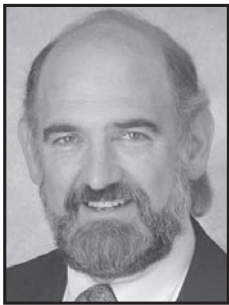


ENHANCING THE TABLE: Lessons from Mediation's Middle Age



By Bill Hartgering, Esq.

Mediation has now been part of the American system of dispute resolution for some 30 years. Over that time, the practice has matured. The expansion has prompted study, discussion, and experimentation, with counsel, academics and practitioners anxious to find best practices.

However, no matter how much we search for the "way," we arrive at the same conclusion: like the practice of law, there is no "one way" to mediate. The mediation must fit the dispute and the parties, and the timing must be right. Ultimately, it is the parties who choose the details of the process.

As more courts order trial-minded litigators and clients into mediation, more advocates find themselves in uncomfortable situations. This is particularly true where there is more than the usual distrust between litigants or a client is acutely surprised at being forced to mediate. Indeed, when a court orders mediation of a complex or sensitive matter, or when opposing counsel has limited experience in a voluntary mediation, participants can fail to prepare in such a way as to enable a productive mediation, or react in such a way as to hobble the process from the start.

Suffice it to say, particularly when the trial judge "suggests" mediation, advocates and mediators are presented with additional challenges as they navigate the negotiations and options when they try to structure or design a mediation process that will (they hope) maximize the outcome.

While there is no "one way," we have learned enough to better articulate what may be more effective.

I've organized my experience into the order you would encounter particular issues in a mediation. Tracking the basic stages of the process, I outline specific opportunities for advocates (and mediators) to enhance both the quality and effectiveness of your time at the table, whether the mediation is voluntary or court-ordered.

First, a few disclaimers. One, these are general observations intended for complex or sensitive matters. Your situation, regardless of complexity, may require modifications. Two, I do not include "focusing on interests, not positions" or that you should "bring the right decision makers to the table." These, and other similar tips are sufficiently developed as to not require additional space here.

We'll start with what you might consider doing before the parties and mediators are ever in the same room and work through to final agreement.

I. Pre-Mediation

Mediator Selection: Two Recurring Issues.

Choosing a mediator is like choosing any other expert, except that you have to agree with your opponent about who to hire. If you choose badly, you may end up with a very dissatisfied client. While voluntary and non-binding, the process needs to be geared to work the first time, as most cases are only mediated once. Thus, in choosing a neutral, in a resolution of the more sensitive, difficult or complex matter, demonstrated experience is essential to maximize both the probability and the quality of the outcome.

The first issue: "If they like a mediator, he must be good for them, and bad for me." Don't let this myth (called "reactive devaluation") guide your hiring deci-

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sion. It's too simplistic. Assuming the proposed mediator has extensive experience, check out references—such as counsel on the other side of previous cases or someone you know on the reference list or in the geographic or subject matter area who can provide candid data.

Like the best sitting judges, there is often consensus as to who is effective. Caveats: (1) you have the right to know the mediator's experience with the other parties or their counsel...too much familiarity can affect objectivity, and (2) one lukewarm reference should not end your inquiry...anyone who is good will also create waves.

The second issue involves specific "subject matter" vs. substantial "process" experience (an issue which merits its own article). Given the present pool of mediators, you should get both. However, in balancing the two, consider that while subject matter knowledge is very important, it is substantial mediation experience that often brings closure to the most difficult cases.

Use a Mediator to Help Convene and Design Multiparty, Complex Mediations. Once chosen, an experienced mediator can greatly assist the parties in a variety of ways with discovery issues, streamlining and maximizing the benefits of the process.

Preliminary Organizational Telephone Conference. While sometimes a hassle to arrange, a conference call among all participants is critical to getting a complex mediation organized. If the mediator doesn't suggest such a call, you might. Your first contact with the mediator need not be (and should not be) at the mediation table.

There should be a specific agenda for the call (which generally just involves counsel) that might include:

- disclosure of potential conflicts of interest (you may want to find out if the mediator has worked with opposing counsel and its firm)
- clarity as to what is to be exchanged or shown only to the mediator
- status of discovery (if anything still needs to be exchanged before the mediation)
- settlement negotiations (identifying the toothpaste out of the tube: offers/demands)
- identifying necessary mediation participants
- outlining what you expect and might be expected at the mediation, and
- identifying the potential of non-monetary resolution options that might be explored prior to the mediation—if you or the other side has non-monetary interests, you will want to be prepared to meet them.

While one may cringe when mediators talk "win/win," there are often opportunities to create value. Such opportunities can be greatly enhanced, particularly those involving related companies, if they are explored before parties get to the table, so that they may be intelligently discussed as a way to narrow the gap in later negotiations.

Mediation Memo/Brief. Avoid the "exchange or not" limitation. There are different views as to what or even whether to exchange memos before the mediation and whether to limit material to "mediator's eyes only." The legal culture in places like Indiana, Florida, and Texas seems to limit exchange. Ultimately it is the decision of the parties.

My experience is that a client or counsel may quite appropriately provide certain confidential information only to the mediator (such as interests, creative settlement options or settlement approaches). However, the practice of providing only *ex parte* briefs denies counsel the early opportunity to accomplish many objectives that might be at the top of your agenda, such as to:

- Affect the decision maker on the other side. The purpose is not to convince, but to have a direct opportunity to educate that there are two very real sides to the story. Effective briefs in complex cases facilitate better settlements.
- Avoid surprise at the mediation, include all arguments and documents to be discussed at the mediation. While presenting a previously unknown expert report at the mediation is dramatic, it makes settlement that day difficult.
- Anticipate and deal directly with what the other side might see as the weaknesses of your case as well as the problems with their case. The mediator should not hear of your problems only from the perspective of the other side.

- Include copies of cases or articles which discuss key issues or copies of cases which are “misquoted” by the other side. There is no need to include copies of cases in string sites or cases citing generally accepted principles of law.

Thus, if there is information your client wants to keep confidential at the outset of the mediation, consider providing both a memo to the other side and a separate letter to the mediator.

As for the “mediator’s eyes only” custom, it also can create additional distrust due to the uncertainty of what the other side may be giving to the mediator. Further, mediators understand that when there is only an audience of one, facts and arguments may be stated a little less carefully than when they are also to be viewed by the other side. While it is helpful to educate the mediator, ultimately it is the other side that will eventually have to understand your position in order to write a bigger check or take a more reasonable settlement.

Finally, consider the other side as your “jury.” Avoid provocative statements (in the brief and at the mediation) that might push the other side away from the table.

II. The Mediation

Separate Meetings with Each Party and the Mediator Before the Joint Session. Strongly consider meeting with the mediator on the phone or preferably, face to face, prior to the mediation. The agenda might be to introduce your clients to the process and the mediator, fine tune the process in light of the particular issues involved in the case and materials exchanged prior to the mediation, and most importantly, educate the mediator as to issues beyond the facts and law which affect the resolution of the matter.

Traditional Opening Statements. Approach with caution. The pre-mediation exchanges should already provide an effective overview of the issues. However, the outset of a mediation is an opportunity to set a positive tone, particularly in a matter with parties involved in ongoing business. Finally, in a few particularly sensitive cases, I have seen effective apologies that did not affect legal rights and greatly facilitated negotiations with the plaintiff. Insincere apologies are not helpful, and often cause harm.

Joint Session. Consider an “issue by issue” point/counterpoint discussion as opposed to an opening statement. While your client—or you—may not want to meet jointly with the other side (parties often do not want to be in the same room), the same parties have often been quite surprised that an effective joint session can greatly facilitate settlement of difficult cases.

It is the mediator’s responsibility to keep the discussion focused, civil, and productive, but you can help by setting a good example and gently stepping in if the mediator lets the conversation stray from one issue to another to another.

Questioning Parties During the Joint Session. Few good litigators tolerate a discovery deposition as part of a mediation. However, decision makers often have questions whose answers can help move negotiations. Consider asking the mediator to limit questions to ones in which the asker does not know the answer. This works surprisingly well.

PowerPoint Presentations. Mediators must be sensitive to counsels’ opportunity to present their case as they see fit. In today’s laptop world, PowerPoint is a standard part of a litigator’s toolkit, and it may be part of your mediation. PowerPoint presentations can be effective or deathly dull.

The tension arises between acknowledging the importance of continuity in making a particular point and when to respond to an important issue. Consider suggesting to the mediator that the “non-pointing party” be provided an opportunity to respond to issues not at the end, but rather, at designated intervals chosen by the presenter. This can be done in a way to balance the tension, and provide a cure for the fact that opposing parties generally stop listening after about seven minutes, particularly when they disagree with what is being said.

Mediator as Negotiating Partner. While we may need to serve as an objective commentator, mediators can often best be used as a negotiating partner or advocate for settlement for each side (rather than someone to fight with).

III. Closing the Deal

Reduce Mediation Settlement to At Least a Binding Deal Sheet Executed by All Parties. It is after

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midnight, and the parties have just concluded a deal in principle and want to go home and “write up the deal tomorrow.” The mediator’s (or if necessary, your) added value here is to summon up the additional energy to get parties to get the deal points written down (unless, of course, the parties state otherwise) clarifying:

- Payment schedule
- Potential confidentiality
- Scope of the release
- Tax issues
- Non-disparagement or non-admissibility options
- Identity of relevant parties not at the table
- A drafting schedule for the final agreement, and
- Any other issues unique to the settlement.

While such a deal sheet may specifically anticipate a final agreement consistent with the terms of the writing, if executed by the parties, it should also specifically state

that it is a binding agreement as to the terms stated therein.

Final Thoughts

Conventional wisdom among litigators is that the best settlement occurs “when no one is happy.” This is too often the case, especially when settlement is delayed until the courthouse steps.

Counsel effectively resolve most disputes without mediators. Whether court suggested, ordered, or voluntary because negotiations reach impasse (“the other side is unreasonable”), mediation provides the option for clients to create joint gains, control the outcome, and better understand the settlement. While not necessarily “happy,” clients are generally much more comfortable with a final, thoroughly mediated resolution than even the same resolution achieved through unassisted, hasty negotiations crammed into an adversarial negotiation on the eve of trial.

Bill Hartgering, Esq. is a neutral with JAMS.

The Power of a Positive No

By William Ury, Bantam Books 2007

Reviewed by Richard Birke

Bill Ury is best known as one of the co-authors of the mega-best seller **Getting to Yes** and the solo author of the almost-as-widely-read **Getting Past No**. These two books spread, respectively, the gospel of interest-based bargaining, and a terse recipe for bargaining with difficult negotiators.

The first book – **YES** – taught such negotiators to separate people from problems, to bargain based on interests instead of positions, and to negotiate using one’s walk-away alternatives as a measure of power, i.e., BATNA. (How often do you make up acronyms that become this well known?) Its messages are so universally accepted now that they sound like folk wisdom. The book has sold more than five million copies, and it made Bill Ury a famous man.

The second book – **NO** – taught

would-be devotees of the **YES** approach how to negotiate with people who were disinclined to negotiate in an interest-based manner. Some of the disinclinations Ury describes are situational – you’ve backed them into a corner? Build them a “Golden Bridge.” Some are personality based: “Bring them to their senses – not their knees.” **NO** was written for the people who really wanted to get to “Yes,” but found themselves negotiating with people inclined to say “No.” If you haven’t seen the book, you ought to. The cover has a drawing of a businessman’s hand reaching to shake hands with another businessman (you can tell they are businessmen by their visible suit sleeves), but the second hand is a prickly cactus.

Now, in his third book, after teaching us how to get to “Yes” and to get past “No,” Bill Ury is back to tell us why sometimes “No” is the best answer.

Why is “No” okay? When is “No” okay? How does one get to “No?” Here’s a summary of the book.

First, Ury tells the story of the



medical tribulations his youngest daughter has endured. He describes seven major surgeries in the first seven years of her life. He describes the extraordinary caution required of her caretakers ("If she gets so much as a cold, she could die."). He tells the reader that he had to say "No" to a lot of things during this time – speaking engagements, invitations, and that sort of thing, but also "No" to medical personnel who were treating his child as a case instead of as an individual. Born in part from this experience came the idea that in order to say "Yes" to some things (in this case, his family), he had to say "No" to others.

But the "No" had to be a positive "No." He couldn't afford to alienate the doctors who were acting in a less-than-perfect manner. He didn't want to offend the people who thought so highly of him to invite him to consult or speak. So he had to determine how one says "No" in such a way as to leave open the possibility of a future "Yes." Ury teaches that many people accommodate, avoid, or attack when they want to say "No." He aspires to give people a better way.

Ury offers three stages, each with three parts:

Stage One: Prepare

1. Uncover Your Yes
2. Empower Your No
3. Respect Your Way to Yes

Stage Two: Deliver

4. Express Your Yes
5. Assert Your No
6. Propose a Yes

Stage Three: Follow Through

7. Stay True to Your Yes
8. Underscore Your No
9. Negotiate to Yes

Uncover Your Yes is a recipe for determining your interests. What do you really care about? If you uncover what you care about, your priorities will fall into line. *Empower Your No* is advice to make the best BATNA you can. If you can deal with the fallout of a "No," then you are more likely to stick by it. *Respect Your Way to Yes* suggests that you don't have to demonize the other person or make them feel bad just because you intend to say "No." He advocates that you listen and try to empathize.

In the *Deliver* portion, Ury offers some advice for those who fear saying "No" the wrong way. He suggests you use "I" statements, and that you keep the tone positive. *Asserting your No* has specific advice for "situational No's" (e.g., "I have a policy," "I have other commitments," or "I don't think I can do a good job.") and "No" based on behavior – "stop No's." In *Propose a Yes*, Ury summarizes **YES'** interest-based approach. *Invent Options for Mutual Gain* is a chapter in **YES** and a subchapter in **Positive No**. Ury suggests saying "later" instead of "No" (assuming "later" is truthful).

In *Follow Through*, Ury suggests ways to withstand their response. *Stay True to Your No* has a story of President Johnson refusing the resignation of one of his most trusted aides. The aide sticks to his guns despite Johnson's threat to conscript the aide into the military and order him to remain on staff. Advice runs the gamut from "pinch your palm" to "go to the balcony" (the latter a chapter in **NO**). *Underscore Your No* involves not caving in, and deploying your BATNA where necessary. In the final chapter, Ury re-emphasizes lessons from his prior books. Look for creative ways to create gain. Create good relationships. Help them tell their constituency a story in which "No" is an acceptable answer (build them a golden bridge).

The last word is a chapter called *Marrying Yes and No*. Ury closes as follows:

You don't have to choose between saying No and getting to Yes. You can do both.

You can say No...positively!

In closing, I wish you the kind of success that can come only from being true to yourself and respectful of others!

I will try to follow this sage advice.

When I am *True to Myself*, I have to admit that I didn't like this book. I don't recommend it. It isn't, in my view, Worth Reading.

Be Respectful of Others.

Bill Ury is a great guy. He's an accomplished mediator and author. His other books have plenty of content and are worth reading.

However, this book is just too thin. The message is important. Sometimes you have to say "No," and you needn't say "No" in a way that closes doors. But I think that if you have read his prior books, these lessons are

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apparent. In fact, many of the thoughts are reiterations of thoughts from his own prior books, albeit somewhat rearranged and reworded.

Moreover, there's more to **YES** than there was to **NO** and the taper is too great to justify reading **Positive No**. This book could have been an added afterword to one of the other books and I don't think anything would have been lost.

Finally, the lessons in **YES** were lessons that went against the grain of popular negotiation culture. It was common to conflate people and problems, common to bargain positionally. While the ideas in **YES** were not complex, they were somewhat radical in their juxtaposition with then-popular power/hardball negotiation methods. And **NO** was like an appendix to **YES**. It filled in an obvious question left behind from **YES** – What If They Won't Play?

In contrast, the lesson of **Positive No** is simple and well understood. We know that we shouldn't slam doors in people's faces. We try to let them down gently. We understand that we overcommit at our own peril. We

know that life is full of tradeoffs and that we can't say "Yes" to everything. The lessons of **Positive No** are lessons in accepting these well-understood truths and expressing them in action. To the extent that it's difficult to stand by your "No," I would recommend the book **Difficult Conversations** by Doug Stone and Sheila Heen. It traverses similar turf, but more thoroughly. Or Susan Newman's book, **The Book of No** – with the subtitle **250 Ways to Say It – and Mean It, and Stop People-Pleasing Forever**. Or even Carol Tavris' seminal work, **Anger: The Misunderstood Emotion**.

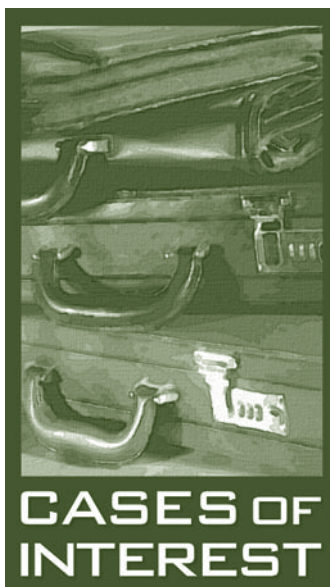
In fact, there are a great many books that I'd recommend you read before devoting your time to **Positive No**. And in part, this fact validates the main lesson of Ury's book. You have limited time and you have to make tradeoffs. In a world in which you only have time to read a small number of negotiation books, you might have to say "No" to Ury's to say "Yes" to someone else's.

So with all due respect to Bill Ury, when asked whether this book is Worth Reading (in a world of limited time and many great books tugging at one's attention), my answer is a "Positive No."

YOU CAN'T DISCLOSE A CONFLICT THAT HASN'T HAPPENED

Hayden v. Robertson Stephens, Inc., (Cal.App. 1 Dist., April 27, 2007)

Robertson Stephens, Inc. loaned money to David Hayden. Hayden defaulted on the loan and sued Robertson Stephens for breach of fiduciary duty. Robertson Stephens cross-complained to collect the loan. FleetBoston acquired Robertson Stephens and joined as a defendant. The parties agreed to arbitrate their dispute and selected a JAMS arbitrator. The arbitrator complied with all corporate and legal disclosure requirements, including past, pending, and prospective employment and the parties agreed that the arbitrator had no conflict of interest with either party. In October of 2003, the arbitrator made an interim award authorizing Robertson Stephens to collect. Shortly thereafter, Bank of America acquired FleetBoston. In June 2004, the arbitrator finalized the award.



Robertson Stephens moved to confirm the award, and Hayden moved to vacate, alleging that the acquisition of Fleet by Bank of America created a conflict of interest between the arbitrator and the parties, namely, that JAMS had provided prior service to Bank of America. Hayden's motion to vacate was denied and he appealed. The California Appeals Court affirmed the denial of the motion to vacate, holding the arbitrator did not have to disclose his or JAMS' relationship with Bank of America because Bank of America was not a party to the dispute at the time that the disclosures were required. The Court held that a parent corporation is not a party to a dispute unless it was "involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding."

Because Bank of America was not in the picture at the time of the original dispute, it would have been absurd for the arbitrator to disclose prior work conducted by JAMS for the Bank.

FAA STATUTE OF LIMITATIONS TOUGH TO TOLL

Dalal v. Goldman Sachs & Co., WL 1334972 (D.D.C., May 7, 2007)

Sandeep Dalal and Goldman Sachs resolved an employment dispute through arbitration. The \$25,000 award in favor of Dalal was about to be announced when Dalal requested that his name be deleted from the public announcement. The revised version was promulgated on January 20, 2006. On February 8, 2006, Dalal requested an upward modification of the award; Goldman responded on February 22, 2006. The arbitration panel denied the request on March 9, 2006. On June 8, 2006, Dalal filed a suit in the District Court appealing the denial, relying in part on the FAA. The Court ruled Dalal's FAA claim was time barred because there is a three month statute of limitations on FAA claims. The statute of limitations started on December 7, 2005 – the date that Dalal was originally notified on the award – and expired in March. The Court cited FAA section 11, which states, "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

LACK OF PRIVITY NIXES ARBITRAL COLLATERAL ESTOPPEL

Digene Corp. v. Ventana Medical Systems, Inc. (D.Del., May 9, 2007)

Digene Corporation held a patent on Human Papilloma Virus paste, a substance used for testing for the disease. Digene cross-licensed the patent to a competitor which then sub-licensed the product to Beckman Coulter, Inc. Ventana Medical Systems began purchasing HPV paste from Beckman and using it in its product line. Digene sued Ventana and Beckman for patent infringement. Digene and Beckman went to court-ordered arbitration, and the arbitration panel held for Digene. Digene then sought to employ collateral estoppel against Ventana, arguing that Ventana had attempted to intervene in the arbitration, Ventana's attorney represented Beckman during arbitration, and Ventana reimbursed Beckman for attorney fees. The court denied the motion, holding that Ventana and Beckman were not in privity and that Ventana did not have a full and fair opportunity to litigate, despite use of the same attorney in a substantially

identical matter, and therefore the Digene-Beckman arbitration had no preclusive effect on Ventana.

DVD MAKES GREAT CLAY PIGEON BUT NOT A PUBLIC POLICY ARGUMENT

NetJets Aviation, Inc. v. International Brotherhood of Teamsters, Airline Div., 2007 WL 1412307 (C.A.6, May 15, 2007)

NetJets and the Teamsters sent a DVD to all pilots in the union promoting a tentative new collective bargaining agreement. A pilot opposed to the CBA posted a video on the internal union website showing him shooting the DVD with a rifle. NetJets fired the pilot and the union filed a grievance. Under the controlling CBA, the grievance went to the System Board of Adjustment to arbitrate the dispute. The System Board reinstated the pilot and NetJets appealed to the District Court claiming a violation of public policy. The court held that public policy review was not permitted under the Railway Labor Act and enforced the award. The Court of Appeals affirmed, stating that the award did not violate any public policy that conceivably could warrant vacating the RLA arbitration award.

PARTIES HAVE TO LIVE WITH ARBITRATOR'S MISTAKES

American Laser Vision, P.A. v. Laser Vision Institute, L.L.C. (C.A.5, May 16, 2007)

Ophthalmologists Frazee and Selkin formed American Laser Vision and opened laser vision correction centers; ALV then contracted with The Laser Vision Institute for management of the centers, non-medical personnel, and equipment. Selkin left the practice claiming interference with his medical decisions, but Frazee and ALV continued to work with LVI. Selkin bought Frazee's interest in ALV and sued LVI for breach of contract. The case went to arbitration, where the arbitrator considered on his own that Selkin and Frazee were not partners, but independent contractors. Selkin and ALV won \$1.8 million. The district court affirmed the award, and LVI appealed on the basis of manifest disregard of the law and other grounds. Reviewing the case *de novo*, the Fifth Circuit held that so long as the award is 'rationally inferable' from the contract, it will be upheld. The Court also said that arbitration has advantages and disadvantages,

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Cases of Interest *Continued from Page 7*

and that arbitrator errors are part of the disadvantages – hinting that the arbitrator made mistakes but that the parties contracted for a process in which mistakes would be unreviewable.

MEDIATION PRIVILEGE UPHELD BECAUSE OF ALTERNATIVE WAY TO PROCURE EVIDENCE

Harris v. Euronet Worldwide, Inc. (D.Kan., May 29, 2007)

Darrel Matthews sued Euronet for racial discrimination. Matthews' attorney was Brendon Donelon. During a mediation between Matthews and Euronet, Jerry Harris contends she was identified as a witness willing to testify on behalf of Matthews. Three weeks after the mediation, Harris was terminated and filed a complaint against Euronet for retaliation. Harris hired Donelon to represent her. Euronet attempted to depose Donelon about statements regarding Harris made at the Matthews mediation. Harris moved for a Protective Order to prevent the deposition. The district court granted the Protective Order, stating Euronet would have to show that it had no other means to obtain the information than to depose Donelon. Euronet failed to meet this requirement as two of its employees were present at the Matthews mediation and could testify.

SETTLEMENT MOOTNESS DIFFERENT THAN CASE BASED MOOTNESS

NASD Dispute Resolution Inc. v. Judicial Council of the State of California (C.A. 9., May 30, 2007)

NASD Dispute Resolution Inc. and the New York Stock Exchange both maintained their own securities arbitration services with standards that conflicted with standards promulgated by the statutorily created Judicial Council of California. NASD and NYSE sued, arguing that federal securities law preempted the California legislation. The case was dismissed by the district court on 11th Amendment grounds. JCC appealed, but before the appeal was heard, the 9th Circuit held in a different case that federal securities law preempted California standards, thereby making the instant case moot. The parties agreed the case was moot, but NASD appealed for vacatur of the district court's decision and

asked for remand with instructions to dismiss. The 9th Circuit stated that the Court has an obligation to consider mootness on its own notwithstanding established practice in the Court of reversal with direction to dismiss in cases where the issue becomes moot mid-appeal by way of settlement. The Court held that judgments made moot by court decisions in other cases are not subject to the same exception, and vacated the award with instructions on remand to dismiss the case.

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