

Alternatives



TO THE HIGH COST OF LITIGATION

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 27 NO. 2 FEBRUARY 2009



Publishers:
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International Institute for
Conflict Prevention and Resolution

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Alternatives to the High Cost of Litigation (Print ISSN 1549-4373, Online ISSN 1549-4381) is a newsletter published 11 times a year by the International Institute for Conflict Prevention & Resolution and Wiley Periodicals, Inc., a Wiley Company, at Jossey-Bass. Jossey-Bass is a registered trademark of John Wiley & Sons, Inc.

Editorial correspondence should be addressed to *Alternatives*, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022; E-mail: alternatives@cpradr.org.

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INAUGURAL DIVERSITY AWARD WINNER IS ANNOUNCED; LAW FIRM AWARD, HONORABLE MENTION GO TO TWO U.K. FIRMS

The CPR Institute has announced its first ADR diversity award recipient, as well as this year's honorees for the CPR Law Firm Award for Excellence in ADR.

The inaugural CPR Award for Outstanding Contribution to Diversity in ADR has been presented to veteran neutral and educator Marvin E. Johnson, of Maryland.

This year's law firm award went to Herbert Smith, an international law firm based in London. Eversheds, another London-based firm, received an honorable mention for the law firm award.

The CPR Institute announced the awards in advance of its 30th Anniversary Annual Meeting last month. The awards were presented on Jan. 15 at the meeting's traditional awards dinner, where CPR presents its Annual Awards for Excellence in ADR for books, articles, and significant achievements. Next month, *Alternatives'* CPR News column will include information from the annual ADR awards winners.

* * *

Marvin Johnson is an ADR neutral

who works out of JAMS' Washington, D.C. office. He has mediated and arbitrated more than 1,500 cases in more than 27 years in the profession, focusing on employment and labor work, and has experience in nearly every sector of the economy, including transportation, insurance, banking, and nonprofit matters.

But Johnson probably is best known for founding the Center for Alternative Dispute Resolution, in 1986. The Greenbelt, Md.-based center promotes and provides education and comprehensive approaches to dispute resolution.

In his position as executive director, Johnson has been recognized for promoting diversity in the legal profession and the conflict resolution field. "Marvin has been a mentor for numerous individuals and has given generously of his time to building the quality of the mediation practice generally," wrote Kenneth Andrichik in his letter nominating Johnson for the diversity award.

Andrichik, who is senior vice president and director of mediation and business strategies at New York-based Finra, the securities' markets regulatory arm, wrote that Johnson "is known for his extraordinary efforts to expand the

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Published online in Wiley InterScience (www.interscience.wiley.com).
Alternatives DOI: 10.1002/alt

Stop the Shooting

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former gang members. There is no single route to finding the best mediator, but the credentials must fit the dispute and must command respect from the parties. As Alex Kotlowitz reported in a May 4, 2008, *New York Times Magazine* piece on Cease-Fire, mediator recruiting efforts seek out neutrals who are “deep into street life . . . right there on the edge.” Alex Kotlowitz, “Blocking the Transmission of Violence,” *New York Times Magazine* (May 4, 2008) (available at www.nytimes.com).

In commercial mediation as well, the parties must give a great deal of thought to the type of mediator they really want. Conventional wisdom sometimes leads to hiring a mediator with totally inappropriate skill sets, and results in an unsuccessful mediation.

- **A PIVOTAL EMPHASIS ON VERY, VERY EARLY INTERVENTION.** The street mediator cannot wait for the parties to come forward seeking a resolution, but must actively seek out the disputants at the earliest possible time. Street mediators think of themselves as “violence interrupters.” But if they can’t deal with the parties until gunfire has already erupted, the chance of success is greatly diminished if not impossible. The violence must be interrupted before it escalates. Early intervention is key to street mediation.

The corresponding lesson for commercial cases is to be able to work on matters at an even earlier time. Someone or something, in many cases courts, can serve as the initial “interrupter” and refer matters for resolution at the dispute’s front end, not just on the eve of trial. Referral programs must vigorously seek out and refer disputes nearer their inception.

Many corporate and court-related ADR programs have given great attention to the benefits of early resolution efforts and the institutionalization/mainstreaming of such alternatives. The Chicago initiative, however, takes the concept of early inter-

vention and dispute prevention to a whole new level by focusing on the critical role of the intervening agent.

All too often, disputants need a third-party intervener and cannot be expected to seek out assistance on their own. In fact, street mediators report that participants to gun violence frequently know full well that nothing good will come from their reliance on violence. But they don’t care. They still

Insights from the Streets

The challenge: Learning ADR lessons from disciplines far removed from commercial conflict resolution.

The teachers: Street mediators in Chicago’s most crime-scarred neighbourhoods.

The common ground: Verbal violence isn’t gunfire, but it also must be halted before parties will make progress. Principles of early intervention and opportunistic moves belong in ADR, no matter the forum.

cannot bring themselves to seek out a mediator in a manner that allows them to save face and maintain respect.

This has marked similarities to the litigator who doesn’t suggest mediation for fear of having blinked first or suggesting a weakness in the case.

- **THE COMPLEXITY OF RECOGNIZING THE MOST OPPORTUNE MOMENT.** While early intervention is critical, disputes unfortunately cannot always be mediated at their inception.

Timing is essential to succeeding at mediation. Street violence interrupters recognize that someone who has lost a family member to gun violence might be so full of rage and raw emotion that any talk of peaceful negotiations could be futile. While immediate retaliation must be curbed, any lasting resolution must await the appropriate moment. So too, an astute mediator knows that the dispute must be ripe for mediation before a meaningful intervention can succeed, and that it takes time to get parties ready to come to the table in the true spirit of reconciliation.

- **THE NECESSITY OF STOPPING THE GUNFIRE.** The most important lesson for commercial mediators to learn from an organization such as CeaseFire is that meaningful dialogue cannot take place if counsel and parties continue to fire away at each other without any cessation of verbal hostilities. In commercial litigation, as with street violence, the parties cannot have productive settlement conversations in the midst of “shooting.”

Of course, many opinions have been expressed about the appropriateness of verbal gunfire in commercial mediations. Some view it as a positive if not essential element of the process enabling the parties to vent and experience catharsis. Others view it as so destructive that they refuse to participate in mediations in which a joint caucus or any meeting of all parties takes place.

The commercial mediator must understand the nature and role of the verbal gunfire that accompanies so many mediations and be able to manage it, channel it positively, and ultimately bring about an appropriate cessation before the mediation process can have any chance of success.

Like their street mediator counterparts, commercial mediators cannot bring about resolution and reconciliation until they first stop the destructive shooting. ■

DOI 10.1002/alt.20263

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opportunities for neutrals from diverse backgrounds.” Andrichik added, “I have seen him share practical tips for getting

started in the ADR field as well as on how to progress from volunteer, to paid assignments, to top-level assignments as a neutral.”

The Center for Alternative Dispute Resolution (see www.natlctr4adr.org) began as a self-sustaining entity of Bowie State University, in Bowie, Md., as the first

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dispute resolution center at a historically black university.

The center, according to its website, focuses “primarily on the practical application of ADR principles. It offers a wide variety of dispute resolution education and professional development programs. It has a continuing commitment to enhancing the skills and abilities of current ADR practitioners and users, and to developing more cultural diversity within the dispute resolution field.”

In September 2000, the center ended its 15-year relationship with Bowie, and became affiliated with Salisbury State University’s Center for Conflict Resolution, in Salisbury, Md., the Cooperative Consortium for Dispute Resolution, based in Crofton, Md., and the University of the District of Columbia in Washington.

Three years ago, Johnson was a recipient of a Lifetime Achievement Award from the American College of Civil Trial Mediators, an Orlando, Fla., professional group.

The CPR Award for Outstanding Contribution to Diversity in ADR comes from the CPR Institute’s three-year-old National Task Force on Diversity in ADR. The task force created the award last year to recognize a professional who has contributed significantly to ADR diversity. CPR and the task force sought nominations of “individuals who have provided access to or created opportunities to people who have historically been excluded from active and meaningful participation in ADR including, but not limited to, women, minorities and/or people of color.”

“The ideal nominee,” notes the CPR website, “will have shown leadership and public commitment to supporting, mentoring, training, and leading others to promote the use of diverse mediators and arbitrators and/or demonstrated their extraordinary commitment to using diversity in their ADR practices.”

The task force devises practical strategies to increase the participation of women and minorities in mediation, arbitration and other ADR processes. In 2007, the task force published an ADR Diversity Survey, which guides corporate law departments in holding their outside lawyers

accountable for the use of minorities and women in ADR. The survey tool is available at www.cpradr.org/Portals/0/DiversitySurvey_Apr07.pdf.

Johnson was a member of the task force and contributed to its efforts during the diversity survey. Kenneth Andrichik also has participated in task force meetings and events.

Nominations for the inaugural award were reviewed by the task force’s co-chairs, Carla Herron, group counsel, litigation at the Royal Dutch Shell Group of Cos., in Houston; Charles R. Morgan, Atlanta-based managing director and special counsel at FTI Consulting Inc.; and Thomas L. Sager, senior vice president and general counsel at E.I. du Pont de Nemours & Co., in Wilmington, Del. Herron and Morgan presented the award to Johnson last month.

* * *

While the 2008 CPR Law Firm Award for Excellence in ADR is only the second presentation, neither of this year’s cited firms are strangers to the award.

This year’s winner, London’s Herbert Smith, received an honorable mention when the inaugural awards ceremony was held in Boston in October 2007. And London-based firm of Eversheds is receiving its second straight honorable mention award.

The CPR Institute two years ago decided to create the award to recognize law firms that demonstrate an integrated approach and a deep commitment to using ADR principles and techniques. The award “seeks to honor law firms that demonstrate firm-wide commitment to using ADR principles and techniques [focused] on integrated processes, techniques, systems, client services, and scholarship ‘best practices’ in multiple practice areas.”

The winner of the first law firm award was Stradley Ronon Stevens & Young, of Philadelphia. For information about Stradley’s award, and the honorable mentions, visit: www.cpradr.org.

For full details on Stradley’s program and the firm’s perspective on its award

work, visit the Practice Areas link at www.stradley.com, and click on “Alternative Dispute Resolution.” See also CPR News, “The Winner Speaks: More on CPR’s First Law Firm ADR Award,” 25 *Alternatives* 188 (December 2007)(an adaptation of remarks by Stradley Ronon Partner Bennett G. Picker on receiving the CPR Law Firm Award).

Herbert Smith added the 2008 award to its previous honorable mention with a comprehensive demonstration of ADR integration throughout the firm’s training and marketing functions, and—of course—in its approach to solving clients’ legal problems.

Herbert Smith told the CPR award committee—consisting of attorney representatives from Abbott Laboratories Inc., E.I. du Pont de Nemours and Co., General Electric Co., Johnson & Johnson, Microsoft Corp., and Northrop Grumman Corp., as well as faculty from the University of Missouri Law School at Columbia, Mo., and Pepperdine University Law School in Malibu, Calif.—that its award entry and practice was built around two themes: the firm’s ADR innovation and its capability and commitment across the spectrum of ADR processes.

The firm has about two dozen attorneys and staff as part of its ADR practice team, designated for mediation, adjudication, and expert determination, all of whom are based in its litigation and arbitration division. But Herbert Smith notes that it spreads this expertise throughout the division, so that ADR experience can be found among its commercial litigators across the firm, including insurance, banking, and regulatory practices. All lawyers “must be trained in ADR skills to a high level, whatever their specialist area,” the firm notes in its supporting materials.

Herbert Smith devoted a big 2007 effort to studying commercial ADR, a move it said marked the firm’s 10th anniversary of its institutional ADR commitment. The nearly year-long study—which in its award submission the firm said occupied 455 partner hours and more than 750 senior associate hours—resulted in a report, “The

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Inside Track—How Blue Chips Are Using ADR,” and an ADR toolkit designed to help improve organizational ADR use and performance.

The Inside Track looks at big companies' ADR use. It concludes that there are four ADR user categories: embedded users, ad hoc users, the negotiators, and nonusers. For companies with embedded processes, ADR plays a central role in conflict resolution management, characterized by the companies' use of early case assessment, shorter dispute lives, higher ADR skill levels among in-house attorneys, and an inclination to produce ADR metrics to monitor the company's effectiveness.

Ad hoc users liked ADR, but didn't use it consistently, considering that such an approach was “unworkable or unnecessary.” “The Negotiators” preferred direct talks to deal with problems as the primary settlement tool over more formalized processes, opting for mediation only when negotiation had failed.

Inside Track and the toolkit can be accessed at the firm's ADR page at www.herbertsmith.com/Services/PracticeAreas/Disputeresolution/Mediation.htm.

Herbert Smith has no U.S. office—it is affiliated with Stibbe, which has a New York office—but its ADR practice is international. Its materials stress the firm's cross-border and cross-cultural mediation expertise. It says it averages 25 to 30 annual commercial mediation representation matters. It says it also participates in a range of structured or facilitated negotiations that are close to mediation processes.

The work, Herbert Smith reports, has spread to nearly every partner and associate in its London litigation and arbitration division—“numbering more than 180 fee earners,” the firm states.

The firm also has worked to change its culture to include a variety of dispute resolution options, from its traditional litigation base. It gathers a wide variety of ADR data, so attorneys can assess how the option would work for each matter. The data includes systematic monitor-

ing of individual U.K. mediators since, the firm notes, it often is relied upon by clients for recommendations.

Herbert Smith's internal ADR system, “Libra,” allows information sharing on ADR precedents, as well as advice on ADR processes that includes presentations, mediation agreements and drafting notes, written submissions, and settlement agreements. The firm has a wide-ranging ADR library and resources for clause writing directed to transactional attorneys.

The firm's arbitration practice operates worldwide, led by 10 partners and 22 associates based in London and Paris, with nearly 20 attorneys located in various other offices. The practice uses a global arbitration Intranet that centralizes its resources; it also provides training firm-wide. The training includes “Arbitration Interest Group” meetings, held in London and video-linked to other offices, every three weeks.

* * *

Eversheds and its “Rapid” ADR methodology program garnered an honorable mention for the second consecutive year for the CPR Law Firm Award for Excellence in ADR.

The firm operates worldwide, with offices in 25 countries. It has incorporated “dispute management” into its overall structure for more than a decade. Eversheds reports that it has 17 mediators accredited in the United Kingdom and in Ireland, which it says is the most accredited to one U.K. firm.

“Rapid” is the firm's acronym for providing a variety of problem-solving dispute resolution options to its clients, standing for Review, Analyze, Plan, Implement and Deliver. Rapid helps Eversheds attorneys determine how litigation, arbitration, mediation, negotiation, or another process, is best suited to a new matter.

Each Eversheds attorney gets a detailed manual. They are trained in using Rapid, and, separately, ADR processes. The firm says it has spent more than £6

million on training its lawyers in the conflict resolution methodology.

Eversheds says Rapid works. The firm states that the program successfully achieves its clients' objectives in nine out of 10 cases. It also says that 90% of all its cases are resolved out of court—and even in the one-third of the cases that wind up in formal court proceedings, 78% are still resolved via out-of-court methods.

The bottom line, Eversheds tells clients, is that Rapid can save them at least 50% of their legal costs by settling earlier. See www.eversheds.com/uk/home/about_us/how_we_work_with_you/rapid_resolution.page.

Rapid had its roots in a long-running early case assessment program the firm developed, with Du Pont, in 1997. Eversheds says that it reassessed the program in 2005 to reflect clients' dissatisfaction with traditional court litigation, and to make the Rapid program more focused on dealing with “the entire life span of each dispute, providing more focus on results, more options, and more flexibility to adapt to the inevitability of changing events that happen in the course of litigation.” The Eversheds materials state that “ADR was at the heart of our thinking.”

In the past year, the firm reports that it has created a global IT platform that allows its international clients to get online access to information about their matters in all of the countries in which the clients operate. The Global Account Management System monitors Eversheds attorneys' activities, and allows the client to measure performance.

Watch the CPR website and this CPR News column this spring for an announcement about nominating candidates for the 2009 CPR Law Firm ADR Award. 

NEW ARBITRATION PROTOCOL IS NOW AVAILABLE

CPR last month released for the first time a CPR Protocol on Disclosure of

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Documents and Presentation of Witnesses in Commercial Arbitration.

A PDF pamphlet containing the protocol can be downloaded for free at www.cpradr.org.

In his introduction, Lawrence W. Newman, chairman of the CPR International Committee on Arbitration, explains that the protocol was developed to deal with frequent complaints about arbitration. It “addresses concerns often expressed by users of arbitration, that there is, particularly in disputes involving parties of different nations, a lack of predictability in the ways in which the arbitration proceedings are conducted and that arbitration is becoming increasingly more complex, costly and time-consuming,” writes Newman, a partner in New York’s Baker & McKenzie.

The protocol, he continues, “addresses these concerns by providing guidance in the form of recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules or under other ad hoc or institutional rules. The practices recommended deal with ways in which reasonable limitations may be placed on disclosure and efficiencies gained in the presentation of witness testimony in arbitration hearings.”

Specifically, the protocol is designed to assist arbitrators by setting out general principles for dealing with requests for the disclosure of documents and electronic information, and for establishing witness testimony procedures. The protocol also provides arbitration agreement parties an opportunity to adopt, predispute, methods for dealing with the disclosure of documents and the presentation of witnesses.

The protocol is the product of 26 members of two working groups of the CPR Arbitration Committee’s Information Exchange Subcommittee. The subcommittee is chaired by former CPR President Thomas J. Stipanowich, academic director of the Straus Institute of Dispute Resolution at Pepperdine University School of Law in Malibu, Calif. A working group on the presentation of witnesses was chaired

by Ben H. Sheppard Jr., director of the A.A. White Dispute Resolution Center at the University of Houston Law Center.

The other working group, on documentary disclosure, was chaired by Lawrence Newman. CPR Senior Vice President Helena Tavares Erickson is the CPR staff liaison to the working groups, the subcommittee, and the overall arbitration committee.

MEDIATION SPACE NOW AVAILABLE @ CPR

The CPR Institute now offers mediation space for rent at its midtown Manhattan location.

CPR is offering daily rentals of its executive conference room for mediation or arbitrations in which parties seek a neutral site. The rentals include caucus rooms and two private offices.

The services include Internet access, a screen and projector, and telephone. Coffee service also is available.

The CPR Institute is easily accessible, located at 575 Lexington Avenue between 51st and 52nd Streets, above the 6/E/V subway stop.

The rental fee is \$400 a day.

For inquiries and reservations, contact CPR’s Kevin Robinson at krobinson@cpradr.org or +1.212.949.6490. ☏

UPDATE ON CPR’S FREE WEEKLY PODCAST

The CPR Institute’s *International Dispute Negotiation* weekly podcast at www.cpradr.org recently has devoted episodes to the state of European mediation, corporate attitudes toward arbitration, and cross-cultural conflict resolution.

The *IDN* podcast, hosted and produced by Michael McIlwrath, senior litigation counsel at GE Infrastructure—Oil & Gas in Florence, Italy, will launch its 60th weekly episode this month.

IDN is available with new episodes every Friday at www.cpradr.org, with all

podcasts, new and archives, available for listening or downloading with a mouse click. The podcasts can be played instantly, or saved to the hard drive for listening later on Ipods or other MP3 players.

The web page also has an RSS feed button that will automatically send each Friday’s new episode to users’ desktops.

And, for iTunes users, *IDN* is available in the iTunes store for weekly subscription feed or by individual episodes.

In addition, WestLegalEdcenter.com users can find a list of many *IDN* downloads on the site’s podcast page.

All access is free.

IDN launched in October 2007. McIlwrath has presented the *IDN* podcast features, between 10 minutes and 45 minutes in length, on a wide variety of international business issues.

A must-listen from late last year episode included McIlwrath’s tribute to U.K. Prof. Thomas Walde, who passed away just days after McIlwrath interviewed him for *IDN*. To hear Walde’s final broadcast interview, and McIlwrath’s reflections, download *IDN* Episode 47, “Thomas Walde on Advocacy in International Arbitration,” which premiered on Oct. 24. Additional segments from the final Walde interview will be included in a podcast soon.

McIlwrath also recently explored a sophisticated, yet easily adaptable, med-arb procedure with veteran Barcelona neutral Mercedes Tarrazon. The process, which Tarrazon uses when she is sitting as an arbitrator, deploys mediation techniques during the proceedings. Tarrazon explained that the techniques are effective, and that she has used them in arbitrations worldwide.

To access the archive episodes, go to the Podcasts page under the Training/Events tab at www.cpradr.org, and click on the Podcast Archives link. Archive episodes also are available on the iTunes store and via RSS.

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DOI 10.1002/alt.20264

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