Alternatives
TO THE HIGH COST OF LITIGATION
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ADR Skills

Whose Trial Is It Anyway? Using Improv To Help Lawyers 'Present' More Effectively

BY JEFFREY KRIVIS AND BRIAN BREITER

Picture a group of 30 trial lawyers in an almost empty room, loudly chanting, "Big Booty, Big Booty, Big Booty!"

Now imagine a pair of them trying to have a conversation without using the letter "S."

How about two of them vying for the attention of a third by, at turns, singing, crying, jumping up and down, waving their arms, and even whispering?

Why on earth would a group of highly skilled and experienced attorneys engage in such seemingly childish behavior?

The answer is simple and surprising: They did it to vault their law practices to the next level; to recognize and rethink old habits; to break through barriers they may not have even known they had, and ultimately to achieve more success.

And how did they go about this? By participating in a class, "Increasing Effectiveness of Litigation through Improvisational Theatre for Lawyers."

The authors of this article are in their fifth year of teaching a course created at Pepperdine University School of Law/Straus Institute for Dispute Resolution, in Malibu, Calif., called, "Improvisational Mediation and Negotiation."

To create authenticity, we brought in two top improvisation instructors, Joseph Limbaugh and Kimberly Lewis, from Los Angeles' acclaimed ACME Comedy Theatre (see www.acmecomedy.com/) to help facilitate the theater class.

Krivis, an attorney-mediator, heads First Mediation Corp., an Encino, Calif., ADR provider and consulting firm. He is the author of "Improvisational Negotiation: A Mediator's Stories of Conflict About Love, Money and Anger—and the Strategies that Resolved Them" (Jossey-Bass). He is a longtime member of *Alternatives* editorial board. Breiter is a Los Angeles civil trial lawyer with more than a decade of experience in plaintiff's personal injury cases. He also is an improvisational actor at the ACME Theatre in Hollywood, Calif.

[*Editor's note:* Coauthor Krivis has explored the topic of enhancing mediation improvisation with performance skills in these pages. See Jeffrey Krivis, "Standing Up for Mediation: A Veteran Neutral Trains in Comedy and "Settles" for Getting Laughs," 20 *Alternatives* 93 (May 2002).]

YOU MEAN MAKE UP FUNNY STUFF?

The chief reference point for most people with little exposure to improvisation is the popular television show, "Whose Line Is It, Anyway?" which completed a long U.S. television run in 2006.

On the show, two or more actors made up a short comedic scene on the spot based on an audience suggestion. Though this show sparked huge popularity for the form, the real truth is that improvised performance is as old as performance itself. It predates the invention of writing, since long before we started writing scripts human beings were telling stories by acting them out.

From the 1500s to the 1700s, Commedia dell' Arte performers improvised in the streets of Italy. And in the 1890s theatrical theorists and directors such as Constantin Stanislavski and Jacques Copeau, founders of two major streams of acting theory, both heavily used improvisation in acting training and rehearsal.

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CPR News

THE HONOREES AND THE DATE: THE 2010 CPR CORPORATE LEADERSHIP AWARD DINNER

The CPR Institute has announced that its seventh Corporate Leadership Award dinner will honor David Scott, senior vice president, general counsel and secretary of Amgen Inc., and Jeffrey W. Carr, who is vice president, general counsel and secretary of FMC Technologies Inc.

Save the date: The dinner will be on Oct. 20. The event will return for the sixth time to Cipriani 42nd St. in New York.

Scott has been in his Amgen post since 2004, focusing on the biotech giant's intellectual property needs. Amgen, which had revenue of $14.6 billion last year, is a 30-year-old Thousand Oaks, Calif.-based company that has developed drug treatments for cancer, kidney disease, and other serious illnesses.

Scott joined Amgen from his GC post at Minneapolis-based Medtronic Inc. He previously was general counsel of United Distillers & Vintners in London, and formerly worked at RJR Nabisco Inc. Scott received his J.D. from Cornell Law School, and his bachelor's degree from St. Lawrence University.

Jeff Carr has been a longtime advocate for alternative billing in his post at Houston-based FMC Technologies, which develops and manufactures production and refining technologies for the energy industry. Carr is responsible for designing the company's "ACES" law firm engagement model, which has been covered extensively in this newsletter. See, e.g., Mark D. Wolf, "Update: How Value Billing Helps Both the Client *and* the Law Firm," 28 *Alternatives* 1 (January 2010).

He has been GC since 2001, but joined the company's predecessor, FMC Corp., in 1993. Before his current position, Carr was associate general counsel for FMC's energy and airport systems business groups. He is a CPR Institute board member.

Prior to joining FMC, Carr founded and managed International Advisory Services Group Ltd., an international trade policy, investment banking and commercial consulting firm with offices in Washington, Prague and Manila.

Carr received his a bachelor's degree in government and foreign affairs from the University of Virginia, and a law degree from the

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CPR

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Worldly Perspectives

Algeria: A Free-Market Embrace for Arbitration . . . With Indifference Toward Mediation Development

BY GIUSEPPE DE PALO AND MARY B. TREVOR

Starting with its independence and the adoption of the socialist regime in 1962, Algeria's economy and external commerce were under the state's monopoly for many years. This situation meant that civil and commercial disputes in Algeria were mostly addressed by the judicial authorities.

Arbitration and mediation were the exception to the rule, only employed by some national entities such as Sonatrach, the national oil company, which included an arbitration clause in its international contracts.

The change in Algeria's regime and the end of the state's monopoly in 1989 instituted freedom of commerce and submission of public companies to private law. These two principles encouraged private investment and application of equity among all economic actors. That led, in turn, to the development of trade inside and outside the country—and Algeria's market openness.

As a result, commercial exchanges between Algeria and foreign countries have developed considerably, as has the volume of commercial disputes.

Both the judicial system and private, alternative processes are available for resolving commercial disputes. The Algerian legal system is composed of tribunals and courts answering to the Supreme Court. The tribunal constitutes the basic jurisdiction. It is divided into seven main sections: Civil; Commercial; Criminal; Family and Civil Status; Social and Labor; Real Estate, and Emergency. Judges do not specialize in certain fields and may be moved from one section to another.

The Commercial section handles all commercial conflicts, such as lease matters, contract interpretation, contractual obligations, nonpayment claims, maritime conflicts, and guaranties related to commercial transactions.

ARBITRATION UNDER ALGERIAN LAW

Arbitration, in various forms, has been available in Algeria since 1966. In that year, a new article was added to the Code of Civil Procedure that gave national companies, each supervised by a branch of the state government, the right to arbitrate disputes. The article did not address international trade arbitration.

The procedure imposed by the new provision was not very successful, as it was unnecessarily complicated by a legislature that was bound to respect socialist principles. Consequently, examples of disputes settled by this procedure are rare.

The changes in commercial practices, instituted by the 1989 constitution changeover to a free-market economy, led four years later to a modification of the civil procedure code. The change gave unequivocal permission to both public and private companies to use domestic and international arbitration to settle their economic and commercial disputes.

For the first time in Algeria, the decree instituted international arbitration as a preferred process to settle disputes between a local operator and a foreign partner. Currently, in almost all international commercial contracts, the dispute resolution clause submits conflicts arising from the interpretation or execution of the contract to arbitration. For domestic commercial contracts, the recourse to arbitration is not common, but it is growing considerably.

Algerian law now comprehensively covers arbitration of commercial disputes. When the parties agree to submit their disputes to arbitration, this agreement is called a compromissory clause. The compromissory clause must appoint the arbitrators or set out the conditions under which their nomination will be made. If not, it will be nullified.

The clause may designate the arbitration procedure—ad hoc arbitration—or provide that the arbitration will be subject to the arbitration

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De Palo is cofounder and president of JAMS International ADR Center, based in Rome. He also is Hamline University School of Law's first International Professor of ADR Law & Practice. Trevor is an associate professor of law and director of the legal writing department at Hamline, which is in St. Paul, Minn. Flavia Orecchini, of the JAMS International ADR Center Projects Unit, is assisting the authors with research. This monthly column is expanded and updated from reports gathered for a book edited by the authors, "Arbitration and Mediation in the Southern Mediterranean Countries," published by Wolters Kluwer International in 2007 as the second volume of its Global Trends in Dispute Resolution series. The original Algeria chapter was written by Souad Djeddou, Lyria Mosteghanemi, Mohamed Toukal, and Nabiha Zerigui.

The Basics

Algeria is situated in North Africa, with 1,200 kilometers of Mediterranean Sea coast and reachable in just a few hours from Europe. It is bordered by Libya, Mali, Mauritania, Morocco, Niger, Tunisia, and the Western Sahara.

As a result, the nation has always played the role of a gateway between the European and African continents. Trade between these two continents mostly passes through Algerian ports. Lacking agricultural or light industry development because of its focus on heavy industry, Algeria has had to resort to importing agricultural and industrial goods to address its deficiencies in these areas. Thus, millions of containers arrive punctually at Algerian ports.

Most of the population is Arab/Berber, and most people are Sunni Muslim. The government is a republic, with a president who heads the executive branch's Council of Ministers and the High Security Council, a prime minister who heads the government, and a bicameral parliament. Under its constitution, Algeria is a multiparty state. Algeria has had more than 40 legal political parties.

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Worldly Perspectives *continued*

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rules of a specific organization. This institutional arbitration proceeds in accordance with rules and regulations implemented by a permanent arbitration center, such as the International Center for the Settlement of Investment Disputes, or Icsid; the International Chamber of Commerce, or the Euro-Arab Chamber of Commerce.

The arbitration court may consist of either one arbitrator or an odd number of arbitrators, who must meet certain requirements. Algerian Civil Code Article 18 recognizes the parties' freedom to choose the law applicable to the dispute as long as it has a "real relation" to the contract at issue or the contracting parties. Otherwise, the law of common residence or of the common nationality is applicable; absent either commonality, the law of the place where the contract was concluded is applicable.

The arbitrators produce their award in accordance with legal provisions, unless the parties expressly consent to them ruling otherwise. They then have the capacity to rule in equity. Arbitration awards are enforced voluntarily or by a document known as an "exequatur." In this situation, the party seeking enforcement must determine which exequatur judge has the authority to enforce the award, and meet certain requirements for the award to be recognized and enforced. Appeal and annulment of arbitration awards are available under certain conditions.

Consistent with the increasing importance of international trade and investment and the increasing emphasis on the significance of arbitration for international disputes, Algeria is party to numerous international arbitration conventions and bilateral trade agreements.

In addition, Algeria has adhered to and subsequently ratified many international conventions for the protection of investors. Algerian law contains special provisions for the conduct of arbitration when there is a dispute involving foreign investment in Algeria.

Not all commercial conflicts in Algeria or involving Algeria are resolved in court or through arbitration. Mediation is emerging, although slowly, as an alternative dispute resolution approach.

A Mixed ADR Report In Northern Africa

The setting: Algeria, just into its third decade as a free-market economy.

The good news: Domestically, arbitration is common. And growing considerably.

The not-so-good news: Modern mediation practice has no government support, and isn't something parties generally know about. It's not developed.

The traditional mediation practice has long been known in Algeria. The parties seek a resolution with a third-party facilitator who must be impartial and respect the confidentiality of the parties and the law. Under current Algerian law, a mediated resolution is enforceable as a legal agreement that establishes the legal obligations of the parties. If the solution is not carried out, the parties can go back to the mediator, and if the conflict persists, the parties are free to carry the conflict to the court system.

Mediation typically has been used in simple conflicts, but the possibility of broader application has not come to users' attention generally. There is no mediation support from the Algerian government. Parties still prefer to go to court to solve their disputes. They generally are unaware that the legal system recognizes the legitimacy of mediation for dispute resolution. Even some legal professionals, including judges, are unaware of the possibility of mediating disputes.

In countries where the mediation use is more developed, judges will sometimes direct the parties toward a mediator, which helps to promote the use of mediation. In Algeria, however, such referrals are a rare occurrence.

The Center of Arbitration and Conciliation, created by the Chamber of Commerce and Industry in Algeria, is not very active and has a low volume of business. Algerian companies today still hesitate to entrust the resolution of their conflicts to this center, and tend to prefer state justice.

Algeria's development as a center of free and international trade since 1989 has been the result of significant changes in its law and legal approaches to commercial dispute resolution. As signaled by the increasing use of arbitration and the first signs of potential development of mediation as means to resolve disputes, indications are that alternative dispute resolution processes will continue to branch out and play an important role in Algeria.

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Next month: Tunisia.

ADR Skills *continued*

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After the Commedia died off, improv theater faded into obscurity until it was separately and spontaneously reinvented in the 20th century by two people who have shaped the craft as it exists today—Keith Johnstone and Viola Spolin.

Johnstone began formulating his theories about creativity and spontaneity while growing up in England, and later brought them into his teaching at the University of Calgary. He felt that theater had become pretentious, which is why the average man in the street didn't even consider attending it. Johnstone wanted to bring theater to the people who went to sporting and boxing matches, the same audience that Shakespeare had written for in his day.

Johnstone decided that one approach would be to combine elements of both theater and sports, to form a hybrid called Theatresports. The trappings of team sports were adapted to the improvisational theater context; teams would compete for points awarded by judges, and audiences would be encouraged to

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cheer for good scenes and jeer the judges ("Kill the umpire!").

Viola Spolin can probably be considered the American Grandmother of Improv. In the 1920s and 1930s, she began to develop a new approach to acting instruction. It was based on the simple and powerful idea that children would enjoy learning the craft if it were presented as a series of games.

Her son, Paul Sills, along with people like Del Close and David Shepherd, created an ensemble of actors who developed a kind of "modern Commedia," which would appeal to the average man in the street. As with Theatresports and the original Commedia, the goal was to create theater that was accessible to everyone.

Sills started both the Compass Players and Second City in Chicago. Many members of the original cast of Saturday Night Live came from Second City, and the franchise has since produced such comedy stars as Mike Myers, Chris Farley and John Belushi.

BACK TO THE (LEGAL) PRACTICE

But what on earth does improvisational comedy have to do with being a successful litigator or mediator?

The art and technique of improvisation involve the very same tools that serve people well in any professional endeavor. When you think about it, life itself is an improvisation. Every situation is new, and therefore benefits from a fresh perspective and a creative mind. Not only that, but aren't lawyers, in particular, essentially performers and storytellers? What lawyer could not benefit from developing these skills?

It is a common misperception that there is no skill or structure to improvisation—that it simply involves blurting out the first thing that pops into your head. On the contrary, like jazz, there is an art and mastery to it that can be studied and practiced for years.

And the very tools and techniques employed by improvisational performers are just as applicable to practitioners of law.

The study of improvisation fosters the ability to think quickly on your feet. It enhances the capacity to cooperate and collaborate, to validate others' ideas while not abandoning your own.

Improvisation demands the keenest level of listening to and connecting with others. It encourages openness to creativity and inspiration, willingness to take risks, a lack of judgment, and the capacity to say "yes" more often than "no." It's easy to see that you don't have to be an actor to benefit tremendously from all of these qualities.

FINDING YOUR INNER CHILD

> *Genius is no more than childhood recaptured at will.*
>
> —Charles Baudelaire

> *Perhaps what we sometimes call 'genius' is simply a refusal to altogether let go of childhood imagination.*
>
> —Prof. Michael Cibenko

A sign famously hung in the late Paul Newman's Westport, Conn., office that read, "If I had a plan I would be screwed." Newman firmly believed in the benefit of "creative chaos." He understood and appreciated that success in today's age depends on how good we are at improvising rather than merely sticking to a script or plan.

At the negotiating table, improvisation demands that parties deal with the reality they are presented in real-time rather than continually revisiting scenarios of what they believe could or should be. By limiting oneself to a scripted plan, options for solving problems are narrowed and opportunities for solutions are more likely to be missed. Improvising instead of following a script or a plan allows the flexibility to stay nimble, and operate more freely and authentically.

The Art of Thinking On Your Feet

The tool: Improv theater techniques for negotiators and mediators.

The objective: Be better at your ADR role. Take it to the next success level.

Why this method? The skills involved are similar to what you do at the negotiating table. Familiar and comfortable—but also a challenge outside your comfort zone.

The goal for trial lawyers is the ability to truly be "in the moment," as it is happening. If we are thinking about how we planned something might go, we are not in the moment and not able to see and adjust to how it actually is going. We have lost the ability to be spontaneous.

People can sense when someone is really in the moment—and when they are trying to recreate something they rehearsed in their head an hour go. People can sense that disconnect—when the person opposite them is standing outside watching themselves, or in other ways is removed from the discussion.

We can smell the artifice and the lack of authenticity and passion. And we automatically disconnect from them, often without even realizing it. It becomes like listening to a boring lecture in school. We zone out and turn off.

This obviously is a catastrophic problem when your vocation hinges upon your ability to be a compelling communicator, and how well you connect with your audience—that is, read the jurors, the judge, opposing counsel, the deal parties, etc.

The dictionary defines spontaneous as, "coming or resulting from a natural impulse or tendency; without effort or premeditation; natural and unconstrained." This describes a state that is the exact opposite of fear. Fear is the biggest obstacle to spontaneity. It separates us from our senses and robs us of our instincts. When we are in fear we cannot really see or listen or react. We become the proverbial deer caught in the headlights.

It often is said that most people fear public speaking even more than death. Even many lawyers fear it, though it is part and parcel of their profession. Studying improvisation can actually help to get past this fear.

A lot of improvisation involves playing games that seem like children's games. People who are in a playful state are more open and receptive, more willing to experiment and to learn, without the fear of judgment. To be sure, much of the work done in improvisation classes is aimed at rekindling a sense of playfulness, freeing up the imagination and fostering a willingness to take risks.

'YES, AND . . . ' IMPROV HELPS

One of the cornerstones of improvisation is the concept of "Yes, and. . . ."

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As two performers develop a scene together, each makes offers; an offer being anything they say or do that helps define the elements, reality or story of the scene they are creating. It is the other actor's responsibility to accept the offers that their fellow performers make—in other words, to assume them to be true and act accordingly, to figuratively and often literally say "yes" to their scene partners.

Ideally, accepting an offer is followed by adding a new offer that builds on the earlier offer; this process is known to improvisers as "Yes, and. . . ." Every new piece of information added helps the actors refine and develop the action of the scene together. To not do so is known as blocking, negation, or denial. Here is an extreme example of blocking:

Performer #1: Hi, Mom. You don't look well. Are you all right?

Performer #2: I'm not your mother. I've never met you. And I've never felt better!

In this example, the second actor negated everything the first actor offered. Let's see what might have happened if the second actor used the concept of "Yes, and. . . ."

Performer #1: Hi, Mom. You don't look well. Are you all right?

Performer #2: No, honey. I'm worried about your father. He's been working way too hard lately.

In this case the second actor says "yes" to the first by implicitly agreeing that she is her mother and that she is, in fact, not well. She then adds the information about the father working too hard. That's the "and" part.

Inexperienced improvisers naturally tend to want to block their fellow improvisers' offers, and usually need coaching to break this habit. Ironically, this is a trap mediators and lawyers often fall into as well. People think if they don't hold on tightly to their notion of what the answer is, that they will ultimately get the short end of the stick.

But if you don't listen to the other person's needs, they completely shut down and the negotiations stall. Mediation experience indicates that if both sides in the negotiation get the opportunity to tell the mediator their story, and made sure they felt listened to and heard, then the mediator has an excellent chance of helping them break the deadlock that had brought them to mediation in the first place.

The trial lawyers who participated in the improv class have found the "Yes, and . . ." concept particularly helpful. "Recognizing, and then stopping myself, from just 'blocking' an opponent and, instead, listening to what they require and attempting to fulfill the need has led to more productive and less frustrating negotiations for me and more successful results for my clients," says Los Angeles attorney Dawn E. Smalberg.

Attorney Lisa Maki, a consumer and employment attorney in Los Angeles, also says she has used "Yes, and . . ." to great effect:

> In mediations during and since the class, I have used this method to open up my ability to listen and really understand where the defense and the mediator are coming from, allowing me to pick up signals early on to guide me to a resolution of a case, rather than shutting down and out all of what the defense and mediator are communicating. This principle has also greatly assisted me in truly "listening," rather than being hellbent on getting my particular point across, which is essential to my ability to more effectively depose witnesses, interview new clients and even speak with opposing counsel and address the court.

ONCE UPON A TIME . . .

> *Myths are public dreams, dreams are private myths.*
>
> —Joseph Campbell

> *Everyone is necessarily the hero of his own life story.*
>
> —John Barth

Improvisation takes a scene and generates a story from that scene. Lawyers are storytellers. A trial can be thought of as an opportunity for two opposing sides to tell the same story from two different points of view. The side that tells the best story wins the case.

The best story isn't necessarily the most entertaining, but it might be the most resonant, or the most honest, or the most accurate. The connection between the improviser and the lawyer becomes clear when you realize that, like an improvised scene, a lawyer has to incorporate new information and adapt the story as he or she goes forward. Witnesses might give unexpected testimony, new information and evidence can be revealed, and the observation of the behavior of those involved in the trial can offer insight that was not available before.

A lawyer is called upon to continually adapt the version of the story as this new information becomes illuminated. The lawyer that is able to incorporate this information into his or her version of the story and adapt it will be more successful.

It takes time to learn to create an acceptable story while playing this game, and the challenge lies in the cooperation. Improvisation isn't just creating a story from scratch, it is creating a story from scratch cooperatively with other performers. It is this added challenge that makes it a specialized skill. Improvisers must learn to accept and incorporate the story additions of their partners on stage, and in some cases the audience. This is what makes improvisation such a specialized form of storytelling.

CHALLENGE THE STATUS QUO

A juror's perspective: "One particular trial stands out in my memory, especially the difference between the prosecuting and defense attorneys. The defense attorney spoke first. He was calm, relaxed, looked the potential jury members in they eye and smiled. I liked him immediately. The prosecutor spoke next and barely looked at us. He stuttered. He frequently referred to his notes. He was fidgety and uncomfortable and tense. 'Oh boy,' I thought, 'this guy is going to lose his case.' He was obviously prepared, he was organized, and it seemed that he was following a plan for the trial. He was also impossible to listen to for more than a minute. Here was someone who spent six years in law school, passed the bar, earned his legal degree, and yet he didn't have the communication skills to back it up. He was like a surgeon that couldn't hold a scalpel steady."

Improvisers have their own craft-specific vocabulary. Improvisational guru Keith Johnstone was frustrated with the robotic stiffness of some performers when he realized they were not using the natural social skills on stage that they used in life, such as a concept called "Status." Johnstone defines status as "the conscious manipulation of our level of dominance. . . . Status is not confusing so long as we understand it as something we do, rather than our social position; for example, a king can play 'low status' to a servant, while a servant can play 'high status' to a king."

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Status is taught by encouraging students to focus on specific physical or verbal behaviors. A teacher will direct one group of students to maintain eye contact at all times, while another group tries to make eye contact, but immediately looks away if they actually catch someone's gaze.

This focus on behavior when teaching and learning status is important, because status *is* behavior. Most people only have a narrow range of status strategies that they have learned to be effective, and that have been reinforced by their environment or those around them.

In addition, there are many people who are mistaken about how they are presenting themselves. Having a greater and more fluid understanding of status allows people to adapt to more situations, and to be more aware that they are presenting themselves as intended.

In a recent class, one of the trial lawyers objected to learning the concept of "status" as a means to persuade. He felt that learning status techniques felt artificial and insincere, and that the point of learning these skills was to pretend to be someone other than himself.

It was illuminating to him when the instructors explained that these skills are not for pretending to be someone else, but to allow participants to more accurately present who they really are.

Many people are unaware of how they present themselves, and it is difficult to get accurate feedback from those around us. Status forces us to become aware of the face we are presenting to others, and by making it into a game students become aware of the strategies that have become habits, and are able to learn new strategies.

Being aware of the status one is projecting is especially important for lawyers. The lawyer is frequently placed in a position of authority over their clients. Most people don't deal with lawyers on a regular basis, and when they do need a lawyer it is usually because they are faced with difficult circumstances that only the lawyer with his or her specialized knowledge can help them with.

This creates a status gap between the lawyer and his or her client that can be more easily overcome by someone who is trained to observe the status another person is presenting and to match it.

A trial lawyer is called upon to perform. Lawyers work hard to be certain they are armed with the most accurate and substantial facts and logic before presenting their case. When they do present their case, however, they must perform. They must communicate their point of view clearly, effectively, and in some cases sympathetically.

There is a danger for any person who performs regularly that one's performance starts to be shaped subconsciously by their audience. Learning and observing status is an effective way for lawyers to become aware of their status habits. These habits might serve a lawyer well in their career, but it is always better to be aware and to have a range of choices.

* * *

This article describes how basic improvisation concepts can be modified, and by creating new games and exercises, and tailored for the practice of law. The authors' Pepperdine theater class provided a laboratory to work on trial attorneys' unique challenges in a safe and supportive environment, without the high stakes of an actual trial or negotiation.

The students have had practical opportunities to role play—for example, to present mock opening statements, conduct voir dire, and cross-examine difficult "witnesses," all in a classroom setting. Afterward, through discussion and coaching, the students gained valuable insight into how they come across.

Who knew improvisation had so much to offer the legal profession? It improves communication and creative problem-solving skills, encourages thinking outside the box, helps to overcome fear and stumbling blocks, builds dynamic presentation and storytelling skills, increases authenticity and spontaneity, nurtures innovation, reduces negativity, and increases cooperation. Not bad for a seemingly silly endeavor.

So perhaps the next time you're in a trial, mediation or deposition, instead of saying "No, but . . . ," you might try saying "Yes, and . . ." instead and see where that leads you.

ADR Procedures

With Arbitration Facing Restrictions, It's Time To Look at a U.K. Solution for Consumer Disputes

BY ADAM SAMUEL

Mandatory consumer arbitration is under severe criticism in the United States, led by the Minnesota Attorney General's successful attack on the National Arbitration Forum, forcing it out of the consumer debt arbitration arena. The cessation of that business by NAF was followed last summer by voluntary withdrawals from specific standard ADR practices by major credit card issuers and the American Arbitration Association, pending reforms.

It might be the moment to try something European to enable businesses to stay out of court and politicians out of the legal system.

In 1981, four British insurers set up the Insurance Ombudsman Bureau to deal with consumer complaints about themselves. It operated for the next 20 years before the U.K. government created a statutory body, the Financial Ombudsman Service, to do much the same job throughout the financial services industry, including insurance. It has since been extended

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The author is an attorney and a barrister in London. He is a neutral and is on the panels of the World Intellectual Property Organization and Hong Kong International Arbitration Centre. His website is www.adamsamuel.com.

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ADR Procedures *continued*

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to most residential mortgages and consumer debt. Financial Services and Markets Act 2000, Secs. 225-234.

The key idea of the Insurance Ombudsman Bureau was that the body was to be free to access for consumers, and mandatory only for the insurers involved. Companies' owners, represented by the board of directors, were not allowed access to the ombudsman who made the decisions, or his staff. The ombudsman was accountable to a council with a majority of public interest representatives. This created vital insulation for the scheme from industry interference.

[The author worked for the bureau between 1991 and 1994, and recounted the bureau's early history in "Consumer Financial Services in Britain: New Approaches to Dispute Resolution," 3 *European Business Organization Law Review* 649 at pp. 655-669 (2002). The insulation described failed once when the board sought to pressure the ombudsman into declining jurisdiction over what were then called mortgage indemnity guaranty insurance policies. This fight is described at p. 659].

Another central feature of the scheme was that permanent staff investigated the complaint and then engaged in evaluative mediation as a way of persuading the parties to reach the right conclusion. Only if that proved impossible did an ombudsman issue a decision. While this generated the risk of "industry capture," it did mean that staff knew how the companies worked and could spot patterns of misconduct in a way that an arbitrator cannot.

NO LAWYERS NEEDED

The inquisitorial approach of the ombudsman's assistants means at least in theory that the consumer does not need legal representation and is only rarely awarded the costs of any that it obtained. The workings of the Financial Ombudsman Service, the descendant of the Insurance Ombudsman Scheme, are described in "Consumer Complaints & Compensation: A Guide for the Financial Services Market, City & Financial," pp. 587-630 (2005); see in particular pages 616-624. See also the Financial Services Authority's Disputes Sourcebook (referred to here as DISP) 3.7.10G.

The maximum award was set in 1981 at £100,000, about $160,000. Despite the ravages of inflation it has never been increased, much to the Financial Ombudsman Service's annoyance. Financial Services Authority PS 06/4 at para 2.2.7. The scheme could always make recommendations for payments to be made above the maximum award. See Financial Services and Markets Act 2000, Sec. 229(5). The current scheme also can add costs and interest to that figure anyway. Secs. 229 & 230 & DISP 3.7.4R & 3.7.5G.

The Insurance Ombudsman Bureau idea was copied by the U.K. banks and was enshrined in statute by the Building Societies Act 1986 for the United Kingdom's equivalent of savings and loans institutions. In 1988, the various financial services regulators which came into existence that year set up their own ombudsman and arbitration schemes for things regulated by them as they were required to do by the Financial Services Act 1986. The Investment Management Regulatory Organization set up the Investment Ombudsman, and the Financial Intermediaries, Managers and Brokers Regulatory Association ("Fimbra"), created its own arbitration scheme, administered by the Chartered Institute of Arbitrators that year. The Life Assurance and Unit Trust Regulatory Organization's ("Lautro") complaints subcommittee delegated to the Insurance Ombudsman Bureau power to deal with all cases within the latter's jurisdiction, maintaining an ombudsman-like complaints subcommittee to deal with the rest.

The Personal Investment Authority created its own ombudsman scheme in 1994, when it took over the functions of Lautro and Fimbra. The private and regulatory schemes in the financial services industry were subsumed into the massive Financial Ombudsman Service in 2001. This handles more than 100,000 cases a year—for a population about a quarter of the United States' size. See Financial Ombudsman Service, Annual Review 2008/2009 at p. 1 for the latest statistics (the scheme received a frankly astonishing 127,471 cases during the year in question).

Decisions that formerly were enforceable only as a matter of contract have a status similar to an arbitration award but only if the complainant accepts them. Financial Services and Markets Act 2000, ss. 228(5) & 229(9). If not, he or she must use the court system. In practice, very few do.

The Banking Ombudsman scheme enabled small businesses as well as consumers to complain about their banks. This was adopted by the 2001 legislation for the Financial Ombudsman Service as a whole. So, there are three classes of eligible complainant: consumers (regardless of how wealthy they are), microenterprises with fewer than 10 employees and revenue of less than €2 million (US$2.9 million), and charities and trusts with revenue of less than £1 million ($1.6 million) at the time of the complaint.

Funding is by a combination of case fees, regardless of outcome, and a levy collected in line with the amounts firms pay the sister regulator, the Financial Services Authority. The case fee does not apply for the first three cases each year to protect small firms.

PUBLIC APPROVAL

There have been and continue to be many problems with the Financial Ombudsman Service, as there were with its predecessors. Nevertheless, these schemes have the advantage of public approval and credibility drawn from their constitution, with the emphasis on a board with a public interest majority.

The inquisitorial approach means that consumers are perceived to be receiving a fair deal. When there is a financial scandal, it can be contained within the ombudsman framework generally without the need for class actions—and as happened regularly last winter in Hong Kong—demonstrations outside the offices of

A View From Abroad

The problem: Tainted U.S. consumer arbitration practices, and the effect on ADR overall.

The proposed solution: Use ombudsman schemes that resolve complaints long before court or arbitration.

The implication: With better consumer resolution processes, maybe the vilified and now shuttered/suspended ADR programs never would have developed.

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well-known institutions. Jurisdictions such as Hong Kong and Japan currently are working on devising their similar schemes.

The ombudsman idea, though, is just one part of a number of regulatory tools to improve the treatment of consumers and small businesses. Alone, it cannot force firms to behave themselves generally or while handling complaints. As a dispute resolution body, it cannot fine or expel from the consumer arena companies that break the rules or handle complaints inappropriately. The ombudsman is not well designed to handle industrial quantities of complaints, although it may be the best of a number of bad alternatives here.

Effective conduct of business and complaint rules allied to effective regulatory enforcement need to be combined with effective ombudsman schemes to ensure adequate consumer protection. (This is the central theme of the author's "Consumer Financial Services in Britain: New Approaches to Dispute Resolution," supra.)

Throughout the European Union, a 1993 directive makes pre-dispute arbitration clauses presumptively unfair and unless convincing evidence of fairness is shown, invalid. Council Directive 93/13/EEC on unfair terms in consumer contracts, Arts 3(3) & 6(1), Annex 1 para 1(q).

As a result, cases like *Buckeye Check Cashing Inc.* v. *Cardegna,* 546 U.S. 440 (2006), would never have ended up anywhere near an arbitration tribunal in England, let alone a court. See "Separability and the U.S. Supreme Court Decision in *Buckeye v. Cardegna*," 22 *Arbitration International* 477 (2006). In the United Kingdom, they would have been looked at by the Financial Ombudsman Service.

Perhaps building an ombudsman scheme is an idea that deserves consideration by the Minnesota Attorney General, the various threatened dispute resolution schemes, and financial services regulators in the United States.

ADR Brief

N.J. COURT COMMITTEE PROPOSES REMOVING REPRESENTATION REQUIREMENT

A vestige of New Jersey legal world protectionism that is opposed to the basic alternative dispute resolution principle of choosing your negotiating representatives—and which appears to have had a big effect on ADR practice—might be wiped off the state's rule books soon.

The New Jersey Supreme Court's Professional Responsibility Rules Committee recently recommended that the Court, in its biannual rules revision, change its version of Model Rule of Professional Conduct 5.5, the multistate practice rule that came down hard on ADR attorney-advocates.

If the change is adopted, out-of-state attorneys could represent clients in New Jersey ADR without hiring local counsel, registering or paying a court fee. The Court is expected to decide this summer on whether to adopt the recommendation.

The rule extended to commercial conflict resolution practice the pro hac vice rules on registering out-of-state lawyers in court cases. The rule was a step beyond: even private mediations were dragged under its orbit in Opinion 43, a 2007 ruling that says that non-New Jersey attorneys would have to register before ADR negotiations took place.

That opinion, by the Court's Committee on the Unauthorized Practice of Law, didn't merely provide a juicy hypothetical for Model Code of Professional Responsibility wonks and New Jersey law school ethicists. The state has many large companies conducting international business and interstate transactions. Some have large legal departments employing attorneys who had joined out of New York and Philadelphia practices, where they may not have been admitted across the river.

The specter of violating unauthorized practice of law rules loomed over in-house work in run-of-the-mill contract disputes as a result of the Court's UPL Committee opinion.

The ruling made providers the enforcers in policing the ADR matters. The American Arbitration Association—the target of the 2007 opinion—announced after the ruling it would issue warnings before ADR sessions started. The association objected to its new obligation to assess mediation and arbitration participants' bar memberships.

Some New Jersey ADR attorneys said that the tough registration requirement would mean that out-of-state attorneys would declare themselves business representatives of the companies they worked for in negotiations, rather than corporate legal representatives. That stance seeks shelter under the Uniform Mediation Act, which allows mediation participants to choose whoever they want as their representatives.

That New Jersey was an early adopter of the conciliation-supportive UMA added fuel to the griping by state ADR practitioners, who saw a newly invigorated market potentially cut off by protectionism. The 2004 UMA passage coincided with the state Supreme Court's adoption of its version of RPC 5.5, along with a Court rule designating mediation and arbitration to be "the practice of law."

When the 2007 Unauthorized Practice of Law opinion requiring the pro hac vice ADR admission for out-of-state attorneys was released, many state practitioners' feared was that any gains from the requirement of the presence of a New Jersey-licensed attorney would pale next to the losses that would be felt when mediation and arbitration matters fled to New York and Pennsylvania.

The new corrective Professional Responsibility Rules Committee proposal would make these issues a bad memory. "If the N.J. Supreme Court adopts the newly proposed RPC 5.5, then all of the many serious problems we critiqued for the last six years disappear instantly," according to Princeton, N.J., ADR attorney Hanan M. Isaacs. "We will be back to self determination in selection of ADR neutrals *and* advocates: self representation or representation by non-lawyers, out of jurisdiction ("cross border") lawyers, or N.J. lawyers, in both arbitrations and mediations."

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"[W]e're very supportive of the changes being suggested here," says Eric Tuchmann, general counsel of the American Arbitration Association. "They would bring to an end what was a practice that was very out of line with most of the states' laws on out-of-state lawyers representing parties in the state."

The N.J. Professional Responsibility Rules Committee produced the report late last year, after a request to look at the Court rules and Opinion 43. The report was published by the state's Administrative Office of the Court on March 15. A notice to the bar opened a one-month comment period for the new proposed rule, extended to the end of last month, after which the Court will decide to adopt, change or reject.

The revision eliminates the problematic 2007 UPL committee's opinion gloss over an already highly restrictive regime. The new PRRC committee report notes that "[u]nder the state's current RPC 5.5(b)(3)(ii), a cross-border attorney may represent a party to a dispute by participating in ADR when the 'representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice.'"

The new report for the Court says that the fixes that have been proposed since the UPL Committee's ruling still leave holes requiring ADR attorney representatives to register. Those proposals, by another Court committee, have not been adopted by the Court.

In a paragraph in its report, the PRRC committee lays out the problems with the previous proposed solutions:

> The Committee recognizes the policy of encouraging ADR, and that imposing additional requirements on cross-border attorneys seeking to engage in ADR processes on behalf of their clients will deter them from selecting New Jersey as their ADR forum. Although the previously proposed new safe harbor would allow cross-border representation in a matter involving a New Jersey client or a dispute that originated in New Jersey, the required prerequisites—association with local counsel, registration, and payment of the annual assessment—may prove to be too cost prohibitive for many clients. In addition, the justification for regulating the practice of law is more attenuated in the context of ADR than it is in a pure litigation setting. For example, in a private mediation conducted pursuant to a private agreement between private individuals, there is no regulation or oversight by the courts. Even laypersons may assist parties under Section 10 of the Uniform Mediation Act, N.J.S.A. 2A:23C-10.

John M. Barkett, a partner at Shook, Hardy & Bacon in Miami says that the Court committee "cares more about keeping the business in New Jersey" than policing bad practices. He says that the statement that regulating legal practice "is more attenuated" in ADR than in litigation rings hollow. "You're still trying to protect somebody from having a bad lawyer," says Barkett, who has written extensively on MPC 5.5.

"The part where the committee says that [registration] 'will deter them from selecting New Jersey as their ADR forum' is the key," he explains. "That's what I think this is all about."

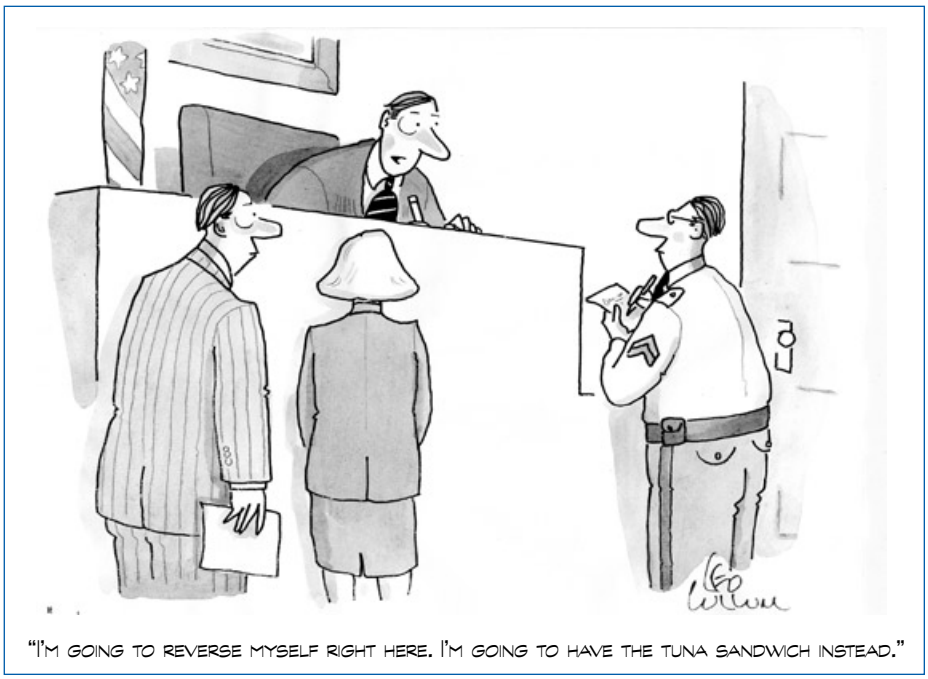
The PRRC committee's proposal, its report notes, correlates with the American Bar Association's versions of Model Rule of Professional Conduct, focusing on the relationship between the legal representation and the lawyer's practice—not the New Jersey location of the client or the dispute.

Practitioners have greeted the new proposed rule warmly. They seem to believe that the Court committee got it right after the earlier false starts, and the practices sought with the state's 2004 UMA adoption will finally be normalized. "If adopted in its entirety," says Jeffrey Posta, chair of the New Jersey State Bar Association's Dispute Resolution Section, "it will clear this up a bit and make it easier for ADR proceedings to be conducted across state lines."

The association had not yet taken a position at press time, but the DR section had backed the PRRC recommendation. The association's board of trustees was set to look at the entire 2008-2010 rules cycle package to prepare a comment letter regarding its positions on the various recommendations, of which the MPC 5.5 change is only a small part.

In a comment letter to the Supreme Court strongly backing the proposed fix, the Trenton, N.J.-based New Jersey Professional Association of Mediators, an accreditation group with more than 400 attorney and nonlawyer members, notes that the proposal corrects Opinion 43's explicit extension of pro hac vice filing

Cartoon by Leo Cullum



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requirements to private mediation process, even though the opinion specifically dealt with an inquiry about arbitration. The opinion was titled "Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey."

In the NJAPM comment letter, organization president Robert J. McDonnell, who heads the Lincoln Park, N.J.-based provider Alliance Mediation Services, notes that "[h]aving the mediator ask parties and counsel if they are properly admitted in New Jersey can suggest a lack of neutrality—something which is critical to the mediation process. Mediators should not be enforcers of the RPC in their mediations."

The proposed 5.5 revision, notes McDonnell in the letter, "would restore party self-determination in mediation and other ADR matters. It would permit lay people to serve as advocates in private mediations and allow parties to have the legal counsel of their choice, whether New Jersey based or from out of state."

McDonnell said in an interview that the focus for his group, about 70%-75% of whose members are lawyers, is making New Jersey more mediation friendly, and operate more in accordance with the UMA. He says the organization doesn't take a general position on pro hac vice admission or attorney conduct rules, but notes that the state version of 5.5 and Opinion 43 have provided an additional hurdle to get to mediation.

McDonnell says he recently mediated a court-annexed case where the party and the attorney were from Pennsylvania. For an unknown reason, local counsel dropped off, he says, and he had to help the Pennsylvanians—"who didn't know anyone here"—find new local counsel, delaying the ADR proceedings.

So, says McDonnell, people were following the rule, but it wasn't helping dispute resolution achieve its goals.

* * *

Hanan Isaacs, long active in New Jersey ADR and a former member of the Court's Unauthorized Practice of Law Committee, also sent a comment letter strongly supporting the Professional Responsibility Rules Committee's proposals.

An ADR purist, Isaacs urged the Court in March to adopt the proposed rule, noting that ADR principles trump the business considerations:

> I am a New Jersey licensed and practicing attorney, and proudly so. I welcome retention by out-of-state clients for advocacy assignments in New Jersey arbitrations and mediations as well as in the state and federal courts here. I would rather parties pick me for these assignments over lay advocates. But the lifeblood of [ADR] has always been party control. Its wide success in the marketplace has been built largely on avoidance of formality, regulation, and restriction, mediation being the least formal and regulated of the three. If parties want out of state legal counsel or a non-lawyer making their case to a mediator or an arbitrator, then too bad on me. That is their choice and the law should respect it. In my view, the Supreme Court should regulate lawyers in their court-based or directly court-related functions, and not impose itself into the purely private and contractual ADR marketplace. The legal system does not gain when the Court so acts, and the public loses. That is not good public policy.

National experts have followed the New Jersey drama closely, and they also mostly welcome the proposed change. The AAA's Eric Tuchmann echoes the praise, though the New York-based nonprofit didn't file a comment letter. The proposed changes "really bring New Jersey into the mainstream of the accepted practice," he says.

They also would remove a burden imposed on the practice, but targeted at the AAA, by the 2007 UPL opinion. Since then, Tuchmann explains, parties and counsel to New Jersey AAA matters would get a letter providing the Opinion 43 cite and telling the participants that if they were out of state lawyers, registration would be necessary.

Tuchmann says the association can't quantify how many matters moved out of New Jersey, or avoided the state altogether in light of the registration rule. "You don't know why a particular lawyer, specifically, in retrospect might have moved out, or a counsel switched in a particular matter," he says, adding, "All that would happen behind the scenes."

"But," continues Tuchmann, "as a general rule, where you have a rule that exists like in New Jersey and Florida, where they appear to be burdensome, the tendency is that the jurisdiction will become known as not friendly to the process. And over time, on the margins, lawyers will tend to avoid those jurisdictions."

Shook Hardy's John Barkett also cites Florida as another restrictive jurisdiction—but one that has an ADR accommodation. He says ADR practitioners attached to court matters, quickly wind up registering, pro hac vice style. Barkett points out, however, that Florida is a site for many international arbitrations involving Latin American parties. The state's Rule 4-5.5 on multi-jurisdictional practice specifically exempts registration for lawyers in international arbitration proceedings attached to local courts.

Representation restrictions, he says, make ADR more expensive to conduct, rather than expeditious. The New Jersey proposal is a vast improvement, Barkett says. "They are being sensible and being practical to allow a New Jersey client involving a New Jersey dispute that happens to involve a cross-border attorney to get the benefit of mediating in New Jersey at a reasonable cost," he says. "How could you argue with that?"

Still, notes Paul Lurie, a Chicago partner in Schiff Hardin, practice restrictions are a problematic part of the legal world that won't disappear easily, in New Jersey or elsewhere. Lurie points out that if a motion to compel an arbitration is needed, or when an enforcement motion needs to be filed, the need to hire local counsel reemerges in an ADR context that otherwise wouldn't invoke the multijurisdictional practice rules.

Referring to New Jersey's lengthy court appearances rule, 1:21, Lurie says, "This looks like fairly flagrant constitutional violation." (Lurie wrote an analysis of the constitutional issues related to the New Jersey Court rules in "Court Committee Opinion Limiting ADR Representation Raises Constitutional Issues, as Well As Problems Rooted in Protectionism," 25 *Alternatives* 72 (April 2007).)

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The proposed amendment to New Jersey RPC 5.5 incorporates a recommendation from previ-

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ous two-year rule cycles. In the earlier proposal, the section would permit the representation by the out-of-state attorney the "lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice."

The new proposal provides the safe harbor for out-of-state attorneys by adding that the services also "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required."

Hanan Isaacs, in his comment letter to the Supreme Court, concludes, "The revised Rule 5.5 would restore common sense. . . . It would restore party self-determination in contractual ADR dealings. It would permit lay people to serve as advocates in purely private ADR processes and allow parties to have the legal counsel of their choice, whether New Jersey based or from out of state."

"It seems as though most states have settled in and there is a broader consensus," concludes the AAA's Eric Tuchmann, adding that, if the rule change is passed, New Jersey will be in "a much more consistent position" with other states.

"Building walls does not generally help the process or the practice," says New Jersey state bar association dispute resolution section chair Jeff Posta, who is a partner at Stark & Stark in Lawrenceville, N.J. "It's up to the Supreme Court to fine tune the registration and payment-of-fees rules. We'll see what they do."

(For bulk reprints of this article, please call (201) 748-8789.)

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Georgetown University Law Center.

The CLA dinner began in 2004, honoring Kathryn A. Oberly, who was vice chair and general counsel of Ernst & Young.

Last year, the CPR Institute honored Thomas L. Sager, senior vice president and general counsel of E.I. duPont de Nemours & Co., and Amy W. Schulman, senior vice president and general counsel of Pfizer Inc.

The other Corporate Leadership Award honorees are:

2005—Brackett B. Denniston III, senior vice president and general counsel, General Electric Co,

2006—Russell C. Deyo, vice president and general counsel, Johnson & Johnson,

2007—Stephen F. Gates, senior vice president and general counsel, ConocoPhillips Co.

2008—Brad Smith, senior vice president, general counsel and corporate secretary, Microsoft Corp.

SAVE THE DATE! THE 2011 CPR ANNUAL MEETING

The date and place are set for CPR's 2011 Annual Meeting.

The event will be held on Thursday, Jan. 13 and Friday, Jan. 14 in New York. The meeting will return to the Intercontinental Barclay Hotel.

Watch www.cpradr.org for announcements about an accompanying training session.

The full agenda will be posted at the site and appear in this CPR News feature late in 2010. Follow the CPR Institute on Twitter—@CPR_Institute—for information in 2010's fourth quarter about an early bird discount to the meeting.

For highlights from January's 2010 Annual Meeting, see below.

SAVE THE DATES! TWO CPR Y-ADR EVENTS— NEXT MONTH IN HOUSTON, OCTOBER IN LONDON

CPR's new program for attorneys 45 and younger has spring and fall events dates.

First, next month in Houston, CPR's Y-ADR—formed last year to introduce young attorneys to in-house counsel in the international ADR practice area through periodic seminars and networking—will present a panel of in-house counsel.

The panelists are Janet Langford Kelly, senior vice president, legal general counsel, and corporate secretary at Houston's ConocoPhillips Co.; Sylvia J. Kerrigan, vice president, general counsel, and secretary of Marathon Oil Corp., in Houston; and Timothy Hill, senior vice president, legal and public affairs, and general counsel/corporate secretary at Chevron Phillips Chemical Company LLC of The Woodlands, Texas.

The event will be held at Beirne, Maynard & Parsons, on Wednesday, June 16. The program will run from 5:00 p.m. to 6:30 p.m., and a networking cocktail reception will follow.

RSVP by June 9 to CPR's Julie DeSarbo at jdesarbo@cpradr.org.

* * *

Y-ADR also will have an event in London in October. The law firm of Allen & Overy will host. Watch the CPR website at www.

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cpradr.org and @CPR_Institute on Twitter for the dates and program this summer.

The Y-ADR events are free. For more information or to sponsor a Y-ADR event in your office, please contact DeSarbo, or CPR Senior Vice President Lorraine M. Brennan at lbrennan@cpradr.org.

LAST MINUTE: CPR/CIARB JOINT ARBITRATION TRAINING IN NYC

At press time, a limited number of slots were still available for the Joint CIArb-CPR Arbitrator Training Program later this month. The training provides a fast track to fellowship in the Chartered Institute of Arbitrators.

The May 20–22 training will be held in New York, at Covington & Burling, The sessions will run from 9:00 a.m. to 5:30 p.m. the first two days, and then, on the third, a Saturday, from 9:00 a.m. to 1:00 p.m.

For availability, check www.cpradr.org under the Training/Events tab, or call (212) 949-6490.

The Chartered Institute is a London-based organization with worldwide membership of 12,000 trained neutrals that focuses on, among other things, improving ADR practice. See www.ciarb.org. It offers education and vocational training courses and qualifies neutrals in a variety of ADR disciplines including arbitration, mediation, and adjudication.

"Fellowship," according to the CIArb website, "is a mark of excellence for arbitrators from which, having gained relevant experience, an arbitrator may progress to become a Chartered Arbitrator."

The trainers will be Stamford, Conn.-based attorney-neutral Steven A. Certilman (biography at www.certilman.com), Thomas Halket, name partner in Mamaroneck, N.Y.'s Halket Weitz (www.halketweitz.com, Covington partner Jack Levin, of New York (www.cov.com/jlevin/), and Pete Michaelson, of Shrewsbury, N.J.-based Michaelson & Associates (www.mandw.com).

There are three attendance options: the full three-day program, which costs $2,945, and includes Modules 3 and 4 of the "CIArb Fast Track to Fellowship"; attendance for Module 3 only, on Thursday and Friday, May 20-21, at $1,995; and one-day Module 4 attendance only, on Saturday, May 22, which will focus on award writing, at $1,150.

Previous joint CPR-CIArb training sessions have sold out. Cancellation is available until May 14, less a $250 cancellation fee. After May 14 there is no refund, but free substitution is permitted until May 19—that is, another qualified practitioner may take the place of the cancelling individual.

Covington is located at 620 Eighth Ave. in New York City, in the *New York Times* building between 40th and 41st Streets.

The course is nontransitional and will not be acceptable for newly admitted attorneys. The CPR Institute has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in the State of New York [July 14, 2007-July 13, 2010]. CPR is a nonprofit organization. Under financial hardship guidelines, at its discretion, CPR may waive the fee for attorneys who demonstrate that they are not currently employed (not retirees). CPR also may provide a special discounted price to attorneys, full-time judges and administrative law judges practicing in the nonprofit and public sectors full time. E-mail info@cpradr.org for information.

CURRENT COMMITTEES AND EVENTS ROUNDUP

There will be a lot of CPR committee activity throughout spring and summer and through the end of 2010, with many committees already scheduling multiple meetings.

Below are few near-term gatherings. Please see the CPR Institute website for more; membership login is needed for minutes and agendas. Most of these meetings are available via conference call.

- The Insurance Committee's Policyholder-Neutrals Subcommittee will have a lunchtime meeting at 12:30 p.m. on May 7, at the New York office of Wilson Elser Moskowitz Edelman & Dicker, to review applications to CPR's insurer-policyholder panel, which is one of CPR's Panels of Distinguished Neutrals.
- The CPR Employment Committee will meet May 17 at the New York office of Kaye Scholer, where committee chairman Jay Waks is a partner. Kenneth R. Feinberg, who is overseeing compensation payments at companies bailed out by the federal government, is going to participate as part of a CLE-accredited panel that will cover employment ADR developments, and public policy consensus issues. The full panel wasn't available at press time; check the CPR website for details.
- The Global Accelerated Rules subcommittee of the Arbitration Committee also is meeting on May 17 to discuss the promotion of its recent "Global Rules for Accelerated Commercial Arbitration" (available at www.cpradr.org/ClausesRules/GlobalArbitrationRules/tabid/422/Default.aspx).
- Next month, the Commission on Facilities for the Resolution of Mass Claims will discuss the latest draft of its book, a master guide to designing mass claims ADR programs. The discussion is scheduled for June 15.
- June 16 will be an Energy Committee meeting, in Vinson & Elkins Houston office. The group expects to cover the use of dispute review boards in energy projects.

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Dates are coming soon for the next meetings of the following committees: Arbitration, Construction, Diversity, the European Advisory Committee, Health Care, Intellectual Property, and Patent.

For more information on any of these committees, E-mail info@cpradr.org.

* * *

Later this month, CPR Senior Vice President Helena Tavares Erickson, who oversees dispute resolution services and training, will be visiting CPR neutrals, members, and conflict resolution professionals in the Minneapolis/St. Paul area. For information on her visits, the week of May 26, E-mail her at herickson@cpradr.org.

MORE FROM THE MEETING: HIGHLIGHTS FROM CPR'S ANNUAL NYC GATHERING

Below are highlights from the 2010 Annual Meeting sessions.

In *Alternatives*' CPR News column the past two months, the keynote speakers' remarks have been featured. The first-day keynoter was Kenneth R. Feinberg, returning to the CPR meeting dais as President Obama's designee to oversee executive pay at companies bailed out by the federal government. His comments before his keynote, to a Jan. 14 breakfast meeting of the CPR Employment Committee, are covered in full at 28 *Alternatives* 85 (March 2010); see item immediately above for details on Feinberg's return to the CPR Employment Committee, for CLE credit, later this month.

U.K. consultant and professor Richard Susskind looked at changes in the legal profession in his Jan. 15, second-meeting-day address. It is summarized last month, at 28 *Alternatives* 101 (April 2010).

Susskind also stepped in as a late substitute for the CPR Annual Meeting's final panel. That discussion will be summarized in a future *Alternatives*.

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While the keynote addresses are not included, CPR and WestLegalEdcenter.com have posted six of the meeting sessions for on-demand CLE credit. Full details are at the West site and at CPR's Training/Events tab at www.cpradr.org.

Because the online sessions are accredited in dozens of jurisdictions nationwide, annual meeting attendees were urged to bring the meeting back home with them by encouraging colleagues and staff to "attend" via the CPR Annual Meeting seminars online.

Individuals at CPR Institute member organizations receive a hefty 25% discount by registering for the courses using their work domain E-mail address.

The CPR Institute has partnered with WestLegalEdcenter.com to provide 34 sessions, and 19 for-credit podcasts for CLE on the go. See the West and CPR websites for full information on the six sessions, and links.

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This year's meeting marked the first time a CPR event has had live Twitter coverage. Follow @CPR_Institute for up-to-the-minute details about the CPR Institute, and ADR news and coverage, via CPR's new Twitter page at http://twitter.com/cpr_institute. Visit the *International Dispute Negotiation* podcast's Twitter page at http://twitter.com/IntlDispNegPod, and follow the podcast and related developments at @IntlDispNegPod.

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The session, "New Business Realities and the Role of ADR: The GCs Weigh In," which followed Ken Feinberg on the first meeting day, explored ADR processes and their efficacy from the in-house perspective. GE's Barbara Daniele, a CPR board member, moderated.

Nancy L. Vanderlip, vice president and general counsel at ITT Corp. in Santa Ana, Calif., said that pressure to lower costs led her employer to establish an ombudsman as part of a "very comprehensive" employee dispute prevention program. Noting it is "prevention at its earliest stage," she said that the program allows the company to track matters closely.

The program, she said, allows the company attorneys to "'create the facts' of the case before it is a case," leading to resolution before filings—meaning that an in-progress record of incidents are recorded long before ITT is served with a complaint, creating a contemporaneous "history."

Moderator Daniele asked panelist Hans Peter Frick, senior vice president and group general counsel at Nestlé in Vevey, Switzerland, about the importance of an "ADR mindset" in dealing with regulators. Frick said it was essential for the consumer food products producer, which faces scrutiny from regulators worldwide. But he added that the techniques are helpful in dealing with competitors, too, "who generate the objections regulators act on."

The ability to implement ADR and negotiating processes, said Frick, "improves relationships." He said that with "four or five major players" in the industry, Nestle can't afford disputes. "We have to do business with them," he said, referring to distributors as well as suppliers. He said that good relations are needed for joint product ventures and sharing intellectual property to spur that development.

"Mediation," concluded Frick, also a CPR board member, "is the only way to sort it out."

Also on the panel was Marc Gary, executive vice president and general counsel at Fidelity Investments/FMR LLC, in Boston.

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CPR Annual Meeting highlights will continue next month.

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