Alternatives

TO THE HIGH COST OF LITIGATION

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ADR Commentary

The Changing Landscape of Mediation: Personal Observations Over the Past 40 Years

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I have been asked to reflect upon the origins and the changing landscape of mediation over the past 40 years.

I think the reason I have been invited to speak is that I am old—enough—to have been around at the dawning of the age of commercial mediation. So, I am asking you to travel back in time with me—to 1971.

I was about to try my first case, representing a defendant in connection with a claim arising from an alleged breach of a long-term supply agreement. Six weeks before trial, the parties and counsel agreed to a one-time meeting to explore settlement.

At this meeting, plaintiff's counsel made an excessively high demand. My client said, "They're not here in good faith. Let's walk out."

In response to my urging that we make a credible offer, my client said, "I thought you were my lawyer. If you don't believe in my case, maybe I should find another lawyer."

Needless to say, our effort to settle was an abysmal failure. I walked away from our meeting thinking—if only—if only an intermediary were present to work with the parties, perhaps we might have settled by restructuring the agreement upon different pricing terms. Although my client prevailed in part at trial, he was displeased with both the result and the cost.

So, why did we not consider mediation? The answer is that the process *never crossed our minds*. In one form or another, we can trace antecedents of commercial mediation as far back as the Phoenicians, the Greeks and the Romans. In labor, we have had mediation since 1926. Mediation was also used in the 1960s to address certain civil rights controversies.

But, in 1971, mediation of commercial disputes simply did not exist.

I would like to trace the origin and growth of commercial mediation in the United States, and then share my perception of the ways the process and practice have changed over the decades.

A 'PERFECT RAINBOW'

In many respects, in 1971, the world of civil litigation looked the same then as it had 700 years earlier, when a jury of peers replaced trial by ordeal and trial by combat.

Then, in a five-year period starting in the mid-70s, the landscape of commercial dispute resolution changed dramatically. You have all heard the phrase a "perfect storm." What happened during this period was a "perfect rainbow."

Commercial mediation was first publi-

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investor first gained knowledge, or should have first gained knowledge, of the event. Annex 14-E Art. 4.

Additionally, the respondent state must be party to another international trade or investment agreement that permits investors to initiate dispute settlement procedures. Annex 14-E Article 2(a)(i)(B). Though the annex on disputes relating to covered government contracts does not explicitly refer to proceedings before a Mexico court or administrative tribunal, it indicates that the general USMCA provisions will apply. Annex 14-E Art. 1.

Also, investors will not be able to pursue arbitration unless they waive their right to proceeding in courts upon commencing arbitration for national treatment claims, where a nation is accused of treating foreign investors less favorably than domestic investors; most favored nation status claims, where a state is accused of a foreign-investor preference, and expropriation and compensation claims. Annex 14-D article 5(1)(e)(i)-(ii); Ch. 14 Appendix 3.

Interestingly, the USMCA Appendix 3 seems to be a somewhat awkwardly drafted attempt to reproduce Annex 1120.1 of NAFTA. The intention of NAFTA Annex 1120.1 is to protect Mexico from investors relying on NAFTA's status as a self-executing treaty, and therefore its status as domestic law, to bring simultaneous proceedings at the national and international level. See Sergio Puig, "Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga," 5 *Mexican L. Rev.* 199, 218 (2012)(available at https://bit.ly/2pTdfGa).

Annex 1120.1 explicitly prevents investors from bringing complaints both in arbitration and in proceedings before a Mexican court or tribunal. When transferred to the USMCA, however, the language becomes that United States investors are prohibited from submitting an arbitration claim against Mexico, where they have alleged breach of that obligation before a court or administrative tribunal of Mexico.

Considering the aforementioned requirement that disputes must first go before a local court or administrative tribunal, Appendix 3 would seem to have the effect of preventing U.S. investors from accessing arbitration for disputes other than those relating to covered government contracts or where local remedies are obviously futile or manifestly ineffective.

While the USMCA will increase the minimum waiting period for submitting an arbitration claim from NAFTA's six-month requirement, the agreement also extends the deadline within which investors may make a claim. Under NAFTA, investors must make a claim within three years from the date they first acquired or should have first acquired knowledge of the relevant events. Ch. 11 Art. 1116. The USMCA provides investors with four years from the relevant date to make a claim. Annex 14-D Art. 5(1)(c).

Overall, the restrictions that the USMCA places on submitting an arbitration claim will likely lengthen the time it takes parties to reach arbitration. Whether the USMCA will result in parties receiving a binding decision faster from local courts than they would under NAFTA's investor-state dispute resolution will depend on the USMCA's implementation. This will highlight the classic question of whether parties benefit more from arbitration or litigation.

DEFINING A LEGACY

The scope of the USMCA is limited to disputes that occur once it comes into force, with a small legacy case window.

Legacy investments are defined as an "investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of [the USMCA]." Annex 14-C Art. 6.

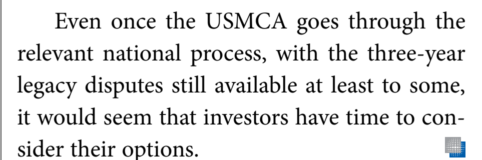
Thus, the components are an investment made after NAFTA came into effect, and before NAFTA is terminated, which existed on the date of entry into force of the USMCA.

Once NAFTA is terminated, parties will have three years to bring legacy investment disputes under Chapter 11. Chapter 14 will apply to disputes which are brought once the three-year period expires. But the expiration of the term will not affect the conclusion of legacy investment disputes. Annex 14-C Arts. 3-4.

As a further limitation, investors may not submit a dispute to arbitration as a legacy investment where the dispute qualifies as a covered government contract. Annex 14-C article 1(c) footnote 21. This seems to be of limited consequence, as the discussed conditions precedent between covered government contract disputes and the previous NAFTA provisions are the same. Additionally, the USMCA will not apply to events that occurred before the agreement entered into force. Art. 14.2(3).

The USMCA does not provide a date upon which it will come into effect, and the U.S. government has not provided any significant dates. The USMCA is currently subject to "legal review for accuracy, clarity, and consistency" and "subject to language authentication."

Even once the USMCA goes through the relevant national process, with the three-year legacy disputes still available at least to some, it would seem that investors have time to consider their options.



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cally discussed in 1976 at the Pound Conference, which many legal scholars refer to as the "Big Bang" moment in the history of ADR.

At the Pound Conference, convened by U.S. Supreme Court Chief Justice Warren Burger, leading scholars and judges met in St. Paul, Minn., to discuss insufficient access to the courts and increasing dissatisfaction with the costs of litigation.

At this conference, the late Frank Sander, a distinguished Harvard Law School professor, articulated his concept of a multi-door courthouse, where there could be an array of dispute resolution options, including mediation.

The following year, 1977, marked the founding of the Center for Public Resources, commonly known today as the CPR Institute. CPR was founded by America's leading business corporations to institutionalize mediation in corporate and law firm settings.

Acting as a thought leader and a catalyst for mediation, CPR quickly pursued its core mission to encourage companies and law firms to be more

knowledgeable about ADR, principally mediation, and to recommend the process where appropriate.

To the extent mediation is a part of the mainstream of dispute resolution today by contract, court mandate or voluntary agreement, it is fair to say that the growth of mediation in America is due, in significant measure, to the sustained commitment of CPR. [The CPR Institute has published this newsletter since 1983.]

The mid-70s saw the beginnings of tort reform. I am not speaking of the more controversial political effort through legislation to limit plaintiff's rights and remedies, but rather, of corporate America's search for faster, better and cheaper solutions. In-house corporate counsel were in these years beginning to take a more active role in the management of their companies and many found mediation an attractive alternative to litigation.

A few years later, in 1981, Roger Fisher and William Ury's book, "Getting to Yes," helped to popularize the potential for interest-based—even "win-win"—solutions through principled negotiations. Many began to see mediation's potential for negotiating business solutions unavailable in either litigation or arbitration.

Yet not too much happened on the ground over the next 15 years. By far, the rhetoric about mediation exceeded the actual practice. Yes, a few corporate counsel and practitioners became passionate about the process, some with almost religious fervor, but the interest, knowledge, and practice levels remained low.

Perhaps a few real-world examples best illustrate that while mediation was percolating in the 1980s and early 1990s, it remained in its infancy.

In 1988, Congress passed the first federal ADR act. The new big thing was "court-connected advisory arbitration." Mediation was not even on Congress's radar screen in 1988.

During this period, I was often asked by mediation advocates "Will this mediation be binding?" The question reflected the fact that many did not fully understand the difference between mediation and arbitration. Some probably could not have explained the difference between mediation and meditation.

In 1993, I gave a lecture on "ADR" at an American Bar Association Business Law Section meeting. After a few minutes, several individuals in the front row stood up and began to walk out. I stopped them and asked, "Are you in the wrong room?" Their response: "We thought we were going to a lecture on "American Depository Receipts." Clearly, ADR had not yet achieved widespread recognition.

Also in 1993, International Academy of Mediators' former President Eric Galton authored the first book ever written on mediation advocacy. A promotional flyer stated: "You probably haven't been asked to represent a client in a mediation, but you soon will be." The brochure concluded that "mediation is the future … those who embrace it will be remembered, those who do not will be forgotten."

Origin Story

The keynote speech: An influential Philadelphia neutral looks at commercial mediation development.

The view: A discussion on the significant legal and societal changes in and around mediation demonstrate how and why use of the process has increased.

The takeaway: Mediation has succeeded, but its growth also re-emphasizes 'the critical importance of preparation and patience and of fairness and respect for the process.'

TWO DECADES OF DRAMATIC CHANGE

Now, let's take a look at the past 20 years—from the mid-90s to the present day.

By the turn of the century, we began to see explosive growth in commercial mediation. By 2005, in Texas, California and Florida, almost every litigated case was being mediated. In Florida, almost overnight, more than 8,500 mediators were certified by the Florida Supreme Court.

Over the past 20 years, mediation has moved from a sleepy profession to a booming one. Nevertheless, acceptance of mediation has been less than universal. There is still some resistance to mediation in the legal community and, as a consequence, the full promise of mediation has yet to be realized. More about this later.

Having just taken you on a whirlwind tour of the growth of mediation, I would now like to explore six ways in which the practice of mediation has changed dramatically over the years.

EXPLOSIVE GROWTH IN DEMAND

First, and perhaps most obvious, there has been explosive growth in the demand for commercial mediation. As I have suggested, this demand started with corporate counsel who increasingly have insisted that their lawyers engage in mediation prior to litigation.

Government programs requiring mediation have also played a role. Among the most successful of these programs are the U.S. Equal Employment Opportunity Commission's mediation program, and Redress, a conflict resolution program for the nation's half-million postal workers, which employs a transformative mediation model.

The growth of mediation has also been driven by court-annexed programs, which are now prevalent throughout the country. Congress enacted the ADR Act of 1998 which, in contrast to the enactment a decade earlier, encouraged each federal district court to develop a mediation program. America's state courts soon followed with similar mandates.

No doubt the Canadian experience has been similar. It is my understanding that it was the mandatory mediation program in Toronto that spurred substantial growth of mediation in Ontario and, ultimately, throughout much of Canada.

Lest we think that in America we are all drinking from a mediation glass that is overflowing, it is a glass only half full, especially in regions of the country where court-annexed mediation is not the rule.

A closer look reveals that corporate America's embrace of mediation has been neither full nor complete. Some corporate executives still want to "win," regardless of the expense.

Other corporations have had ADR champions who have created company-wide cultures embracing mediation. This culture, however, frequently disappears once the champion moves on or retires. Moreover, while many corporate counsel have encouraged their outside law firms to use mediation, they have done little to assure compliance in the way they have with issues of cost containment and diversity.

What about the law firms? Essentially, they have come on board in response to the demand

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of their clients. Still, too many litigators "talk the talk" but do not "walk the walk." For example, many litigators routinely tell their clients that mediation might be the appropriate road to resolution, but quickly add, "Not yet, we first will need to take discovery and file motions."

The problem is an inherent conflict between law firms and their clients due to the fact that litigation is the largest profit engine in many firms. Moreover, the issue is exacerbated by an individual lawyer's interest in his or her own origination of legal work and the resulting impact on personal compensation.

Of course, I recognize that many lawyers do understand they are in a relationship business, and that resolving a lawsuit early on is often the best way to preserve and enhance a lawyer-client relationship. At the same time, it is a plain fact that many trial lawyers are simply not enthusiastic about early resolution through mediation.

HUGE GROWTH IN SUPPLY

A second dramatic change in the practice of mediation is on the supply side. When I started as a mediator, many colleagues asked me, "What are you doing?" They really did not understand. They asked questions such as "How will you get work?" and "Do you think working as a mediator can be profitable?"

Their skepticism was palpable.

Today, it seems as if almost every retiring judge and senior litigator wants to be a mediator. In my own region, there are now more than 300 individuals holding themselves out as mediators.

Without exaggeration, I receive 20 or more calls a year asking me for advice on how to build a practice. I tell most that if they are serious, get training and develop a good business plan that defines their niche, and they may well succeed.

I also tell them to be patient because, in the beginning, getting mediation assignments is not a sport for the short-winded. One recent study concluded that the median number of cases mediated in a given year by persons calling themselves mediators is zero—meaning more than half got no work in a given year. Nevertheless, new entrants continue to move into the field and many have developed highly successful practices.

As a reflection of this growth, we now have organizations such as the CPR Institute, JAMS Inc., the American Arbitration Association, local providers, and industry organizations like FINRA [the Financial Industry Regulatory Authority Inc.] supplying the names of candidates for mediation assignments. But since mediation is mostly an ad hoc world, the highly competitive search for assignments has presented significant marketing and pricing challenges to those seeking work.

I commend to you the Spring 2017 issue of the ABA's *Dispute Resolution Magazine* devoted to key marketplace and competition issues. [The author is a former member of the magazine's editorial board and edited the issue discussed.] You will learn, for example, that daily rates range from $500 to $25,000, and hourly rates range from $100 to $1,500.

Moreover, some mediators are seeking creative fee arrangements such as "pay me 70% of my hourly rate, but if we settle, pay me 140%." Or, "pay me what you think I deserve." That issue of the magazine also discusses whether one should practice mediation solo, with an ADR provider group or in a law firm, as well as other fundamental business decisions.

To those of you developing a mediation practice, I would also commend to you a book written by Jeff Krivis, a past IAM president, titled "How to Make Money as a Mediator (And Create Value for Everyone)."

INFORMATION EXPLOSION

A third major change in mediation is the explosion in the amount of information available to inform mediators about the art and science of our craft.

Until about 20 years ago, it was almost impossible to find a good training program. I was quite fortunate after a few years of on-the-job training to have found two extraordinary trainers in the early '90s, Michael Lewis and Linda Singer, now with JAMS in Washington, D.C. Their expertise gave me entirely new perspectives on mediation and negotiation techniques.

I realized then how much more I had to learn, how much room there was for creativity, and that in this dynamic field my learning would continue for the rest of my professional career. Today, training programs abound and can be found in every region of the country.

Furthermore, there were no websites or blogs on mediation in these early days. Indeed, the World-Wide Web did not exist until 1991 and it took the better part of the decade for it to gain widespread acceptance.

In the past two decades, we have seen a cascade of websites, blogs, journals and magazines become available to mediators, and the dark ages have become brightened by a multiplicity of venues providing information.

The past two decades have also seen the formation of an abundance of professional organizations such as the ABA Section on Dispute Resolution and the International Academy of Mediators, which provide opportunities for mediators to network and learn from each other. Our only difficulty today is selecting from among our myriad of choices.

GREATER SOPHISTICATION

A fourth change in the practice of commercial mediation is a consequence of this explosion of information and knowledge. Mediators are now far more sophisticated and nuanced in their management of the process.

Armed with studies on anchoring and adjustment, for example, mediators often coach participants on the advantage of making the "first credible move." And armed with a Harvard Program on Negotiation study on advocacy bias, mediators are in a position to explain to participants the reasons they have overestimated their chances of success.

Furthermore, the work of Daniel Kahneman, Amos Tversky and Jeffrey Rachlinski and others on the psychology of judgment and decision-making has made a difference in the way many mediators approach reality testing.

Their studies, which essentially challenge the assumption of human rationality in decision-making, permit mediators to demonstrate to participants the extent to which heuristics and cognitive illusions, such as assimilation bias and egocentric bias, have distorted their assessments. For those who have not read it, I commend to you Kahneman's book, "Thinking, Fast and Slow," which summarizes much of his research. Renowned mediator Eric Green calls this field of research the "future of mediation."

In addition, other studies in psychology, economics, negotiations, linguistics and neuroscience have informed mediators and influenced their techniques.

Not only have mediators become more sophisticated in their approach, but trial lawyers representing parties in mediation have as well. In the initial years of my mediation practice, many advocates hardly prepared for mediation because they saw no downside to a nonbinding process. Today, many prepare as they would for a court hearing.

GREATER CONTROL BY LITIGATORS

The fifth major change in commercial mediation has been the far greater control over the process by trial lawyers, and not always with positive benefits.

In recent years, I have seen trial lawyers increasingly try to spin the mediator with less candor and more over-the-top advocacy. I am also seeing a declining focus by counsel upon the underlying interests, or on preservation of relationships. Instead, many seem to have been inspired by the line from the movie "Jerry Maguire": "Show me the money!"

With trial lawyers taking greater control, we are seeing the process itself change before our eyes. For example, commercial mediation is becoming a far more evaluative process. In recent mediations for which I have been interviewed, I have been asked, "Are you an evaluative mediator?"

Of course, my answer is "yes." I am evaluative, facilitative, even transformative, and often a combination, as the situation demands. Each style has its usefulness in the pantheon of the dispute resolution processes.

In addition, the demand for evaluation has led to an increasing insistence upon selecting a mediator with subject-matter expertise. I guess I am old school, as I continue to believe process expertise to be paramount.

Greater trial lawyer control has also led to other changes in mediation which I regard as unfortunate. One is what now is commonly referred to as the "disappearing joint session."

The demand to dispense with a substantive joint session began in California where parties and their trial lawyers insisted on dispensing with this session, often suggesting "just get me a number." When mediators pushed back, mediation advocates invariably threatened to find a new mediator. As this demand became commonplace, most mediators have yielded to their clients' demands.

Today, I am seeing this demand more frequently in my own region. My own response has been, "Let me give you my three top reasons why a joint session will be in your interest." At least for the moment, I have been mostly successful.

DIVERSITY AND JUSTICE

Diversity is the sixth major change in mediation. In the '80s and '90s, even in the early 2000s, the pool of mediator's consisted almost entirely of older white males. In contrast, today there is a deep and talented pool of diverse neutrals available for selection. And, yet, they are disproportionately not being selected in commercial disputes.

Regrettably, the statistics tell us that the percentage of women and people of color selected for mediation assignments in significant commercial disputes is abysmally low—slightly more than 10%. A sad statistic, indeed.

Too often, when advocates select a mediator, they follow the patterns of yesteryear and send an email to their colleagues which invariably begins "Can anyone recommend a mediator …?" Unfortunately, the replies reflect the past, not the present.

Our profession has a responsibility to do what it can to increase top-of-the-mind awareness concerning this issue in an effort to overcome the forces of inertia and implicit bias. In addition to the values our profession realizes from diversity, mediation increasingly serves a role that is a substitute for judicial process. Diversity, therefore, becomes an issue of fairness—public justice—and public acceptance.

REFLECTIONS AND PREDICTIONS

As I look back upon my years as a mediator, it has been quite a ride.

At the beginning, we faced a cynical legal profession. Many thought the mere idea of mediation was absurd. The early academic thinkers and writers were extraordinary. Christopher Moore, Robert A. Baruch Bush, Joseph P. Folger, Lela Love, Kimberly Kovach, Leonard Riskin and so many others challenged new mediators with so many brilliant thoughts about the practice, process and ethics of mediation. Many of our IAM members were among this early group of pioneers.

Over the decades, I have seen our profession grow, and I have personally and professionally grown myself. I have come to recognize the critical importance of preparation and patience and of fairness and respect for the process. I have learned to probe deeply for the hidden barriers and drivers of resolution, often unknown even to counsel.

And while assessing risk tolerance is always important, I have learned that resolution is invariably as much about the people and the problem as it is about the positions.

In a word, I feel lucky to participate in a process where I get paid to help people solve their problems in ways that sometimes appear to be almost magical. For this reason, and so many more, I have never lost my passion for the process.

Sure, I lament that we seem to have less focus upon some of the words that defined the process of mediation in the early years, such as "collaboration" and "creativity." I regret that the "safe place" for conversation we all cherished 25 years ago has become a forum that is, at times, more about bargaining for advantage.

At the same time, I see how much we have gained with widespread acceptance of the process, greater opportunities for professional collegiality, and greater diversity.

When I look to the future, I recognize that predictions can be precarious. Thomas Watson, an IBM founder, once said "I think there's a world market for, maybe, five computers." With that caveat, I modestly will predict substantial growth of mediation internationally, new roles for younger and newer entrants in the field, and innovative solutions driven by technology.

I think we can also be fairly safe in predicting increased use of mixed mode processes given the conclusions of the recent Global Pound Conferences, held over the past two years in 23 countries, that users want earlier resolutions using a combination of adjudicative and non-adjudicative processes. [See Angela Cipolla, "Updating the Global Pound Conference: A Survey on Mediation in Cross-Border Disputes," *CPR Speaks* blog (Nov. 10, 2017)(available at https://bit.ly/2Gx4CZz); see also www.globalpound.org.]

And, while I am doubtful, who am I to dismiss the bold prediction of one highly regarded scholar that artificial intelligence may, in time, result in the demise of the human mediator?

What we do know is that we will change over time in ways we cannot even anticipate. But change we must or, to paraphrase Prof. Sander, "Our profession will be killed by the status quo."

At the end of the day, when I try to project where we will be in five years, I am optimistic. After all, I am a mediator and optimism is what we are all about.