JAMS DISPUTE RESOLUTION
ALERT
An Update on Developments
in Mediation and Arbitration

Winter 2014

Engaging Neutrals for Mock Exercises Provides Invaluable Insight

IN DEPTH

Not long ago, lawyer Roland Tellis was handling a high-stakes securities case involving alleged investment fraud and was facing an upcoming summary judgment motion in advance of a settlement conference. As part of his preparation, Tellis hired three JAMS neutrals, all retired district court judges and all with similar profiles to the real judge in the case in terms of number of years on the bench and specialties practiced before judging. The three neutrals were asked to give wholly blind opinions of the summary judgment motion, meaning none of them knew which side was asking for the mock ruling. The neutrals were given 10 days—and a 10- to 20-hour limit—to read the pleadings and provide a reasoned opinion. All three neutrals decided the case the same way, but for three widely different reasons. The case wound up settling.

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WHAT'S INSIDE

1979 2014 *JAMS celebrates 35 years of ADR excellence.*

ADR CONVERSATIONS

More Energy, More Deals, More Disputes

The U.S. had its highest level of exports of crude oil in 57 years this past July, according to the U.S. Energy Information Administration. Some say the U.S. is poised to overtake Saudi Arabia as the number-one producer of oil in the world in the next couple of years. Along with the increase in production and exportation of energy comes more energy deals, which often means more disputes that need to be resolved. The large amount of time and people involved in energy projects typically requires complicated contracts among various entities. Although much thought and planning is given to basic terms such as price, timing and other specifications, the "get the deal done" mentality takes over, with little thought given to how these multi-million-dollar disputes will be handled.

The following interview was conducted with individuals involved with energy disputes on various levels, from mediation to arbitration, domestic to international. They are John P. Bowman, Partner, King & Spalding;

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"I would do it again, for sure," Tellis says of hiring neutrals for the neutral analysis exercise.

While simulated juries often provide huge insight into case themes and the likability of witnesses, dispositive motions decided by judges before trial sometimes also need that kind of experiential treatment. Plus, "just like when a trial lawyer interviews a juror after trial, there was a ton of value in speaking with retired judges who gave the opinions," adds Tellis, who serves as co-manager of Baron & Budd's Los Angeles office. "We were also able to bounce the reasoning of the different judges off each other and discovered ways to position the motion before it was too late."

Roland Tellis, Esq., Co-Manager, Baron & Budd

In addition to gaining information about the strengths and weaknesses of their clients' positions, lawyers have found that mock rulings can be used for strategic purposes as well. During settlement discussions, lawyers have the option of informing the other side that they've gone through the exercise. "It can provide a leverage point that can be pretty compelling," he says.

For Tellis, engaging neutrals in this way is worthwhile whenever it's critical to "handicap the odds or when you can't leave the decision to chance." In one case, he sought a neutral's input after receiving a summary judgment ruling that was based solely on procedural grounds, rather than on substantive issues. "I wanted an analysis of the case on the merits in advance of trial," and a retired judge provided that.

"I view it as a reality check," adds Stuart Sender, an intellectual property litigator at Budd Larner in New Jersey. "You get so engrossed in details of your case, you start breathing your case." So asking former judges to evaluate pleadings and preside over mock trials before the real thing provides an important outside perspective, "a fresh pair of eyes," Sender says. "That feedback is invaluable."

Stuart D. Sender, Esq., Shareholder, Budd Larner

Matthew Becker, a patent litigator at Axinn, Veltrop & Harkrider in Connecticut, believes that mock trials can be particularly helpful when lawyers are able to find neutrals who "track the tendencies of the trial judge."

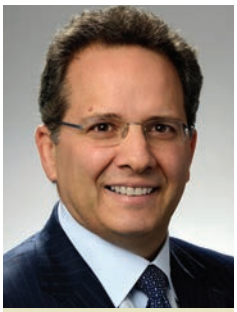
While Becker frequently conducts mock trial exercises with colleagues at his firm or in-house lawyers assessing presentations to hired mock jurors, he points out that all of those lawyers "have horses in the race." So using an outside neutral can be particularly helpful in those situations when the lawyer seeks a fresh perspective. "Despite your best efforts, being as immersed in the issues as lawyers tend to be, working day and night, it can sometimes be difficult to identify every potential attack on your position. In these situations, a neutral can provide valuable feedback."

> **"[I]t can sometimes be difficult to identify every potential attack on your position. In these situations, a neutral can provide valuable feedback."**
>
> –Matthew Becker

Patent lawyer Dominick Conde has been hiring neutrals for this purpose for years. Recently, he engaged three former judges to evaluate what he calls a "clopening"—part opening argument, part closing argument—in a pharmaceutical case. He sought out three judges who were similar in one way or another to the actual judge in the case; two were women like the actual judge, and one had served on the same court. "They either knew our judge or were a similar demographic," explains Conde, a

partner at Fitzpatrick, Cella, Harper & Scinto in New York. The exercise, which took "the better part of a day," included "a fairly extensive feedback process."

Conde has also used neutrals early in litigation to vet case theories and, as cases move closer to trial, to analyze "our best and the other side's best arguments and to give feedback on presentation." He's also conducted mock trials with live witnesses, which is particularly beneficial for the witnesses themselves, he explains.



Dominick Conde, Esq., Partner, Fitzpatrick, Cella, Harper & Scinto

Importantly, using neutrals in this way often has a broader benefit beyond the case itself, according to Conde. "The interesting thing about mock exercises is that it's always helpful to get insight into how judges think," he explains. "Lawyers don't normally get the opportunity in a non-courtroom setting to pick judges' brains about these issues." Winning or losing largely depends on the witnesses and the facts in the case, "and you probably already know which part of your case is weak or strong," he says. "But learning how a judge thinks—that's pretty insightful."

Neutral analysis exercises are also beneficial at the appellate level. Matthew Lembke, for instance, has hired former appellate judges as many as 10 times to read briefs and hear oral arguments before the real thing. "Obviously, they have real-world experience, and their reaction gives a real-world perspective" on the issues, explains Lembke of Bradley Arant Boult Cummings in Birmingham, Alabama. "We discuss the way the case should be argued and the points that are more likely to resonate" with the ultimate decision-maker. Invariably, during the mock appellate argument, Lembke gets thrown at least one question from the neutral that he'd not anticipated. "They're questions raised by brief, and I'm often too close" to the issues to have considered them, he says. Also invariably, Lembke ends up getting asked those very questions later during the real oral argument.

"A former judge will frequently ask hard questions, and there's nothing better for an advocate than to have those questions asked before going into the courtroom," says Robert Heim, a litigator with Dechert in Philadelphia. At the appellate level, mock arguments are especially helpful when there are multiple issues. "A former justice can provide thoughtful views on how all of the issues should be balanced in the argument. Sometimes, the neutral will say, 'I wouldn't make that argument at all.'" The discussion "around the conference room table afterwards" is particularly useful when the former judge gives advice about "how to use your time, how to deal with questions you need to answer but may not have time to. They also explain nuances of court procedures that you wouldn't get just by reading about them."

"Obviously, [former appellate judges] have real-world experience, and their reaction gives a real-world perspective…."

—Matthew Lembke

"[Former judges] also explain nuances of court procedures that you wouldn't get just by reading about them."

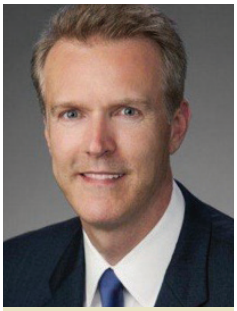
—Robert Heim

The cases most ripe for this kind of exercise are those with "great monetary value or with precedential impact to the industry." Every client Lembke has presented the option to has authorized him to do it, he notes, adding that he self-selects the cases before suggesting the option to the client. "In every instance I've done this, it's made me better prepared." ●

More Energy, More Deals, More Disputes Continued from Page 1

Zela "Zee" Claiborne, Mediator and Arbitrator at JAMS; Scott D. Marrs, Partner, Beirne, Maynard & Parsons; and Paul G. Yale, Shareholder, Gray Reed & McGraw P.C.

Q. Why is arbitration a good way to handle energy disputes?



Scott D. Marrs, Esq., Partner, Beirne, Maynard & Parsons

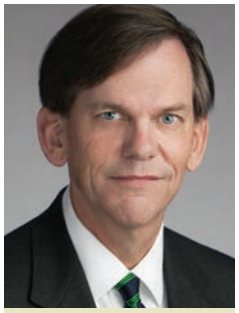
A. **Scott D. Marrs:** Energy contracts usually entail significant capital costs and political risks, and [arbitration] is the perfect cross-border type of mechanism to resolve disputes, especially in energy deals, where there is political instability or parties don't trust host countries' laws or courts. I highly encourage [arbitration provisions], but only if you have the right language. If you don't have the right language, then you have the evil twin of litigation.

You want to control your destiny, and it's all about allocating risk in an energy deal, so you have to mitigate that risk when it comes to multi-million-dollar lawsuits to make sure you have a level playing field, so that's where arbitration is well-suited.

John P. Bowman: Domestically, energy arbitration is increasing because of the belief that having arbitrators with oil and gas experience is important to the outcome of the case. You want someone who knows the industry and is not easily bamboozled with respect to a persuasive lawyer or advocate. Having an arbitrator who knows the industry will help avoid that type of problem.

Q. What types of energy disputes are you seeing?

A. **Zela "Zee" G. Claiborne:** The place where I see the rise now is in alternative energy cases that have to do with solar and wind, bio gas facilities, hydroelectric power plants. I really think it's a growth area with a new strain of cases coming along.



Paul G. Yale, Esq., Shareholder, Gray Reed & McGraw P.C.

Paul G. Yale: We see upstream, midstream and downstream disputes. Upstream disputes are closer to the field where production occurs; they can be between the landowner and the oil company over who gets paid what. Midstream disputes are over gathering and transportation of the product, either oil or natural gas, between pipeline companies and producers; and downstream are refineries, gas stations, where the product is ultimately transported to, sent by truck to gas stations and sold to consumers, so these can be antitrust disputes. Environmental issues can come up in all three kinds, disputes by landowners over contamination of water supply and a lot of lawsuits over fracking. The higher the price of oil goes, [the] more people are inclined to dispute, and we see commercial, regulatory and private contract disputes.

John P. Bowman, Esq., Partner, King & Spalding

JB: There are two main types of disputes: international oil company [IOC] versus host government or national oil company over production sharing contracts or possibly other petroleum agreements, or they could be area-of-mutual interest or confidentiality disputes. We are seeing more of what we call mega projects, by definition more than $10 billion, which have huge political risk because these are long-term agreements with lots of commercial and investment disputes.

We are also seeing more disputes between IOCs and international service companies, the Baker Hugheses, Halliburtons, the big international oil field service companies, where contracts are in the hundreds of millions of dollars. We are seeing more construction-related disputes.

Q. Why the rise in energy arbitration?

A. **ZC:** There are more international cases because business is more international.

Zela "Zee" G. Claiborne, Esq., JAMS Mediator and Arbitrator

Alternative energy is especially a growth area I have seen in the last five years. Energy cases are large and complicated and extremely expensive to litigate. By selecting arbitrators with experience in the subject matter as well as in managing the arbitration process, parties can get an efficient and fair resolution of their dispute in a reasonable amount of time.

SM: The sheer number of deals that are being done over the last 10 years has gone up exponentially, and companies are starting to realize that arbitration really is better than litigation. It is also more efficient if you draft the arbitration provision correctly.

JB: International arbitration has always been high, but there has been an increase as a group [domestic plus international disputes] because of the rise in oil and gas prices, more and more projects; more mega projects in the international arena means more international disputes going to arbitration.

Q. Where are you seeing most of these cases?

A. **PY:** Texas is still the leading oil- and gas-producing state, so we have the most energy disputes here. Having said that, there are also cases in Louisiana because the offshore industry is headquartered there, as well as other oil-producing states, including North Dakota, California, Oklahoma, Colorado, New Mexico, Utah, Montana, Pennsylvania, Ohio, West Virginia, even the Florida panhandle.

SM: Most arbitrations are done primarily in Houston, certainly in Texas. International deals [are] done in Texas or New York unless foreign parties try to cram Paris in there.

JB: At the moment, as a snapshot, [there is] India, Venezuela, Caribbean countries, Algeria, Kazakhstan, Mozambique, Tanzania, Canada—wherever there are significant oil and gas projects.

ZC: I tend to hear cases in different parts of the country. In one recent case, a dispute between joint venture partners from the U.S. and India, the mediation was in New York.

Q. What other tools are you using to solve disputes?

A. **JB:** If it's a construction dispute, you might see a dispute resolution board that is impaneled at the front end of the project to be on call to handle those disputes as they arise on a daily basis to get them resolved. On the domestic side, mediation is still very important, but on the international side, that's less likely to be used. Normally, you go to arbitration.

PY: In Texas state court, any energy litigation will go through a mediation process before it goes to trial. Mediation increases the chances of settlement, so fewer cases are tried, and we have crowded dockets. We don't have enough courts.

In Texas, it's mandatory for nearly 100 percent of all disputes to be court ordered to mediate first.

ZC: Usually, contracts have a three-step process that's pretty typical: The first step is executives from both sides would negotiate with each other and try to get a resolution; and then if they can't, a third-party mediator is called in to mediate the dispute, and hopefully there's a resolution; but if not, then the next step is go to arbitration within a certain period of time. ●

FEDERAL CIRCUIT COURTS

"Direct Benefits" Bind Non-Signatory to Arbitration

Everett v. Paul Davis Restoration

2014 WL 5573300
United States Court of Appeals, Seventh Circuit, November 3, 2014

Matthew Everett and his wife were co-owner-operators of a Paul Davis Restoration (PDR) franchise, and his wife was not a signatory to any agreements. PDR rules require that any co-owner sign all agreements and that PDR be notified of any change in ownership. Despite knowledge of these rules, Ms. Everett never signed anything, and the couple transferred 95 percent of the ownership to Ms. Everett.

PDR terminated the franchise for cause, but the Everetts continued to operate the same business with a new name and an email campaign that read "Same Great Service under a New Name!"

PDR initiated arbitration. Ms. Everett filed suit seeking a declaration that she was not compelled to arbitrate because she didn't sign the arbitration agreement. The district court denied her motion, and the arbitration resulted in a unanimous award against her, but the district court reversed itself, holding that Ms. Everett did not directly benefit from the franchise and was not bound by the arbitration clause. PDR appealed.

The U.S. Court of Appeals for the Seventh Circuit reversed. The Court noted that "[t]ypically, the fact that Ms. Everett never signed the franchise agreement would be the end of our discussion…[However,] under the doctrine of direct benefits estoppel, a non-signatory party is estopped from avoiding arbitration if she knowingly seeks the benefits of the contract containing the arbitration clause."

The Court found the benefit flowing to Ms. Everett directly from the contract was the same as that flowing to her husband and the business; that is, the signatories to the arbitration agreement. These benefits were name, goodwill, reputation and more. The Court summed by writing, "The only way the benefits flowing to Ms. Everett could have been more direct would be if she had signed the agreement as a principal owner, as she was in fact obligated to do under the agreement."

Facebook IPO Snafu Not Subject to Arbitration

NASDAQ OMS Group v. UBS Securities

2014 WL 5486457
United States Court of Appeals, Second Circuit, October 31, 2014

UBS chose not to pursue an SEC-sanctioned method for obtaining relief from NASDAQ for more than $350 million in injuries associated with the IPO for Facebook. (These injuries were the result of the failure of NASDAQ computers to adequately manage the project.) Instead, it chose to pursue arbitration. NASDAQ filed for a declaratory judgment to preclude UBS from pursuing arbitration. The district court granted a preliminary injunction, and UBS appealed.

UBS argued to the United States Court of Appeals for the Second Circuit that the district court erred in exercising federal question jurisdiction in a case involving only state law claims, that the arbitrability questions are for the court, not an arbitrator, and that UBS' claims are not arbitrable. The Court found no error in these ruling and affirmed.

As to whether a federal question was implicated, the Court wrote, "UBS's arbitration demand makes plain that a singular duty underlies all four of its claims: NASDAQ's duty to operate a fair and orderly market…This is its primary obligation to the investing public and to entities such as UBS. NASDAQ violated this obligation.'… The duty UBS identifies—indeed, the very language it employs—derives directly from the Exchange Act."

As to arbitrability, the Court wrote, "The law generally treats arbitrability as an issue for judicial determination unless the parties clearly and unmistakably provide otherwise…UBS and NASDAQ made no such alternative provision here."

However, the Court then found that the contract excluded from arbitration disputes "as provided in NASDAQ OMX Requirements." These requirements basically insulate NASDAQ from any liability associated with its hardware. "Our singular purpose is to discern the scope of a broad arbitration provision that is specifically limited by, among other things, NASDAQ rules. Because Rule 4626(a) specifically disallows member claims against NASDAQ for losses sustained in trading securities on that exchange, we conclude that the parties did not intend to submit such foreclosed claims to binding arbitration."

One Arbitration Provision Produces Two Outcomes Based on Different Prior Contracts

Sharpe v. AmeriPlan Corp.

2014 WL 5293707
United States Court of Appeals, Fifth Circuit, October 16, 2014

AmeriPlan terminated more than 800 sales directors and sent a final commission check in February 2011. In 2012, Robert John Sharpe filed a putative class action against AmeriPlan for breach of contract, misrepresentation and similar claims, alleging that he and the other sales directors were entitled to lifetime commissions. AmeriPlan moved to compel arbitration pursuant to the contracts between itself and the sales directors. The district court allowed the motion, and Sharpe and the plaintiffs appealed.

Most of the sales directors, Sharpe included, had contracts that required mediation, and if mediation failed, the parties could litigate. However, when a Dallas County jury awarded $5.5 million to a sales director who was denied lifetime commissions, AmeriPlan added an arbitration provision to its employee manual. AmeriPlan relied on this provision in its motion to compel arbitration.

The Court found the provision ineffective. "Ordinarily, an amendment to a contract would supersede prior conflicting provisions, but that is not the case here for two reasons. First, the Broker and Sales Director Agreements, which contain the original dispute resolution provisions, 'may not be changed except by written amendment duly executed by all parties, except as otherwise provided in this Agreement.' So although the Manual could be amended without the need for a written agreement executed by all parties, such an amendment could not override a provision in the Broker and Sales Director Agreements. Otherwise, amendments to the Manual could undo the Broker and Sales Director Agreements in their entirety, rendering the 'written amendment' requirement a nullity."

Moreover, the Court found that AmeriPlan was estopped from arguing that the Sales Director Agreements were superseded. "AmeriPlan relied on the venue clause, which is included in the dispute resolution provisions in the Sales Director Agreements but does not appear in the arbitration provision of the amended Manual, to transfer the case from the Central District of California to the Northern District of Texas, and thus is estopped from arguing that the dispute resolution provisions are no longer in effect."

The Court found that other sales directors' contracts did not contain a "mediate then litigate" clause, but instead included a clause that names the venue for dispute resolution. The Court found no conflict between these contracts and the later-added arbitration provision. Thus, those with Sharpe-like provisions were not compelled to arbitrate, while the others were.

Where Arbitral Forum Is Unavailable and Integral to the Agreement, Court Cannot Name a Substitute

Inetianbor v. CashCall, Inc.

2014 WL 4922225
United States Court of Appeals, Eleventh Circuit, October 2, 2014

Abraham Inetianbor borrowed $2,600 from CashCall. After paying back more than $3,200 over 12 months, Inetianbor thought he had fully repaid his loan. CashCall disagreed and continued to bill Inetianbor, and eventually, CashCall turned Inetianbor's account over to collections.

Inetianbor sued CashCall for defamation, for damage to his credit rating and other claims arising out of the alleged loan default. CashCall moved to compel arbitration pursuant to the contract between the parties. That contract called for arbitration "conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement." However, when approached, the tribe indicated that it did not have anything to do with arbitration. After several back-and-forths between the court and the tribe, the trial court ruled that the arbitration organization was unavailable; therefore, it denied the motion to compel.

CashCall appealed, and the United States Court of Appeals for the Eleventh Circuit affirmed. The Court found that while in many instances, the unavailability of the arbitral forum allowed a court to substitute the arbitrator, or where the forum selection clause is invalid but severable, this case was different. The Court found that "the designation of the tribe as the arbitral forum is integral to the agreement, so arbitration can only be compelled if that forum is available."

The Court concluded that "[b]ecause the selected forum is unavailable, a substitute arbitrator pursuant to 9 U.S.C. § 5 cannot be appointed under the terms of the contract we consider here." ●

Mandatory Mediation Programs Successful in Clearing Dockets

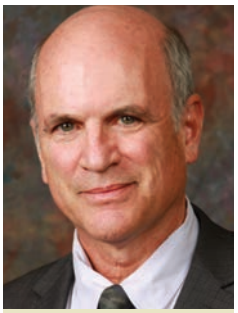
Mandatory mediation programs in state courts have demonstrated their usefulness by assisting parties with reaching settlements more rapidly and cost-effectively, thereby reducing court dockets and strain on the courts. State courts began instituting ADR and mandatory mediation programs more than two decades ago, using both volunteer and paid mediators to assist parties with resolving cases, while reducing court costs and shrinking delays in court dockets. According to practitioners and experts in the field, the programs have been successful in their stated goals and have expanded in certain areas, but they have also been victims of budget cuts.

Laura Kaster, a mediator and arbitrator in Princeton, New Jersey, and the New Jersey ADR Practitioner of the Year in 2014, said New Jersey's mandatory mediation program for civil cases has been "very successful, changed the culture, brought more people into the field and increased the number of people trained in mediation."

Kaster noted that while attending mediation is mandatory, settling a case is not, so it does not run counter to the mediation principle that the process should be voluntary when it comes deciding whether or not to settle a dispute. "It is very helpful to have a method to support the process whereby the parties are able to choose the mediator, the process and whether to settle," she explained.

Laura A. Kaster, Esq., Mediator and Arbitrator

According to Kaster, "most parties engage in good faith in mediation," and "attorneys in the bigger firms are seeing how mediation can reduce the cost of the litigation process." She also suggested that "while many of these cases would settle without mediation, the process significantly advances the date of settlement."



Joe Markowitz, Esq., President, Southern California Mediation Association

Joe Markowitz, a lawyer and mediator in Los Angeles and president of the Southern California Mediation Association, said Los Angeles had "maybe the largest mandatory mediation program in the country, but that due to budget cuts, [it] was eliminated last year." However, when the program was up and running, it was responsible for "processing and settling thousands of cases a year." According to Markowitz, "the mediation program was most successful in giving parties the chance to have their case heard by a neutral person who provided them the opportunity to have their concerns addressed."

He suggested that "court-connected mediation programs should not only be judged based on settlement rate or whether they reduce the workload of the courts. The purpose of courts is not to reduce their workload, or even to dispose of cases, but rather to allow litigants a chance to have their concerns heard and to have their disputes resolved in a fair way," he said. "That is what mediation does, which is especially important since it seems to be getting more difficult to have disputes resolved to parties' satisfaction in court." Markowitz said that since the program was discontinued, "some cases are languishing in limbo, while others have been settled by using local or national private ADR providers.

Richard Reuben, James Lewis Parks Professor of Law and Journalism at the University of Missouri School of Law, said, "Mandatory mediation was one of the key ways the legal profession was introduced to ADR and was key to educating the bar and the court about the possibilities for resolving cases earlier in the litigation process." It "absolutely helped change the culture in a significant way and brought ADR to the attention of lawyers and its usefulness."

Mandatory mediation played a "hugely important role and has been helpful in getting cases off the docket more quickly," he said, adding, "Parties like the process, even though they're compelled to participate." Furthermore, "mediation can be very effective in getting parties to better understand their case and give them a more realistic approach to settlement," he suggested. "It also gives parties a good evaluation of the strengths of the other," he added. He noted that while court-connected mediation programs can be more legally focused, and thus deprive parties of some of the benefits of facilitative mediation, "they are still effective at moving cases off the docket."

Holy Mediation! Good Shepherd Mediation Program Celebrates 30 Years of Peacemaking in Philadelphia

"One person is of more value than a world" is a motto of the Sisters of the Good Shepherd, a Roman Catholic order originating in Angers, France. Today, the Good Shepherd Mediation Program (GSMP) in Philadelphia still holds this concept—save one person and it impacts the whole world—as one of its guiding principles.

Cheryl Cutrona, Executive Director, Good Shepherd Mediation Program

GSMP's Executive Director, Cheryl Cutrona, recounted how a community needs assessment conducted in 1982 by Sister Brigid Lawlor revealed that in the northwest community of Philadelphia, the neighbors were very concerned about escalating violence, particularly with young people. To address these concerns, the nonprofit Good Shepherd Mediation Program was established in 1984. Its mission was to offer free and low-cost mediation services to low-income people; they began with parent-youth and landlord-tenant mediations, but today they offer a long list of services, including youth mediator training, conflict coaching and elder mediation.

"We leveraged the 100-year relationship we had with Philadelphia Family Court to start doing parent-youth mediation," explained Cutrona. "We put together an adult mediator and a teen mediator who would co-mediate with the parent and youth over whatever issues brought them there: school attendance, curfews, sibling relationships, communication."

When asked what else they do, she answered, "You name it; we do it, including training in basic mediation, 40-hour divorce and custody mediation training, conflict coaching. We do a lot of community training, and that's how we support the free and sliding-scale mediations that we do."

GSMP's newest program is part of a $4 million grant from the Office of Juvenile Justice and Delinquency Prevention. The funds will be shared between the school district, police department, family court and GSMP. "We are the only nonprofit involved; the rest are city agencies," said Cutrona. "Our job is to go into the schools when there are multi-party issues, like girl gangs or first-time offenders. They don't want to arrest the kids, so instead, we provide intervention; this

Good Shepherd
MEDIATION PROGRAM
Where Conflicts Can Be Resolved

is a pre-arrest diversion program so kids don't have to go to jail." In addition, this grant provides for GSMP to train several hundred school police officers in mediation and conflict communication, resolution and de-escalation skills.

GSMP also has a contract with the Department of Human Services for a Juvenile Offender Diversion Program, a post-arrest diversion program where they train 500 young people, first-time offenders, in communication and conflict resolution skills. They also do custody mediation at court, where they have two mediators on duty every day the court is open. "We facilitate pre-hearing conferences, where they talk about placement services and visitation of the children," Cutrona said, estimating they do between "1,700 and 2,000 of these hearings a year because 10,000 children at any time in Philadelphia are in the system."

John Delaney, Deputy District Attorney for Trial Division, has known GSMP for more than 20 years. "Good Shepherd helps us train panelists who volunteer in neighborhood panels that hear cases and devise a contract for first-time, non-violent juvenile offenders so they have the chance to have their arrest records expunged and get back on the right path," he said.

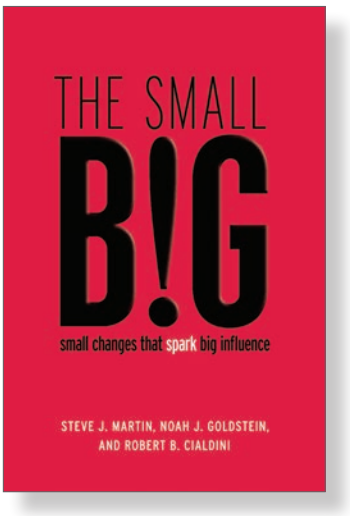
GSMP and Cutrona have traveled around the world with their programs. They were the first to train blacks and whites together after apartheid ended in South Africa, and their training manual was translated into Zulu and Afrikaans. They also went to Israel, where they practiced their listening and neutrality skills.

But the majority of their work remains rooted in Philadelphia. The newest grant GSMP is hoping for will fund conflict resolution education for children of incarcerated and returning parents. "Our mission is community mediation," said Cutrona. "That's what we do." And one by one, they are undoubtedly changing the world.

The Small Big: Small Changes That Spark Big Influence

By Steve J. Martin, Noah J. Goldstein and Robert B. Cialdini

REVIEWED BY RICHARD BIRKE



Nothing is more important to negotiation success than getting the other side to say yes. The formal study of this critical aspect of negotiation is called "persuasion science," and no expert is more accomplished or recognized in this endeavor than Robert Cialdini, professor emeritus of psychology at Arizona State University.

Thirty years ago, Cialdini wrote the book *Influence: The Psychology of Persuasion*, which has now sold millions of copies, was translated into more than 25 languages and has been named by *Inc.* as an "all-time top-10" business book. *Influence* described six principles that accounted for the vast percentage of successful attempts to persuade. These principles, briefly, are as follows:

- **Reciprocation of Concessions:** People feel obliged to reciprocate for acts of goodwill, even if the act produces no value and was not requested or wanted.
- **Authority:** Perceived authority causes changes in decision-making, even when the authority is more imagined than real.
- **Scarcity or Deadlines:** Fleeting offers or disappearing commodities seem more valuable than if they were plentiful or available on request.
- **Social Proof:** If a choice appears to be endorsed by a large number of strangers, a negotiator is likely make the same choice.
- **Liking:** People say yes more to people they like.
- **Commitment and Consistency:** People tend to stay consistent with prior commitments they have made, even if those commitments were made without any deliberation.

The stories and lessons from *Influence* are entertaining, important and fairly short. One quick read will demonstrate clearly why this book is so well-regarded. Here's a short version of one of my favorite stories from the book.

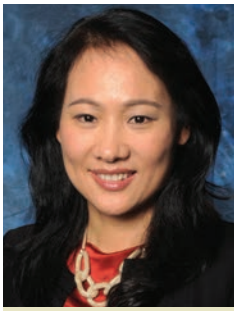
Cialdini sent graduate students to downtown Tempe, Arizona, to ask passersby if they would be willing to "chaperone a group of juvenile delinquents to the zoo on one Saturday for a field trip." About 15 percent said yes. But then Cialdini changed the experiment. His students were instructed to ask first, "Would you be willing to spend a day a week every week for two years mentoring a delinquent?" After a negative response, the questioner then asked the original question about the field trip. More than 50 percent of the people agreed to chaperone! It's a demonstration of the power of reciprocity. By "conceding" from two years to one Saturday, the graduate students elicited a reciprocal concession (from nothing to a Saturday) and thereby created a significant uptick in their recruitment.

Now, 30 years since the first publication of *Influence*, Cialdini has become a sought-after consultant by businesses and governments looking to use these tactics to get what they want as individuals and organizations. Armed with a huge list of successful consulting interventions, Cialdini has joined with Steve Martin (the British journalist, not the American comedian) and Noah Goldstein (a professor of decision-making at UCLA) to write a book of 52 super-practical applications of the fundamentals of persuasion science to a panoply of negotiation situations. Each example forms the basis for a chapter in the book, and for the reader with limited time, the book is perfect. It really lives up to its title—small chapters with BIG lessons.

See *"The Small Big"* on Page 12

Chinese Companies' Investment in U.S. Results in Greater Interaction with U.S. Legal System and ADR Processes

Chinese companies, both big and small, have continued to increase their investments and operations in the United States. Along with this comes increased interaction with the domestic legal system and the alternative dispute resolution field.



Audry Li, Partner, Zhong Lun Law Firm

Audry Li, a partner in the Shanghai office of the Zhong Lun Law Firm, said Chinese companies doing business in the U.S. have become more acquainted with the complexities and expense of the legal system, but they deal with it in different ways depending on their size and the longevity of their relationship in the domestic market. She noted that there is no bilateral agreement between the U.S. and China for the enforcement of awards against Chinese companies. Thus, many Chinese firms will choose not to defend themselves in court or even show up for litigation, she added.

However, as investments and business become more focused long-term, Chinese companies will have to better educate themselves on how to navigate the U.S. legal system, while at the same time maintaining business relationships through the use of ADR to resolve disputes, she suggested. "Culturally, Chinese companies try to resolve disputes without resorting to litigation, but this is changing within China itself, and this may translate to international business as well," she said.

Lei Neu, a partner in the Shanghai office of the Zhong Lun Law Firm, said, "Typically, in case of disputes in the U.S., Chinese companies will first try to carry out negotiations to resolve the disputes. If negotiation fails, they will then resort to arbitration or litigation," he noted, adding, "However, it does not seem to be a trend now that they would refer to an independent mediation institution to settle their disputes in the U.S."

Lei Neu, Partner, Zhong Lun Law Firm

According to Li, "Chinese companies, in particular those that are expanding their business and maintaining long-term business relationships globally, are more sophisticated and getting more knowledgeable about the commonly accepted international means of dispute resolution and also more comfortable and acceptable with ADR as well."

Neu said, "Chinese companies generally should become more and more familiar with the arbitration infrastructure in the U.S. Arbitration has already served as one of the most important and frequently used dispute resolution methods in China to resolve both domestic and international cases, and they are legally recognizable and enforceable under law by PRC People's Courts."

"By comparison, mediation by a third, independent institution is not popular among Chinese companies as an ADR approach, mainly because mediation agreements are not enforceable in China, and in the event one party does not execute the agreement or changes its mind, the other party has to initiate an arbitration or lawsuit," he said. "For this reason, they may not choose to have mediation directly."

According to Li, "it is not common for Chinese companies to include mediation clauses in contracts for dispute settlement. However, it is very common to put an arbitration clause or a two-step clause, which requires negotiation or mediation as a first step before arbitration, as their ADR approach in the contract to resolve disputes," she added.

Neu said, "Chinese companies favor arbitration more as a dispute resolution method in their contracts. However, the Chinese cultural notion of harmony provides those companies an incentive and comfort to utilize mediation first before submitting their disputes to the arbitral institution," he explained, adding, "Mediation also may often take place in the course of arbitration proceedings."

Both attorneys counseled that it would be helpful to begin the process of developing relationships

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Chinese Companies' Investment Continued from Page 11

with ADR providers in the U.S. as the number of disputes in which they are involved increases and their investments become more long-term in scope.

"Although mediation is not popular among Chinese companies due to the enforceability issue, it does have its unique advantages in terms of low cost, convenience and easy-to-maintain business relationships," Li said. "For disputes of relatively small value, it seems the Chinese companies are more likely to engage in mediation."

"As arbitration awards made in the U.S. can be recognized and enforced in China, Chinese companies may choose arbitration more than litigation if that suits the nature of the particular contract or transactions," Neu said.

"However, as Chinese companies become more and more sophisticated with the help of good lawyers, we believe they should learn more and develop relationships with private sector ADR providers so as to get more familiar with all kinds of dispute resolution mechanisms," Li added.

The Small Big Continued from Page 10

Here are two of my favorite tips and lessons from *The Small Big*, even further shortened:

Simply adding the phrase "the majority of people in your postal code pay their taxes on time" resulted in the British government's hiking its collection rate of delinquent taxes from 57 percent to 86 percent. The cost of the change was practically zero (the biggest part was probably Cialdini's fee), and the net increase was 270 million pounds annually. This is an application of the principle of social proof, and the chapter offers clear advice for anyone seeking to collect on monies owed.

Requesting that a patient write down their own appointment information (rather than having the receptionist do it) resulted in an 18 percent reduction in the number of people who failed to show up for their next appointment. In a demonstration of the principle of commitment and consistency, the authors teach us how to prevent missed appointments from creating large costs. The estimate of the cost of missed appointments in the U.K. is more than a billion dollars a year. This small change saves a nation $180 million and offers a lesson for any lawyer, restaurant or businessperson who suffers when someone blows off a meeting or appointment.

There are so many more great stories and lessons (at least 49 more) that anyone interested in negotiating their way to a yes really owes it to themselves and their clients to read *The Small Big*. It will surely point to some small ways for you to make a big difference in the success of your negotiations.

JAMS DISPUTE RESOLUTION
ALERT
An Update on Developments in Mediation and Arbitration