Since the mid-1990s, an animated debate has been carried out among practitioners, academics and lawmakers about the most effective approach to increase the embrace of mediation in a given jurisdiction, especially outside the United States.

This debate usually has been polarized between two alternatives: First, develop the culture of mediation by promoting the process's advantages, and training mediators and lawyers, in order to create a spontaneous demand for mediations.

Alternatively, other moves seek to introduce various legislative reforms to incentivize the reliance on mediation for litigants, and regulate the market in order to decrease the number of cases filed in court.

The debate soon evolved to the pros and cons of voluntary versus mandatory mediation. The vast majority of academics and practitioners objected that mandatory mediation was a contradiction in terms, and above all, a barrier to access to justice and against most nation's constitutions.

Hundreds of conferences and articles have been dedicated to find the “magic formula” to increase the number of mediations.

As a result, most European jurisdictions have introduced new laws in the past two decades based mainly on the voluntary recourse to mediation, with some incentives for litigants, and an accreditation scheme for mediators to ensure high-quality mediation services standards.


With few exceptions, however, this approach failed; all available statistics in Europe report that mediation on average is used in less than one percent of the cases in court. This means out of 100 court cases, on average only one litigation is resolved by a third-party neutral mediator.

AN ITALIAN MODEL

Four years ago, a pilot provision was introduced in Italy within a wider legislative reform of a previous law on mediation for civil and commercial disputes. This provision—limited in time and scope and contained in just one paragraph—was able to generate alone

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ADR PIONEER FRANK SANDER REMEMBERED

Frank E. A. Sander didn’t invent alternative dispute resolution or the techniques it encompasses. But conflict resolution wouldn’t be applied as it is in courts, corporate law offices, and law firms today without him.

Sander, who died in February at 90 in Concord, Mass., provided the concept for the multi-door courthouse, in which parties with problems could find multiple procedural avenues for resolving their disputes at our nation’s courts, including negotiation and mediation.

The idea—which Sander, a Harvard Law School professor, issued at the Pound Conference, a Seventies revival of a turn-of-the-20th-century gathering on access to justice—was the foundation of decades of scholarship, legal innovation, and court reform.

The American Bar Association used Sander’s model for pilot court programs beginning in 1984, which, among other things, included court intake officers to diagnose litigants’ needs.

Among the many ADR-related revelations that are flowed from Sander’s multi-door courthouse approach, direct, indirect, and the 1990 Administrative Dispute Resolution Act requiring federal agencies to adopt ADR policies, the 1998 ADR Act requiring federal courts to offer ADR options, and a 1998 order by President Bill Clinton that required government agency attorneys to consider ADR to resolve disputes.


“That was at a time that ADR wasn’t even a term,” says James F. Henry, who founded the CPR Institute, which publishes Alternatives. “There was no literature, other than Frank’s. There was no intellectual infrastructure at that moment of time of the Pound Conference but for his.”

A long-running, return-to-the-roots reexamination of ADR (continued on page 62)
Practice Focus: The Duty of Candor, Inadvertent Production of Documents, and Your Arbitration Work

BY JOHN M. BARKETT

The conduct of counsel in domestic arbitrations is subject to the rules of professional conduct for lawyers. Stunned looks appear on the faces of the lawyers in the audience. “I will say it again: lawyers are governed by the ethics rules when you conduct a domestic arbitration.”

My hypothetical audience, of course, is made up of lawyers who are not “in the know.” Alternatives readers are in the opposite camp. They know that Rules 3.1 to 3.6 of the Model Rules of Professional Conduct and the various state analogs address the lawyer as “Advocate.”

They also know that Model Rule 3.3 requires candor toward the “Tribunal.” Model Rule 3.3(a) provides that “A lawyer shall not knowingly

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The Model Rules are published by the American Bar Association, which can be found at http://bit.ly/2ra13Bh. Every state except California has adopted the Model Rules, although each state may vary one or more of the Model Rules.

Model Rule 1.0(f) defines “knowingly,” from 3.3(a) above, as follows:

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Model Rule 1.0(m) defines “Tribunal” as including an arbitrator in a “binding arbitration proceeding.” It reads in full:

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Model Rule 3.3(b) makes reference to “an adjudicative proceeding” that must be read to include an arbitration based on the text of Model Rule 1.0(m), and requires a lawyer to take “reasonable remedial measures” in relation to criminal or fraudulent conduct that the lawyers know about that is related to the proceeding. Those measures include, if necessary, disclosure to the tribunal. Model Rule 3.3(b) reads in full:

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

At the same time, a lawyer has a duty of confidentiality under Model Rule 1.6, which says that

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(continued on next page)
to Model Rule 3.3, Section (c) provides:

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

But the duty of candor toward the tribunal trumps the duty of confidentiality that a lawyer has to a client under Model Rule 1.6. Returning to Model Rule 3.3, Section (c) provides:

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

ABA Model Rule 4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment 3 to Model Rule 4.4 indicates that unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment.

The ethics rules' stage is now set. Against this backdrop, let's consider three hypothetical arbitration scenarios that trigger, or may trigger, a lawyer's ethical obligations, one involving the response to an inadvertent production of a privilege or protected document and, in next month's issue, Hypo No. 3 discussing allegations of the unauthorized practice of law.

HYPO NO. 1: ADVERSE AUTHORITY

Facts: A U.S. lawyer for the respondent is preparing for closing argument that will take place at the end of a domestic arbitration hearing.

Whoops! An Ethical Issue

First example: Inadvertent production gives the other side a letter to counsel.

Duties? Generally, give it back. But there is a bunch of potential actions that could be appropriate depending on the circumstances, the jurisdiction, and the arbitration tribunal's reaction.

How does it end? Both attorneys will need to talk with their clients. Find out what to do about inadvertent disclosures as well as the discovery of adverse authority in arbitration in this month's Part 1, and in Part 2 next month, explore the boundaries of the unauthorized practice of law in ADR.

Florida law applies. The arbitration is venued in Miami. The claimant's pre-hearing brief overlooked a Florida intermediate appellate court decision that is arguably adverse to the respondent's position.

But the claimant's lawyer makes no reference to the decision in the closing argument. Should the respondent's lawyer make a reference to the decision in closing argument?

Discussion: Model Rule 3.3 requires a lawyer to disclose legal authority that is "directly adverse to the position of the client and not disclosed by opposing counsel." The hypothetical says that the decision is "arguably adverse." As a matter of legal ethics, "directly adverse" may be regarded as a high standard and may provide cover to the lawyer who can find a basis to distinguish a case.

But Model Rule 1.1 requires "competent" representation. Is it competent representation to eschew discussion of the decision and to explain why it is not applicable? Suppose the tribunal requests a post-hearing brief with no reply. The claimant's counsel finally finds the decision and invokes it. There will not be an opportunity then to distinguish the case.

Or suppose that the tribunal finds the decision. The tribunal may not appreciate the argument that the claimant's lawyer believes distinguishes the decision.

Competent lawyers will bring the decision to the tribunal's decision at an appropriate time. Indeed, competent lawyers will have considered the case long before a hearing and made a judgment about the impacts of the decision on the likely outcome of the case, as well as had a meaningful discussion with the client about those impacts in connection with settlement evaluation and the risks of an adverse award. See Model Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.")

HYPO NO. 2: INADVERTENT PRODUCTION

Facts: During pre-hearing exchange of documents in a domestic arbitration, the claimant's attorney obtains a letter from the respondent to his outside counsel. The production was inadvertent. This letter has helpful information for claimant's case, and claimant's counsel decides to use this document for impeachment purposes of an adverse party during the hearing. Any ethical issues?

Discussion: As noted in the Introduction, ABA Model Rule 4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." There are state variants of this rule that may require a recipient to take additional action. For example, New Hampshire's RPC 4.4(b) adds this sentence: "The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal."

Comment 3 to Model Rule 4.4 states, "Some lawyers may choose to return a document or delete electronically stored informa-
tion unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer.” See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 06-442 (2006); see also Formal Op. 06-440; Formal Op. 05-437 (2005). This standard represents a departure from the ABAs former position, which held that a lawyer should not use inadvertently-produced materials, and should return them.

In the scenario above, there was an inadvertent production of the privileged letter. Therefore, it may be imprudent to take the risk of reading the document if the document is attorney-client privileged. Compare Rico et al. v. Mitsubishi Motors Corp. et al., 42 Cal.4th 807, 171 P.3d 1092 (2007). In this case, the California Supreme Court disqualified counsel who had reviewed privileged information. The Court set forth this rule:

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.

171 P.3d at 1099 (quoting from State Comp. Ins. Fund v. WPS Inc. 70 Cal.App.4th 644, 656-57 (1999)). In affirming the trial court’s order of disqualification, it then held that the damage caused by the receiving lawyer’s “dissemination and use” of the document was “unmitigable.”

In Stengart v. Loving Care Agency Inc., 990 A.2d 650 (N.J. 2010), the New Jersey Supreme Court interpreted the state’s version of RPC 4.4(b). It provides that a lawyer “who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.”

Counsel failed to heed this requirement in circumstances where an employer’s computer system was able to capture emails sent by an employee to her counsel using her private Internet service provider’s email account but on her employer’s Internet connection.

The Court held that counsel for Loving Care violated the New Jersey version of Model Rule 4.4(b):

Loving Care contends that the Rule does not apply because Stengart left the e-mails behind on her laptop and did not send them inadvertently. In actuality, the Firm retained a computer forensic expert to retrieve e-mails that were automatically saved on the laptop’s hard drive in a “cache” folder of temporary Internet files. Without Stengart’s knowledge, browser software made copies of each webpage she viewed. Under those circumstances, it is difficult to think of the e-mails as items that were simply left behind. We find that the Firm’s review of privileged e-mails between Stengart and her lawyer, and use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of RPC 4.4(b) and violated that rule.

To be clear, the Firm did not hack into plaintiff’s personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did it rummage through an employee’s personal files out of idle curiosity. Instead, it legitimately attempted to preserve evidence to defend a civil lawsuit. Its error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further. There is nothing in the record before us to suggest any bad faith on the Firm’s part in reading the Policy as it did. Nonetheless, the Firm should have promptly notified opposing counsel when it discovered the nature of the e-mails.

Id. at 995-666.

The ABA Standing Committee on Ethics and Professional Responsibility, however, has expressly rejected the holding in Stengart in interpreting Model Rule 4.4(b). In Formal Opinion 11-460 (available at http://bit.ly/2nBHJv2), the committee considered whether Model Rule 4.4(b) requires an employer’s attorney to act when the attorney receives emails between an employee, who is suing the employer, and the employee’s lawyer where the employee used his or her office computer to communicate with the employee’s lawyer.

The committee determined that the emails between the employee and the employee’s lawyer were not “inadvertently sent.” Therefore, irrespective of the view expressed in Stengart, Rule 4.4(b) is not applicable, the committee said.

The committee cautioned lawyers, however, that “other law might prevent the receiving lawyer from retaining and using the materials”; that a court exercising its supervisory authority might require the receiving lawyer to provide the privileged emails to the employee’s counsel; that discovery rules might require the employer to notify the employee that it located the employee’s privileged communications; and that “as the court in Stengart has done, a lawyer may be subject to discipline, not just litigation sanction for knowingly violating” a legal duty if a court decides that its state’s version of Rule 4.4(b) imposes a duty to return the documents.

Then to provide the lawyer some cover, the committee explained that when the employer’s lawyer receives the employee’s privileged emails from the employer, that is “information relating to the representation of [the] client” that has to be kept confidential under Rule 1.6(a) unless an exception applies or the employer gives informed consent.

Rule 1.6(b)(6) would permit the lawyer to disclose the retrieval of the employee’s emails by the employer from the employer’s servers “to the extent the lawyer reasonably believes necessary … to comply with other law or a court order.” This exception gives the lawyer some leeway if there is any doubt about the application of “other law” or a court order.

If there is no such doubt, however, “then the decision whether to give notice must be made by the employer-client,” the committee determined. The committee added that it will “often” be in the best interest of the employer-client to give notice and to obtain a judicial ruling as to the admissibility of the employee’s privileged communications
“before attempting to use them, and, if possible, before the employer's lawyer reviews them.”

Following this approach, the committee said, “minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible.”

It is the lawyer's obligation to explain to the client the implications of retaining the privileged communications without disclosure and also of disclosing the employer's retrieval of the communications to allow the employer to make an informed decision on how to proceed, the committee added, citing Rule 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”) and 1.6(a) (“lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by [the exceptions under Rule 1.6(b)]”).

Model Rule 4.4 does not determine whether an inadvertent production waives the privilege. Assuming there is not a stipulation among counsel to return, or a protective order that provides for the return of, inadvertently-produced privileged documents, litigants should be aware of Federal Rule of Evidence 502, which was adopted as an act of Congress and not through the Rules Enabling Act process. For a lengthy discussion of Rule 502, see John Barkett, Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era, 81 Fordham L. Rev. 1589 (2013) (available at http://bit.ly/2nxIkyh).

First, it provides that in a state or federal proceeding, a protective order would insulate the parties from a waiver claim from third parties. Second, it provides that inadvertent disclosure of a communication or information covered by the attorney-client privilege or work-product protection does not waive such privilege or protection, if “the holder of the privilege or protection took reasonable steps to prevent disclosure;” and “the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”

FRCP Rule 26(b)(5)(B) provides: “If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.”

Returning to the hypothetical, there are a number of ethical issues raised for counsel. Assuming the document is privileged, among them consider these:

- Rule 1.1 requires competent representation. Competent representation should have prompted the request for a protective order, stipulation, or other agreement that provided for the return of privileged documents or work-product-protected documents in the event of production. In addition, Rule 1.6(c) now provides: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” A clawback agreement would fit within the reach of this rule.

- While Fed. Rule Evid. 502 would not apply if the arbitration is not “federal court-annexed” or “federal court-mandated,” competent lawyers would further provide in such an order, stipulation, or agreement that each side's production is deemed reasonable, that production of privileged or work product documents is deemed inadvertent, and that return of the documents is automatic and that no waiver shall result from the claw-back arrangement. At least, then, an argument could be preserved regarding the application of Rule 502.

- In the absence of such an order, stipulation, or agreement, the recipient lawyer has to decide whether the production is inadvertent. The answer to that question may depend upon the jurisdiction. If the lawyer determines that the production was inadvertent—as would seem likely—the lawyer should have given notice of the inadvertent production. Depending upon the jurisdiction, the recipient lawyer may also have to follow instructions of the producing lawyer.

- Parties will almost certainly identify hearing exhibits before the hearing. Must impeachment exhibits be listed? Competent lawyers must consider the issue up front and ask the tribunal for guidance. If they are not going to be listed, there is even more reason to seek a clawback agreement.

- Assuming the document has to be listed, competent representation should result in the discovery of the inadvertent production and a prehearing demand for the return of the document.

- If that does not occur for some reason, when the recipient lawyer attempts to use the document in impeachment, the producing lawyer must immediately object and demand return of the document.

- If for any reason in this continuum of events the tribunal is forced to consider the question of return of the document, the tribunal will presumably make a decision on waiver in the absence of a clawback agreement.

- If the tribunal fails to act or renders a decision finding waiver, the producing lawyer has to consider judicial intervention to attempt to preserve the privilege or work product. The delay that might be caused by this action may well also serve as a reason for the recipient lawyer to voluntarily return the document and eschew its use if delay harms the recipient lawyer's client.

- The producing lawyer may also seek disqualification of the recipient lawyer. The tribunal will not order disqualification. But again judicial intervention might be sought, and depending upon the facts, and the law of the jurisdiction, disqualification may be a potential outcome.

Both lawyers have obligations under Model Rule 1.4 to communicate with their clients about how to proceed.

* * *

Next month, author John Barkett returns with a concluding Part 2, providing another hypothetical, on attorney arbitration participation in a jurisdiction in which the advocate isn't admitted to practice.
The Humble Neutral, At Your Service
BY ROBERT A. CREO

Pride is concerned with who is right. Humility is concerned with what is right.
—Ezra Taft Benson (1899-1994)

Humility leads to strength and not to weakness. It is the highest form of self-respect to admit mistakes and to make amends for them.
—John J. McCloy, Esq. (1895-1989), Milbank, Tweed, Hadley & McCloy

Humility is considered a virtue. It is the opposite of pride, arrogance, or hubris. It is viewed as a reluctance to put yourself forward into the limelight or claim success resulting from your own contributions. Restraint and temperance distinguish humility from inauthentic self-deprecation.

Humility involves an accurate self-assessment which includes the ability to recognize our talents, the talents of others, and our limitations. Presentations of self are modest and involve sincere sharing of credit instead of seeking individualized praise.

There is an orientation toward others. This can include engaging with others in a manner that acknowledges that someone else on specific matters may have superior knowledge, skills, values, or interests.

The author is a Pittsburgh attorney-neutral who has served since 1979 as an arbitrator and mediator in the United States and internationally handling thousands of cases. He conducts negotiation and decision behavior courses that focus on neuroscience and the study of decision-making. He is annually recognized by Best Lawyers in America and was named in both 2017 and 2014 as Pittsburgh Mediator of the Year. He is the author of numerous publications, including “Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner” (George T. Bisel Co. 2006). He is the principal of Happy! Effective Lawyer, LLC (www.happy.lawyer), an initiative focusing on lawyer contentment, soft skills, and peak performance, which publishes The Effective Lawyer (www.effectivelawyer.lawyer) Blog. He is a long-time member of Alternatives’ editorial board and of the CPR Institute’s Panels of Distinguished Neutrals. His website is www.robertcreo.com.

THE SCIENCE

Researchers conclude that humility includes a self-awareness and openness that leads to critical thinking and perspective-taking. The lack of humility, which is often characterized as pride, results in a number of cognitive biases.

These are defects in thinking or rational decision making. A few of these related to humility, or its lack thereof, are:

- Self-serving bias, which involves holding ourselves out on subjective and positive elements or dynamics as better than most others. We consider ourselves above the norm in any self-evaluation or comparison to colleagues or others.
- Attribution bias is when you accept responsibility for your successes, yet attribute fault elsewhere, including on external circumstances or luck, for failures and misconduct.
- Cognitive conceit is a tendency to hold or display excessive confidence in the accuracy of our own judgments and beliefs.

Well-known corporate guru Jim Collins contends that humility is an essential element of excellent leadership skills. Without humility leaders become autocratic and fall into the cognitive bias traps. Effective leaders learn from their subordinates. They are open to a variety of options to solve problems without having to take the credit themselves.

Social scientists researching the concept of self-presentation and self-promotion coined the term “humblebragging.” Humblebragging is being boastful or issuing self-aggrandizing bragging that is masked as a complaint or by misrepresentation as humility.

Humblebrags are designed to elicit sympathy or impress others. Studies have indicated that both forms of humblebragging—complaint or humility—are less effective than straightforward bragging or complaining.

Despite the belief that combining bragging with complaining or humility provides strategic benefits, the professors found that humblebragging confers the benefits of neither, and instead backfires because of it being inauthentic. See Sezer, Gino, and Norton in the Sources and Additional Reading box at the end.

MEDIATION MODELING

Traditional mediation models focus on the role of the mediator as a facilitator and a guide and coach of the participants. Mediation is an alternative process relying upon the voice of the disputants themselves with the intention of empowering participants to make their own decisions. The mediation flag is embroidered with Self-Determination as its motto.

This differs from third-party, or institutional, determinations. Although the mediator is a third-party, substantive matters should be handled passively in a party-only cycle without the mediator having a slot on the decision wheelhouse.

Neutrality and mediator impartiality encompasses the trait of humility—the mediator has no agenda or independent interests which may align with one or more of the disputants.

(continued on next page)
Humility is a critical component in the fabric of the mediator’s toolbox, rather than being a tool within it that can be used or lay dormant the entire process. Humility is part of the successful mediator’s persona that is a core ingredient of effective mediation.

For decades I have heard from prominent and successful mediators that if they are perceived as having a “dog-in-the-fight,” their effectiveness is compromised. I had not articulated it before reading the recent “humblebrag” research, but the ability to build trust, rapport, and credibility erodes with humblebragging.

A false sense of self-deprecation comes off as exactly that—false. Disputants want experienced and credentialed mediators. The mediators have to quickly build rapport and trust without singing their own praises, either in falsetto or aggressively.

I believe that when mediators focus on the people and problem at hand, and are guided by their own positive emotions and virtues, especially kindness, gratitude, and humility, the authenticity creating the connections between people arises in an organic and natural manner. See Robert A. Creo, The Master Mediator—The Contagious Emotion: Gratitude Is Kindness, Humility, and Social Psych. 52 (January 2001)(available at http://bit.ly/2F5EkKG).

HUMILITY PROFILE, NOT

I like to give a shining example of the focus of this column from an actual mediation, which provides a “Do’s and Don’ts” for mediators. Although I prefer to accent the positive, what is set forth is likely to be viewed in a negative light.

Nevertheless: Decades ago when mediation was less-often used, there were far fewer experienced mediators, and it was common to travel the corporate circuit over a broad geographic area.

A friend of mine was the chief financial officer of a corporation and was involved in a product liability claim in a western state. After the session, he recounted that the parties were close to a settlement but had reached impasse.

The mediator called everyone into a joint session to proclaim, “I have settled 86 cases in a row, and this case was not going to be the one that breaks my streak.”

He then re-caucused and began the shuttle to attempt to brow beat the two parties into a settlement. The CFO told me that the case did not settle, not because the gap in funds was insurmountable, but because the mediator had lost credibility since it was perceived he would say or do anything to maintain his streak.

The corporate defendants held fast and decided not to make any more offers that day.

The plaintiff did lower the demand, but it was too late. The damage had been done. The CFO decided to wait a few months to settle the claim outside of the mediation process.

Although I had my own doubts, I had maintained that professional mediators were not in the game to build their own stats. It made me acutely aware that even maintaining a “settlement rate” has the potential to undermine the integrity of the process.

From that point forward, I refused to respond to that type of query when being considered for potential assignments. I respond with varying degrees of civility, or hostility, as I stiff-arm the questioner and disdain any cooperative responses. I have been told point-blank that this push-back on settlement rates has eliminated me from some assignments.

This angered, more than humbled, me.

PAYING ATTENTION

As I write this particular column, I am struck by the inherent tension of writing a column on humility under the heading, the Master Mediator.

Based upon the research on humblebragging—see the box at the end for more reading—perhaps it is a more reasonable choice than calling it The Humble Mediator. This might seem insincere but any mediator who has mastered the trade-craft does in fact serve with humility.

So, I leave you with the thought that we are usually at our best when humility trumps pride, including the “humblebrag” common in everyday life.

SUMMARY AND CHECKLIST

Here is a brief checklist for the practitioner.

1. Humility aligns with participant empowerment, voice, and self-determination.
2. Humility trumps pride.
3. Humblebrag is a common, and seductive trap.
4. Humility promotes critical thinking.
5. It really is about them—not you!

SOURCES AND ADDITIONAL READING


Despite the complexity of the entire law (Legislative Decree Nr. 28 of 2010 reformed in 2013), this article aims to explain in simple terms the so-called Italian mediation model, the different results after four years of application, and the lessons learned.

We have noticed most commentators and mediator colleagues wrongly refer to the Italian model as “mandatory mediation.” It is not. Under the Italian mediation model, there are three main ways for recourse to mediation:

(1) Recourse by Voluntary Agreement of the Parties or by a Contract Clause. For any legal dispute, parties are always able to agree to go to an accredited mediation provider under the rules of the law. Litigants can benefit from fiscal advantages and tax credits for the mediation fees. If lawyers assist the parties and sign the mediation agreement, it will automatically become an enforceable document. When a commercial contract or a statute includes a mediation clause, parties must attempt to mediate before they can arbitrate or file a dispute in court. If no attempt to mediate is made, the judge or arbitrator can, by his or her own motion or upon motion by a party, allow the parties a period of 15 days to file a request for mediation. This type of recourse is the so-called voluntary mediation, regulated by the law with accredited mediators, present in most European jurisdictions.

(2) Recourse Ordered by a Judge. For any pending case in any trial court, or in a court of appeals, judges at their discretion can order the parties to attempt mediation after assessing the nature of the case, the stage of the trial, and the parties’ conduct. If ordered to mediation, the parties must file a request for within 15 days with a mediation provider. A judge is able to refer a case to mediation at any time before the closing arguments, or if a hearing is not expected, before oral discussion of the pleadings. In these cases, mediation is a condition for prosecution of the case in court that should be attempted between hearings without any delay in the duration of the judicial proceeding.

(3) Recourse by Voluntary Agreement during a “Required Initial Mediation Session.” In limited civil and commercial matters—including joint real estate ownership; real estate generally; division of assets; inheritances; family business agreements; real property leases including rental apartments, business, and commercial; bailments; medical malpractice liability; damages from libel, and damages from insurance, banking and financial contracts—which account for only about 10% of all civil and commercial disputes, the Italian mediation model requires the plaintiff to first file a mediation request with a provider and attend an initial mediation session before recourse to the courts may be granted. The initial mediation session must be held within 30 days of the filing and in the presence of an accredited mediator and a lawyer. At this stage, a small administrative filing fee is requested—40 Euros for claims below a value of 250,000 Euros, and 80 Euros above. There is no obligation to pay more, unless the parties decide to voluntarily proceed with the full mediation procedure. In the initial session, the mediator explains to all parties and lawyers the process and its benefits for their case. The duration of this first meeting can vary at the mediator’s discretion and as the parties wish. If one party does not attend this initial session, the judge will sanction that party in subsequent judicial proceedings. If during the initial session, one party decides not to proceed with mediation, then the party has fulfilled the mediation requirement and is able to “opt-out” and file the case in a court. There is no obligation to pay any additional fees. If the parties decide to proceed with mediation, the fees are determined by the case value and the process should last no more than 90 days.

**DIFFERENT RESULTS**

Four years after this law was introduced, in 2017 the combination of the three types of recourses produced about 200,000 total mediations. To better understand the approaches that worked, we need to break down that number of mediations and closely analyze it with the three types of recourses described, which shows three different sets of results—and three different levels of success.
International ADR

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(1) Recourse by Voluntary Agreement of the Parties or by a Contract Clause. Out of 200,000 mediations, only about 20,000 were initiated in 2017 by the parties’ agreement to attempt to mediate when the dispute arose, or due to a contract clause. When initiated, these types of mediation reached a success rate of 60%. If we divide the number of “voluntary mediations” by the two million yearly filings of civil and commercial matters in dispute, the success rate is less than 1%. In these matters, which account for more than 90% of all disputes in Italy (e.g., breach of contract, extra contractual damages, partnership dissolutions, etc.), there has not been a recorded substantial decrease of incoming cases in court from 2013.

(2) Recourse Ordered by a Judge. Out of 200,000 mediations, only 1,900 mediations were initiated by a judge’s order. Compared to about three million civil cases pending in the Italian courts, the ratio is less than 0.1%. So out of each 1,000 pending cases in court, only one judge ordered the litigants to attempt a mediation process. It is evident that there has not been a substantial decrease in pending cases due to mediation from judge referrals. It’s clear that Italian judges should be trained more to use their power to refer parties to mediation.

(3) Recourse by Voluntary Agreement during a Required Initial Mediation Session. An incredible 90% of mediations—about 180,000—were initiated due to the first required mediation attempt in the total matters mentioned above. The average success rate was almost 50% when the parties voluntarily agreed to initiate the full process during the initial meeting. If the number of these Type 3 mediations is divided by the 140,000 yearly incoming civil and commercial cases in dispute matters where the first meeting is mandatory, the ratio is more than 100%. This information verifies for the first time in Europe that Italy has more mediations than cases in court—at least in this category. Additionally, since 2013, with Type 3 dispute matters, a substantial decrease was recorded in court-filed cases. (There were 30% decreases in disputes over joint ownership of real estate; a 40% drop in disputes over rental apartments, and a 60% plunge in adverse possession disputes.) And it is worth noting that the European Court of Justice ruled that this Italian provision on the mandatory first meeting is fully compatible with the law.

LESSONS LEARNED

With all due respect to the opinions and theories on the right approach to substantially increasing the number of mediations in a jurisdiction after many years of trial and errors, it is time to analyze objectively the verified results of different approaches in order to evaluate what worked and what failed.

The Italian statistics from the past four years give a clear illustration of drastically different results from the three different types of recourse to mediation currently in place. The contrasting results occur within the same jurisdiction—with the same citizens, lawyers, judges—and prove the number of mediations is not dependent on the “culture” or quality of mediators, but the most effective legislative mediation in place.

Statistics show that currently, the Type 3 model, “Recourse by Voluntary Agreement during a Required Initial Mediation Session” is the only effective model that can generate enough mediations in a period of two or three years for an entire jurisdiction.

This first meeting works well with five important conditions:

(1) The relevant parties of the dispute should be present in person; if the lawyer is without the client there is little chance to proceed to the full mediation process;

(2) The session should be administered by an experienced and well-trained mediator;

(3) The session should be held in a short period of time since the filing of the request and the fee should be minimal in order to not be considered a barrier to the access to justice;

(4) The parties when present can decide to easily “opt-out” without sanctions, or voluntarily continue the process; and

(5) Substantial sanctions should be given in the case of an absent party during the subsequent judicial proceeding.

After witnessing thousands of first mandatory mediations, this author can attest to the effectiveness of having all decision makers in the dispute together in order to decide if they want to opt-out and go to court or continue with the full mediation process.

After talking with the parties and their lawyers about the advantages of mediation for their case, in a joint or separate meetings, in more than 50% of the cases I am able to convince the parties to give mediation a chance.

Without having all parties in front of the mediator, present at the same time, and around the same table, it would be impossible to reach so many agreements to initiate a mediation process, as the statistics prove.

In conclusion, the Required Initial Mediation Session, with an easy opt-out, has been proven to generate a substantial number of mediations in a given jurisdiction in two or three years, providing the best advantages of mandatory and voluntary mediation without their disadvantages.

The Required Initial Mediation Session can be introduced step-by-step, within a legislative reform or in court-connected mediation programs, with the relevant adaptations to local needs, in different jurisdictions as Greece and Turkey have recently done with a great success. See Leonardo D’Urso, “How Turkey Went from Virtually Zero to 30,828 Mediations in Just One Month,” Mediate.com (Feb. 22)(available at http://bit.ly/2GRW2DB).
The U.S. Supreme Court on Feb. 26 added its second arbitration case of the 2017-2018 term, granting certiorari in Oliveira v. New Prime Inc., Docket No. 17-340. The case that could have broad Federal Arbitration Act implications—either in supporting arbitration requirements in independent contractors’ employment agreements, or undermining them.

The First U.S. Court of Appeals decision that the Court will review put the FAA applicability decision in the hands of a judge, not an arbitrator. That’s seemingly at odds with Supreme Court delegation cases, though the wrinkle in the case is applicability to employment matters, not commercial contracts.

The plaintiff maintains that the FAA Sec. 1 exemption for transportation workers removes the case from immediate FAA applicability and puts the arbitration decision in hands of a judge, as opposed to arbitrability of a commercial contract, which usually goes to arbitrators.

But the headline when the case is decided will wait until the Supreme Court views mandatorily employment arbitration and class waivers. This further refinement of employment arbitration—really, a commentary on how increasing numbers of people work and deal with their employers—is the next big ADR issue the Supreme Court will tackle. Oliveira will wait until the 2018-2019 term.

The arbitration issues: Who decides arbitrability of a Federal Arbitration Act Sec. 1 exemption, a trial court or an arbitrator? And the biggie, are independent contractors considered employees under that section?

The current ADR environment: By the time this issue of Alternatives is in your hands, you may know how the Supreme Court views mandatory employment arbitration and class waivers. This further refinement of employment arbitration—really, a commentary on how increasing numbers of people work and deal with their employers—is the next big ADR issue the Supreme Court will tackle. Oliveira will wait until the 2018-2019 term.

New at the Supreme Court


No argument date had been set as this issue was prepared for publication, but the matter spilled into next term, when the Court last month extended briefing into July. The Court at press time also had not yet issued an opinion in the first argument of its term on Oct. 2, which was a consolidation of three cases that will set the parameters of the interplay between the FAA and the National Labor Relations Act on class-action waivers and mandatory employment arbitration. See Mark Kantor, “Supreme Court Oral Argument on NLRB Class Actions vs. Arbitration Policy,” CPR Speaks blog (Oct. 2, 2017)(available at http://bit.ly/2fLwU9C), and Russ Bleemer, “The Class Waiver-Arbitration Argument: The Supreme Court Transcript,” CPR Speaks blog (Oct. 3, 2017)(available at http://bit.ly/2yWjWuf).


New Prime—a private Springfield, Mo.-based interstate trucking company better known as Prime Inc., which also trains drivers—moved to compel arbitration under FAA Sec. 4, because the truckers’ contracts contained an agreement to arbitrate “any disputes … including the arbitrability of disputes between parties.”

Oliveira argued that the contracts should be exempted under FAA Sec. 1’s language, since transportation workers of New Prime qualify as “other class of workers engaged in foreign or interstate commerce.” The result, Oliveira said, is that the arbitrability determination should be made by the court. Id. at 127.

A Massachusetts federal district court agreed. It denied New Prime’s motion to compel arbitration.

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ADR Briefs

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U.S. District Court Judge Patti B. Saris, of Boston, held that it is up to the court “to decide whether the Section 1 exemption applies before considering the motion.” Id. at 127; see also James Jailet, “Supreme Court to hear New Prime Inc’s appeal to uphold arbitration agreement with drivers,” Com. Carrier J. (Feb. 28, 2018)(available at http://bit.ly/2oJaKoH).

In May 2017, the First Circuit affirmed the district court’s denial of the motion to compel arbitration under the FAA. The appeals court agreed that the district court, not the arbitrator, must decide whether the FAA Sec. 1 exemption applies. 857 F.3d 7, at 15.

The First Circuit relied on the reasoning of the Ninth U.S. Circuit Court of Appeals in In re Van Duosen, which found that whether the FAA Sec. 1 exemption applies is an “antecedent determination” before compelling arbitration. Id. at 15-18; In re Van Duosen, 564 F 3d. 838 (9th Cir. 2011).

In contrast, the Eighth U.S. Circuit Court of Appeals had held in Green v. SuperShuttle Int’l Inc., 653 F3d 766 (8th Cir. 2011), that the question of whether the FAA Sec. 1 exemption applies should be determined by an arbitrator. New Prime contended that the FAA Sec. 1 exemption does not extend to independent contractors, invoking Green.

But the First Circuit cited the Supreme Court decision in Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001), that “transportation workers” fall under the purview of the FAA Sec. 1 exemption and highlighted that New Prime does not dispute that Oliveira is a “transportation worker.” Id. at 12, 21.

U.S. Circuit Court Judge O. Rogeriee Thompson, writing for the majority, interpreted the FAA terminology “contracts of employment” as simply meaning “agreements to do work” based on its ordinary meaning in 1925 when the statute was enacted. Id. at 20; see also Public Justice Statement, supra.

Therefore, based on New Prime’s concession that Oliveira was a transportation worker and the “ordinary meaning” of contracts of employment, the First Circuit held that the contract—even with an independent contractor—is “an agreement to perform work of a transportation worker, [and therefore] it is exempt from the FAA.” 857 F.3d 7, at 22.

Thompson was joined in the decision by Circuit Judge William J. Kayatta Jr. and, sitting by designation, Concord, N.H.-based U.S. District Court Judge Paul J. Barbadoro, who dissented from the appeals panel’s determination that an independent contractor fell within the Sec. 1 exception from FAA application.

Barbadoro noted that the district court asked for discovery on the issue. As a result, he wrote, “it is indeed unnecessary to determine the scope of the exemption at this time.”

In its review, the Supreme Court will need to resolve these contentious questions surrounding the enforcement of arbitration agreements and threshold questions of arbitrability and applicability of FAA exemptions, which has produced a circuit split between the First, Eighth, and Ninth Circuits. Mark Bradford, “In Its October-2018 Term, the Supreme Court of the United States Will Address Whether the Court or a Panel of Arbitrators Decides Applicability of the Federal Arbitration Act … ,” Lexology (Feb. 27, 2018)(available at http://bit.ly/2F55SF). In a statement the same day the Court took the case, Public Justice—which had argued in a brief on behalf of respondent Oliveira against reviewing the First Circuit decision—said,

We are confident that we have the stronger argument under the language of the Federal Arbitration Act, under the Supreme Court’s own decisions applying that statute, and in light of Congress’s intention in passing the Act. … After extensive historical research, the court found that the term ‘contracts of employment’ at the time the Federal Arbitration Act was passed universally referred to all agreements to do work—including those of independent contractors.

But in an October friend-of-the-court brief urging the Supreme Court to grant certiorari, the U.S. Chamber of Congress, a frequent participant on behalf of management in arbitration cases, had a characteristically opposite view.

“If the decision below is allowed to stand,” the Chamber noted,

untold thousands of independent contractors would have their arbitration agreements called into question. Specifically, the panel majority below held that Section 1 of the FAA’s narrow exclusion of ‘contracts of employment’ involving transportation workers also eliminates the FAA’s protection of arbitration agreements entered into by independent contractors. 9 U.S.C. § 1 (emphasis added).

“That holding,” the Chamber declared, “creates a conflict with every other appellate and district court to consider the issue.” (Emphasis in the brief.)

NO CLASS: FEDERAL COURT OVERTURNS ARBITRATOR’S CERTIFICATION

BY GINSEY VARGHESE

The latest arbitration decision in a long-running New York case may prove to have the biggest impact among the many opinions the matter has produced.

Specifically, the federal court decision may have substantial implications on the federal review of an arbitrator’s authority, in the context of class arbitration.


The FAA authorizes vacatur in four limited
circumstances, one of which Rakoff employed in this case, “where the arbitrators exceeded their powers, or so imperfectly executed them that a … final and definite award upon the subject matter was not federal made.” 9 U.S.C. §10(a).

In large part, the procedure is the case, with the latest turn part of a complex and lengthy litigation that has been influenced by two intervening U.S. Supreme Court decisions:

- In 2009, following the arbitrator's decision that the arbitration agreement allowed for class arbitration, Sterling moved to vacate the finding under the FAA, but the district court denied its motion. Jock v. Sterling Jewelers Inc., 677 F. Supp. 2d 661, 663 (S.D.N.Y. 2009).
- While the appeal was pending on a motion to vacate was before the Second U.S. Circuit Court of Appeals, the Supreme Court held in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., that a class action is unavailable unless the parties' agreement provided for it under the FAA. 559 U.S. 662,685-687 (2010)(for more information on this case, see Jay W. Waks & Carlos L. Lopez, Stolt-Nielsen, Silence and Class Arbitration: "Same as It Ever Was,*" 29 Alternatives 1 (2011)(available at http://bit.ly/2nWszfP)).
- Based on Stolt-Nielsen, the district court in Jock said that if its jurisdiction were restored, it would vacate the arbitrator's decision on class arbitration. Jock v. Sterling Jewelers Inc., 725 F. Supp. 2d 444, 444 (S.D.N.Y. 2010).
- Considering the evolving situation, the Second Circuit remanded the case to the district court to enter its order to vacate, but the district court denied its motion. Jock v. Sterling Jewelers Inc., 143 F. Supp. 3d 127, 128 (S.D.N.Y 2015).
- Sterling again appealed the decision. In July 2017, the Second Circuit reversed and remanded citing that the issue, not addressed in its earlier Jock I decision, is “whether the arbitrator had the power to bind absent class members … given that they … never consented to the arbitrator.” Jock v. Sterling Jewelers Inc., 703 F. App'x 15, 17 (2d Cir. 2017) (“Jock II”).
- The Second Circuit vacated the district court's judgment, and further narrowed the issue under review to whether an arbitrator who determined a class action is available can also bind “non-parties” in a certification after order. Id. at 18.

And in January, on remand in the district court, in the latest case in the string of cases, U.S. District Court Judge Rakoff vacated the 2018 decision rested in part on Justice Alito’s concurrence highlighting the ambiguity concerning arbitrator’s authority over absent members has been used to overrule an arbitrator’s authority. Andrew C. Glass, Robert W. Sparkes III, Roger L. Smerage, and Elma Delic, “A First in Second (Circuit): On Remand, District Court Breaks New Ground by Vacating Arbitrator’s Class Certification Award,” K&L Gates (Feb. 1, 2018)(available at http://bit.ly/2ELn66I).

At this stage, Rakoff’s decision provides protection for companies with arbitration provisions that are silent on class action procedures, but it undermines and challenges arbitrator authority.

Moreover, the district court opinion found that the arbitration agreement did not specifically provide for class arbitration and the silence of absent members—here “the failure to opt-in or out”—did not amount to consent, inviting lawsuits by absentees. See Jock v. Sterling Jewelers Inc., No. 08 CIV. 2875k, supra, at *8.

In Rossi v. SCI Funeral Services of New York Inc., the Eastern District Court of New York handled Alito's concurrence similarly, stating that it is better to consider class procedures where all members have opted-in to avoid litigation. The case was concerned with the binding effect of an unfavorable arbitration award on absent class members. Rossi v. SCI Funeral Servs. of New York Inc., No. 15 CV 473 (ERK) (VMS), 2016 WL 524253, at *10 (E.D.N.Y. Jan. 28, 2016).

In Rossi, however, the court ultimately held that parties should submit the question of class arbitration to an arbitrator.

In the latest Jock case, Judge Rakoff vacated the class certification and held that arbitrator Kathleen A. Roberts, a New York JAMS Inc. neutral who is a former federal magistrate judge, exceeded her authority under the FAA by permitting class action procedures for “anyone other than the named parties … and those other individuals who chose to opt in.” See Jock v. Sterling Jewelers Inc., No. 08 CIV. 2875k, supra *9.

This case appears to be the first time that Justice Alito’s concurrence highlighting the ambiguity concerning arbitrator’s authority over absent members has been used to overrule an arbitrator’s authority. Andrew C. Glass, Robert W. Sparkes III, Roger L. Smerage, and Elma Delic, “A First in Second (Circuit): On Remand, District Court Breaks New Ground by Vacating Arbitrator’s Class Certification Award,” K&L Gates (Feb. 1, 2018)(available at http://bit.ly/2ELn66I).

At this stage, Rakoff’s decision provides protection for companies with arbitration provisions that are silent on class action procedures, but it undermines and challenges arbitrator authority.

And, as has been a constant in the litigation, there’s more to come. Rakoff’s decision is the subject of a Jan. 18 notice of appeal, and is now, once again, pending review before the Second U.S. Circuit of Appeals. Jock v. Sterling Jewelers Inc., 18-153.
CPR News (continued from page 50)


After serving in the U.S. Army, Sander graduated from Harvard College and then Harvard Law School, followed by a clerkship with U.S. Supreme Court Justice Felix Frankfurter, a post at the U.S. Justice Department, and private practice. He became a Harvard Law School professor in 1962, and remained at the school, serving as associate dean for a 13-year period, until he became Bussey Professor Emeritus in June 2006.

He started in tax—Sander was an undergraduate mathematics major—and worked extensively in family law. But he was best known in academia for teaching alternative dispute resolution at the law school.

Sander worked with the CPR Institute from its beginning in 1979. Jim Henry credits Sander with the creation of CPR’s awards program while on a plane awaiting takeoff after one of the early CPR Annual Meetings. “I can visualize the two of us,” said Henry. “We hadn’t left Aspen, Colo. We were sitting on a puddle jumper talking about the meeting. The awards program was not my idea. It was his idea. And then it was very easy to put the idea in motion.”

CPR has given out awards for achievement in academics, business and government—indisputably judged—since 1983. Sander himself was an early beneficiary. His 1985 Little Brown book, Dispute Resolution, co-authored with Stephen B. Goldberg and Eric Green, won CPR’s outstanding book award, and continues to be published in its revised editions, which have added co-authors Nancy H. Rogers and Sarah Rudolph Cole. It is a frequently used law school text.

In 1990, the CPR Institute presented Sander with a special award for his contributions to the profession. Before the ’90s ended, other institutions joined in the praise by awarding Sander the Robert J. Kutak medal for achievement (American Bar Association), and the D’Alemberte-Raven medal, the ABA Section of Dispute Resolution’s highest honor. In 2006, he was awarded the Lifelong Achievement Award by the International Academy of Mediators. Previously, he had been cited by the American Arbitration Association.

Sander’s contributions to these pages will never be matched: He was the only remaining editorial board member from the group that founded Alternatives, published by the CPR Institute, in January 1983. Sander had served on the editorial board for every one of the newsletter’s monthly issues in its 35-year history—a behind-the-scenes influence on an overview of the development of modern commercial conflict resolution practice.

He was also a periodic contributor. In an Alternatives article in 2009, in which he reflected on the CPR Institute’s 30-year history, Prof. Sander wrote that he believed that the profession had moved into a new development phase, after initial experimentation and then criticism of those efforts.

“Now,” wrote Sander, “we are in the third period—an attempt to institutionalize ADR on the dispute resolution landscape, so that the burden is not on the person who seeks to use it, but with the relevant mechanisms so embedded in the landscape that the burden shifts to the disputant who opposes its use.”


In other work at the CPR Institute, Sander was a member of the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, which produced seminal practice and operational guidelines still in effect. See http://bit.ly/2HwXqV.

He also worked on, and is cited as a significant reference in, CPR’s Mediation Procedure, along with his frequent co-author Stephen B. Goldberg, a Northwestern University Pritzker School of Law professor. The Mediation Procedure is available at http://bit.ly/2IrKkw; the Sander/Goldberg article it references, adapted from Negotiation Journal, is one of the most frequently cited articles in Alternatives’ history, “Fitting the Forum to the Fuss: Factors to Consider When Selecting an ADR Procedure,” 18 Alternatives 49 (April 1994)(available at https://bit.ly/2HU5u9Z).

For an excellent account of Prof. Sander’s life and work, visit the home page of the American Bar Association’s Section of Dispute Resolution, at http://bit.ly/2FLoYgs. Soon after Sander’s death, the section posted the full Fall 2012 issue of Dispute Resolution Magazine, which depicted Sander on the cover and contained seven feature articles on his life and work, including one by his three children. The issue paid tribute to Sander when became chairman emeritus of the magazine’s editorial board, which he chaired for many years. (Direct link to the issue is http://bit.ly/2DtcDez).

CPR JOINS CYBERSECURITY WORKING GROUP

The International Council for Commercial Arbitration, a non-governmental organization that promotes arbitration use and best practices for international commercial disputes based in The Hague, Netherlands, late last year announced that it is joining forces with the New York City Bar Association and the International Institute for Conflict Prevention & Resolution to launch a Working Group on Cybersecurity in International Arbitration.

For an excellent account of Prof. Sander’s life and work, visit the home page of the American Bar Association’s Section of Dispute Resolution, at http://bit.ly/2FLoYgs. Soon after Sander’s death, the section posted the full Fall 2012 issue of Dispute Resolution Magazine, which depicted Sander on the cover and contained seven feature articles on his life and work, including one by his three children. The issue paid tribute to Sander when became chairman emeritus of the magazine’s editorial board, which he chaired for many years. (Direct link to the issue is http://bit.ly/2DtcDez).
The theory behind the effort is that international arbitration is not immune from the increased cybersecurity threats caused by digitalization. If left unattended, the organizers say, the threats can result in confidential information being obtained and used inappropriately; in regulatory breaches, and in reputational damage to disputing parties, individual arbitrators, and institutions.

The working group says that given the consensual nature and rules-based administration of international arbitration, the process is well-positioned to continue as a private and confidential process while addressing cybersecurity risks “in a tailored way that takes into account risk and cost issues present in individual cases.”

The ICCA-NYC Bar-CPR Institute Working Group in Cybersecurity in International Arbitration has completed an initial proposal to be considered in addressing cybersecurity in international arbitration for consultation with the broader arbitration community.

The working group project is dedicated to addressing the need for cybersecurity in arbitral practice and establishing voluntary cybersecurity protocols for use in international arbitral proceedings. It will consider the possible impact of cybersecurity breaches on the system of international arbitration, as well as current practice and existing duties.

The working group will then prepare a set of guidelines, which will provide practical guidance for counsel, arbitrators, and institutions, as well as optional protocols that can be adopted by parties to an arbitration.

The project is chaired by Brandon Malone, chairman of the Scottish Arbitration Centre and Brandon Malone & Co., registered in Penicuik, Scotland. The Working Group members include CPR Institute Vice President for International and Dispute Resolution Services Olivier André; Paul Cohen of London’s 4-5 Gray’s Inn Square Barristers Chambers; New York-based independent arbitrator Stephanie Cohen; Hagit Elul, a partner at Hughes Hubbard & Reed in New York; Lea Haber Kuck, a New York partner in Skadden, Arps, Slate, Meagher & Flom; Micaela McMurrough, New York-based special counsel at Covington & Burling; Mark Morril, an independent New York City-based arbitrator, and Kathleen Paisley, a Brussels partner in Ambos NBGO.

Project Chair Brandon Malone noted for the ICCA:

Cyber-attacks are a clear and growing danger to the integrity of our system in international arbitration. Poor cybersecurity can result in confidential information being obtained and used inappropriately, in denial of service attacks disrupting the process, in regulatory breaches, and in reputation damage to disputing parties, individual arbitrators, institutions, and to the system of arbitration itself. Despite these risks, awareness of cybersecurity threats, and the practice of individual participants in the arbitration process, varies widely. There is a clear need for guidance to (continued on next page)
help those involved in arbitration to identify the risks, and take appropriate steps so as to maintain confidence in the system. We have been working with the New York City Bar Association and the CPR Institute for some time now, devising an outline plan to address these issues, and we look forward to launching draft guidance and protocols for consultation at ICCA 2018 in Sydney.

Malone is referring to the 24th ICCA Congress in Sydney, Australia, on April 15-18. The Working Group will present a consultation paper. The event's website, containing last-minute registration information, is available at https://icca2018sydney.com.

APRIL 23: THE 2018 CPR BRAZIL BUSINESS CONGRESS

The CPR Institute has announced the agenda for CPR Brazil Business Congress 2018, the sixth annual event, which will be held in Sao Paulo next month. There is still time to register.

“Business Dispute Management: Reflections on Innovation” will focus once again on cutting-edge dispute resolution practices to help cut down on litigation in Brazil and for practitioners there who work across borders.

The April 23 program will be held at Sao Paulo’s Mackenzie Presbyterian University.

The sessions will include:

- Interactive Drafting Stepped Clauses Workshop.
- Negotiating with “Invisible” Parties: Artificial Intelligence, Hackers and other Innovative Counterparties.
- Workshop on Employment Expatriation.
- Mediation Revolution: How Brazil’s mediation culture progressed three decades in five years.
- Multi-jurisdictional perspectives on arbitration: Brazilian domestic & international arbitration in the Americas, Continental Europe and the United Kingdom.

The CPR 2018 Brazil Congress sponsors include Fluor Corp., Shearman & Sterling, and Swiss Re, which are Silver sponsors; bronze sponsors General Motors Co., L.O. Baptista, Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados, and Sullivan & Cromwell.

The CPR Brazil Initiative has been funded by Assurant, GlaxoSmithKline, and the Sondheimer Family Charitable Foundation.