.ashx (citing PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 25–28 (2015)).

Section News

Spring Conference Awards

2017 D'Alemberte-Raven Award



Ethan Katsh, a professor at the University of Massachusetts/Amherst, is the recipient of the 2017 D'Alemberte-Raven Award, the DR Section award that is named in honor of its founding ABA chairs and recognizes leaders in the dispute resolution community for their significant contributions to the field. Professor Katsh is known as the founder of online dispute resolution; he co-conducted a pilot project for eBay in 1999 to determine whether mediating online buyer-seller disputes was possible. In 2001, Katsh, together with Janet Rifkin, co-authored the path-breaking book, "Online Dispute Resolution: Resolving Conflicts in Cyberspace."

2017 John W. Cooley Lawyer as Problem Solver Awards



The John W. Cooley Lawyer as Problem Solver Award recognizes individuals and organizations that use their problem-solving skills to forge creative solutions.

Lainey Feingold, the 2017 individual recipient, is a US disability rights lawyer, author, and speaker who represents the blind community on technology, digital, and information access issues and is known for using a dispute resolution process for negotiating landmarks without lawsuits. The American Bar Association published Feingold's book, *Structured Negotiation*.



The JAMS Foundation, the institutional award recipient, is a grant-making organization that inspires the use of alternative dispute resolution, supports

education, and advances settlement of conflict worldwide. The funding of the foundation comes completely from contributions from individual JAMS neutrals and JAMS employee associates.

2017 Chair's Distinguished Service Award



Section Chair Nancy Welsh will present the ABA Section of Dispute Resolution Chair's Award for Distinguished Service to James J. Alfini, who was Section Chair in 1999 and 2000, has served as the Section's Delegate to the ABA House of Delegates, and has been a longtime champion and supporter of the Section.

2017 ABA Section of Dispute Resolution Award for Outstanding Scholarly Work



Professor Andrea Kupfer Schneider has been named the 2017 recipient of the ABA Section of Dispute Resolution Award for Outstanding Scholarly Work, an award that recognizes individuals whose scholarship has significantly contributed to the dispute resolution field. A Professor of Law at Marquette University School of Law, Director of the ADR program there, and a prolific scholar, Professor Schneider has worked to increase the reach of dispute resolution scholarship into international and interdisciplinary realms. She focuses on negotiation, international relations, and pedagogy and has incorporated into her work a range of social science research into her work such as psychology, economics, and political science.

Projects and Events

Nominations Committee

Incoming Section Chair Benjamin G. Davis will chair the Nominations Committee to review nominations for Section Executive Committee and Council appointments. Members of the Nominations Committee include Kristen Blankley, Bryan Branon, Dwight Golann, Homer LaRue, Lela Love, Geetha Ravindra, and Kimberly Taylor.

Section Officer and Council positions are elected in August at the Annual meeting of the Section. The

Section's Nominating Committee presents a slate of nominees, although individuals may stand for election without being nominated by the Nominating Committee. The Nominating Committee will consider nominations for four at-large Section Council positions and four Executive Committee positions: Delegate, Budget Officer, Vice-chair and Chair-elect.

Council members serve three-year terms and are expected to participate in four quarterly in-person

meetings of the Council. In addition, Council members work on task forces, *ad hoc* and standing committees, and various other Section projects. The Budget Officer, Vice-chair and Chair-elect positions have one-year terms. Although this is not automatic, historically there has been a line of succession from Budget Officer to Vice-chair to Chair-elect. To be eligible for election to these Council and Executive Committee positions, nominees must have been Section members for at least one year prior to nomination.

ABA Diversity and Inclusion Portal

The ABA's new Diverse Speakers Directory is now live and accessible via the ABA Diversity and Inclusion Portal. It's an important resource organized to assist ABA groups and members in identifying diverse speakers nationwide and worldwide for Continuing Legal Education or other programs.

The ABA Office of Diversity and Inclusion is working hard to populate the directory by spreading the word and encouraging diverse attorneys (both members and nonmembers) to create a free profile on the directory. Submit a profile at <https://www.americanbar.org/diversity-portal/SpeakersDirectors.html>.

Arbitration Training Institute

The Arbitration Institute is a two-day training presented by a panel of nationally recognized arbitrators and arbitration advocates in which arbitration experts take attendees through the arbitration process from start to finish. This limited-capacity training provides a unique learning environment and industry contacts. This program will be accredited for MCLE and is eligible for ACE credit (for AAA Arbitrators). The Institute will be held at the American Bar Association Offices in Chicago on June 15 and June 16, 2017.

New Practice Development Institute

In response to member requests for more practice development programming, the Section of Dispute Resolution and Forrest "Woody" Mosten are partnering to provide a practical model for implementing client-centered peacemaking strategies, including unbundled legal services and innovative dispute resolution tools. Participants will learn new ways to help clients while staying out of court and will explore the personal and ethical dimensions of collaborative problem solving. Interdisciplinary practitioners, including lawyers, mediators, mental health professionals, paralegals, and

financial professionals, can all benefit from this training. The practice development institute will be in Chicago on July 14 and July 15, 2017.

Advanced Mediation and Advocacy Training Institute

This fall the ABA Section of Dispute Resolution Advanced Mediation and Advocacy Training Institute will be held at the Pepperdine School of Law in Malibu, California, on October 19 and October 20. This two-day interactive institute features rare opportunities to learn from some of the leading mediators and advocates in North America. Each plenary session panel features an expert mediator, in-house counsel, and a skilled outside attorney discussing each phase of the mediation process. Small group discussions led by experts follow the plenary session panels, providing an opportunity for mediators and advocates to interact and creating a unique environment to enhance skill, knowledge, and understanding of the mediation process.

Committee Educational Events

Section of Dispute Resolution Committees help members access the information and experts necessary to improve their practice — and maybe even the world around them. Just in the last few months, the Court ADR Committee has held educational webinars on research on the effectiveness of ADR in the courts and the use of dispute resolution for prisoner complaints. The Women in Dispute Resolution Committee holds a monthly educational webinar. Recent topics have included E-Discovery, what it is like to practice in an ADR firm, and online marketing. If you are not a member of a committee, join one today and expand your educational opportunities. You can join committees from "MyABA" on the ABA website or from the committee web pages.

New Section Staff Provide Member Support

Please welcome Ashley Jackson and Zeina Hamade to the ABA Section of Dispute Resolution staff. Ashley Jackson is a program assistant, working with teleconferences, meetings, and publications. Zeina Hamade, a committee specialist, will support meetings, committee events, and committee projects. As always, call 202-662-1680 to reach members of the Section of Dispute Resolution staff. ■

ADR Cases *By Maria A. Garcia and Maureen Rostad*

Arbitration Provision in Warranty Brochure inside Cell Phone Box Not Binding on Consumer

In *Norcia v. Samsung Telecom. Am., LLC*, 845 F.3d 1279 (9th Cir. 2016), the US Court of Appeals for the Ninth Circuit held that an arbitration provision found in a warranty brochure inside the case of the GalaxyS4 cell phone box is not binding on consumers. The plaintiff, Norcia, brought a class action against Samsung under common law fraud and California state law alleging that Samsung misrepresented the phone's storage and operational speed by manipulating it during testing. Samsung moved to compel arbitration pursuant to the Product Safety & Warranty Information brochure found inside the Galaxy S4 box. Norcia had purchased the phone in a Verizon Wireless store, where he signed a sales receipt that mentioned the brochure found in the phone box. Norcia declined to take the box home with him after having his new phone set up by the sales representative. The brochure included a provision that any disputes would be resolved in final and binding arbitration. Samsung argued that Norcia signed the sales receipt that included a "Customer Agreement" section, and that Norcia had the option of opting out of the arbitration agreement within 30 days of the purchase. The Ninth Circuit affirmed the district court's denial of compelled arbitration, reasoning that Norcia did not engage in conduct that showed an express agreement to be bound by the arbitration provision. Further, because Norcia's failure to opt out of the arbitration agreement constituted silence, his inaction cannot be taken to mean an agreement to arbitration. Finally, Samsung argued that Nocia was bound to arbitration because he signed the Customer Agreement on the sales receipt. The court disagreed, concluding that because Samsung was not a party to the signing of the sales receipt, it was a contract between Norcia and Verizon, not Samsung. To read more: <http://caselaw.findlaw.com/summary/opinion/us-9th-circuit/2017/01/19/278413.html>

UN Convention Does Not Require Confirmation

In *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 846 F.3d 35 (2d Circ. Decided January 18, 2017) the Second Circuit decided that the United Nations

Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not require the appellants, CBF Indústria de Gusa, to seek confirmation of a foreign arbitral award before the award could be enforced by a United States district court. CBF Indústria de Gusa is a group of foreign companies with their offices in and organized under the laws of Brazil that produce and supply "pig iron," which can then be further refined to become steel or wrought iron. In accordance with the contracts, AMCI Holdings, Inc. (AMCI) purchased 33,056 metric tons of pig iron but subsequently ceased making the purchases required by the contracts. By October 2008, AMCI was in default. CBF Indústria de Gusa thereafter filed a request for arbitration in accordance with the arbitration clause of the contracts with the ICC Paris on November 16, 2009. AMCI requested an extension of time from the International Chamber of Commerce Paris until February 15, 2010, to answer the request for arbitration. However, during this period of time, CBF Indústria de Gusa alleged that AMCI enacted a fraudulent scheme to transfer all the company's assets to a preexisting shell company to make AMCI judgment-proof. In this consolidated appeal of two judgments to enforce a foreign arbitral award against AMCI as the new version of the then-defunct award-debtor, the district court dismissed both the initial action to enforce and then the subsequent action to confirm a foreign arbitral award. The Second Circuit vacated both the district court's judgments, holding that (1) the district court erred in determining that the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter of the Federal Arbitration Act, 9 U.S.C. section 201 et seq., require CBF Indústria de Gusa to seek confirmation of a foreign arbitral award before the award may be enforced by a United States District Court, and (2) the district court erred in holding that CBF Indústria de Gusa's fraud claims should be dismissed prior to discovery on the grounds of issue preclusion, as issue preclusion was an equitable doctrine and CBF Indústria de Gusa plausibly alleged that AMCI engaged in fraud. To read more: <http://caselaw.findlaw.com/us-2nd-circuit/1765951.html>.

continued on page 40



3 New Books Every Dispute Resolution Professional Should Have

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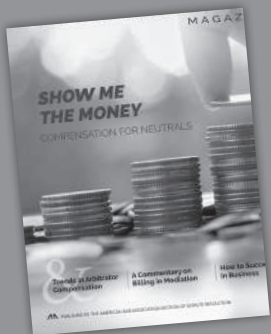
In *Prime Healthcare Services v. United Nurses and Allied Professionals*, 848 F.3d 41, (1st Cir. Decided February 3, 2017) the First Circuit decided whether a dispute between employees and their successor employer should be resolved in arbitration or in the courts. In 2006, Landmark Medical Center (Landmark) and the United Nurses and Allied Professionals (United) entered into a collective bargaining agreement (Landmark CBA), in effect until 2009, renewed automatically each year unless either party reopened. This CBA contained a grievance and arbitration clause that provided that any unresolved disputes "concerning the interpretation, application or meaning" of the CBA could be submitted to arbitration with the American Arbitration Association. Prime Healthcare Services (Prime) purchased Landmark in December 2013. Prior to the purchase, on October 10, 2012, Prime and United signed a cover memorandum (Cover Memorandum) and accompanying contract (Prime CBA). The Cover Memorandum stipulated that Prime shall recognize any labor grievances or arbitrations pending at the time of the closing pursuant to the Landmark CBA. The Prime CBA contained the same arbitration clause as the Landmark CBA. In October 2013, United amended their grievance against Landmark for the change in terms of the defined pension benefit provisions when it ceased to make contributions to employees' pensions. The First Circuit reversed the district court, saying the district court's summary judgment erred in ruling that ERISA preempted the Union's claims (and any matters relating to the retirement plan). The First Circuit first held that a dispute between a union and a successor employer

concerning termination of a pension plan did not raise a question of substantive arbitrability, so the presumption against arbitration did not apply. Secondly, the First Circuit held that no inherent conflict between arbitration and the goals of ERISA existed and it was up to the arbitrator, not the district court, to decide whether the union's claim was preempted or barred by ERISA, and the matter could not be found unsuitable for arbitration by virtue of a concern that the arbitrator might err. To read more: <http://caselaw.findlaw.com/us-1st-circuit/1776134.html>.

Arbitration Inappropriate in Case Seeking Civil Penalties under PAGA

In *Hernandez v. Ross Stores*, 7 Cal.App.5th 171 (2017), the California Court of Appeal held that an employer may not invoke binding arbitration on an employee suing under California's Private Attorney General Act (PAGA). The plaintiff, Hernandez, worked at a Ross warehouse and sued after she was terminated; she alleged that Ross failed to pay all appropriate wages, failed to properly itemize hours worked and paid, and failed to pay for overtime in violation of California's Labor Code laws. Ross moved to compel arbitration, arguing that when Hernandez was hired, she agreed to resolve any disputes through binding arbitration. The district court denied the motion, concluding that there were no individual disputes between the parties that could be arbitrated separately because any action brought under PAGA is a representative action on behalf of the state, whether it is an action involving an individual employee or a class action. The Court of Appeal agreed that the district court had no authority to compel arbitration because Hernandez's suit did not involve a single claim between an employer and an employee but was a representative action where Hernandez was acting on behalf of the state. The court reasoned that this was an action brought for civil penalties under PAGA for violating the Labor Code and therefore compelled arbitration was inappropriate. To read more: <http://caselaw.findlaw.com/summary/opinion/ca-court-of-appeal/2017/01/03/278349.html>. ■

Maria Garcia and **Maureen Rostad** are third-year law students at Penn State University, Dickinson Schools of Law and serve as law student editors for *Dispute Resolution Magazine*.



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