Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution
VOL. 37 NO. 1 JANUARY 2019

ADR Processes/Part 1 of 2

Final Offer/Baseball Arbitration: The History, The Practice, and Future Design

BY ERIN GLEASON AND EDNA SUSSMAN

It is nearly impossible to have a dialogue about arbitration that does not harken back to the problems so often decried by its users: It is expensive and it takes longer than anticipated.

In response to this user experience, numerous studies have been conducted, best practice materials published, and rules revised. One method for streamlining arbitration that is rarely discussed is final offer arbitration, or FOA, in commercial and international practice. It is time to focus on this useful tool.

FOA has several variations but, in its most basic form, it is a process in which the parties submit specific proposals for the resolution of the dispute, and the arbitrator must pick one of the proposals.

This is the first of a two-part article. In Part 1, we provide an overview of FOA's evolution over the past 40 years and include examples of where this tool is currently used. In Part 2 next month, we will review the various forms of FOA, and offer practice pointers for parties and arbitrators to consider to assist them in designing and managing the most effective FOA process.

HOW AND WHY FOA DEVELOPED

While reports vary on when it first surfaced, modern-day references to FOA mostly emerged in the 1950s in the context of collective bargaining agreements in the United States.

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At the time, the use of strikes as part of the dispute resolution process became too unsettling—parties needed better tools to facilitate negotiations. In this context, FOA was seen as an ideal way to resolve impasse arising from union and management disputes over the terms of collective bargaining agreements.

The process was not immediately accepted, however. In one case, a tribunal chair challenged the partisan members of his panel to both write down a figure that they each thought a fair award; the chair would then pick the number closest to his own assessment. Sadly, the wing arbitrators resigned instead of participating in this experiment. See Lon L. Fuller, Collective Bargaining and the Arbitrator, 1963 *Wis. L. Rev.* 1, 25 n.20 (January1963).

It was not until the 1970s that the use of FOA became more prominent, in public employee wage disputes. Then, in 1974, FOA came into play in major league baseball. Today, FOA is widely known by its sport-inspired moniker: baseball arbitration.

FOA was introduced to the world of baseball after years of strife between teams and players over finding the right balance of power in player contract and salary negotiations. Historically, contracts between players

(continued on page 9)

Alternatives DOI: 10.1002/alt

CPR News

CPR PRESIDENT NOAH HANFT TO STEP DOWN

International Institute for Conflict Prevention and Resolution Chief Executive Officer and President Noah Hanft announced he would be stepping down in the middle of this year.

The email announcement to members was sent on Dec. 4, and comes four years after Hanft was named by the CPR board to be the organization's fourth president. Hanft, who also serves as *Alternatives*' publisher, formerly served as general counsel and chief franchise officer for MasterCard.

The CPR board has since undertaken a search for Hanft's replacement. Here is the note sent last month:

"It is with very mixed feelings that I write to let you all know that in mid-2019 I will be stepping down as president & chief executive officer of CPR.

"This decision was a difficult one for me as it has been a privilege to help lead this wonderful and unique organization since 2014. In today's turbulent times, our mission is more important than ever. No organization contributes more to advancing thoughtful dispute prevention and resolution than CPR, and that is largely a result of all of you.

"You are at the heart of everything we do and, along with our dedicated staff, will continue to be CPR's most important asset. From the moment I accepted this position, I have been amazed by the warmth and graciousness extended by the greater CPR community. Please accept my sincere thanks for your support, both of CPR and me personally. The board will be initiating a search for a new president and CEO in the near future.

"I should add that this is not a farewell because, although I will be stepping down from my current role, I intend to stay involved with CPR and our initiatives and will see you at CPR events going forward. And, of course, since the upcoming Annual Meeting in Washington, D.C., will be my last as CEO, I expect to see each and every one of you there!

"On a personal note, in June I will be launching an ADR practice, encompassing mediation, arbitration and consulting with law

(continued on page 12)

Alternatives

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Publishers:
Noah J. Hanft
International Institute for Conflict Prevention and Resolution

Editor:
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ALTERNATIVES TO THE HIGH COST OF LITIGATION, (Print ISSN: 1549-4373; Online ISSN: 1549-4381), is published monthly, except bimonthly in July/August on behalf of International Institute for Conflict Prevention & Resolution by Wiley Subscription Services, Inc., a Wiley Company, 111 River St., Hoboken, NJ 07030-5774.

Postmaster: Send all address changes to *ALTERNATIVES TO THE HIGH COST OF LITIGATION*, John Wiley & Sons Inc., c/o The Sheridan Press, PO Box 465, Hanover, PA 17331 USA.

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View this journal online at wileyonlinelibrary.com/journal/alt.

Printed in the USA by The Sheridan Group.

International Institute for Conflict Prevention and Resolution members receive *Alternatives to the High Cost of Litigation* as a benefit of membership. Members' changes in address should be sent to Membership and Administration, International Institute for Conflict Prevention and Resolution, 30 East 33rd Street, 6th Floor, New York, N.Y. 10016. Tel: 212.949.6490, fax: 212.949.8859; e-mail: info@cpradr.org. To order, please contact Customer Service at the address above, tel: 800.835.6770 or e-mail: cs-journals@wiley.com.

ADR Techniques/Part 3 of 3

Safety (and Power) in Numbers: Negotiation with Groups

CHRIS HONEYMAN AND ANDREA KUPFER SCHNEIDER

Last month in these pages we introduced some examples from our new book, the culmination of 15 years' work in the Canon of Negotiation Initiative which we run, and whose overall arc of discovery we discussed in the first issue in this three-part series. "A Canon Is Revised: Has the Negotiation Field Come of Age?" 36 *Alternatives* 147 (November 2018)(available at https://bit.ly/2zG6X1K).

In last month's article we included some excerpts of chapters that we think address the perennial problem of how one human being relates to (and gets something accomplished with) another, in new and useful ways. See "One to One: Moving Forward While Facing Deep Differences," 36 *Alternatives* 161 (December 2018)(available at https://bit.ly/2SKciwr).

But businesses and other organizations don't run just on *individual* negotiations. Negotiations between individuals and groups, and those which are entirely between groups—sometimes multiple groups at a time—are everyday necessities of organizational life. The failure of these negotiations is sometimes the cause of an organization's failure as a whole. So this month we will follow up with a few excerpts of what our contributors have been teaching us about groups, firms and other organizational settings.

NEGOTIATING WHILE BLACK

BY MICHAEL Z. GREEN

Applying a Scenario:
The Salary Negotiation
Involving Samantha, Jerry, and Barry

Imagine a black female, Samantha, is being recruited away from her junior position at a prestigious accounting firm out of state to work for a major state government agency as comptroller.

She has already visited with all the top people at the government agency. They all raved about her and want to get her on board as soon as possible. They know her husband, Robert, is a well-qualified engineer and that part of the negotiation will involve providing some type of a positive landing for him. The family also has two young children and need to find appropriate schools and housing.

The head of the agency, Jerry, a white male, makes an initial salary offer based upon a few thousand dollars more per year over what Samantha's current salary is, and has agreed to recommend Robert to the manager of the environmental arm of their state governmental body, which is hiring engineers.

Samantha does not know anyone at the agency and has no friends or mentors who have negotiated major positions with a state government agency. Samantha is concerned that the offer was based upon her prior salary, when she will definitely have major responsibilities that go well beyond her current job duties.

Also, Samantha will be moving into a larger metropolitan market where the cost of living, especially housing in a good school district, is much more than where she currently lives. Additionally, Samantha is concerned that Jerry is only going to make a recommendation for her husband, Robert. She was under the impression that the agency and especially Jerry knew that Samantha and Robert were a "package," and she doesn't understand why the offer did not guarantee a position for Robert as well.

Samantha was very excited when she interviewed and obtained the offer to work for the agency until she heard the salary amount, and only received a recommendation for Robert, as part of the terms of the offer.

Samantha has no information about how the offer was constructed. Samantha is worried that Jerry thinks he can lowball her and she will just accept it without much negotiation. If Jerry had made a reasonable offer of a sizeable amount more than Samantha's current position, one that also considered her need for more income due to cost of living and removed any uncertainty about her husband's employment, she had planned to not negotiate much, as her basic needs would be met.

But now Samantha is beginning to wonder if she was lowballed because she is a woman, or black, or both. The initial offer was so low from what Samantha could imagine as reasonable. Even if she is able to negotiate with Jerry to address broader terms, Samantha is concerned that Jerry's approach may affect future evaluations of her work in continuing to lowball her on raises.

Jerry is oblivious to all of this. He assumed that there would be bargaining, and felt he could not afford to give away the farm immediately. Jerry knew that the eventual final terms would increase Samantha's salary offer to around the same amount of others at the agency at her level—and that the agency would guarantee Robert's position.

In fact, Jerry negotiated exactly the same way with a white male, Barry, hired last year as director of human resources, who is at a similar level to Samantha's position. However, unlike Samantha, Barry had a good friend at the agency who told him where to find all the salaries—which were publicly available, since it was a state government position.

Barry's friend at the agency also told Barry that the agency had consistently hired the spouse of a key candidate whenever there was a position available within the agency that fit that spouse's background.

(continued on next page)

The authors are the editors of The Negotiator's Desk Reference, which is described and excerpted in this three-part series. It is available at www.ndrweb.com and on Amazon and other booksellers. Honeyman is Managing Partner of Convenor Conflict Management, a Washington, D.C., consulting firm (see www.convenor.com). Schneider is a Professor of Law and Director of the Dispute Resolution Program at Marquette University Law School in Milwaukee.

ADR Techniques

(continued from previous page)

So when Jerry initially offered a very low number and only a recommendation, Barry immediately countered with a salary more than $20,000 per year above the last person hired at a similar level by the agency, and very close to Jerry's own salary. Barry also responded that it was a deal-breaker if the agency was not going to provide his wife with a definite job within the state agency, because he knew the agency had an opening in her field of expertise.

Jerry countered with a job offer from the state for Barry's wife and raised Barry's salary offer, but it was still $5000 per year less than what Barry had proposed. Barry held to his position and Jerry eventually acquiesced and granted all of Barry's demands.

If Samantha accepts Jerry's offer to her as is, she will be making $65,000 less than Barry per year. And she will not have a guarantee that her husband will have a job. Further, when Samantha starts working for the agency, she will learn that she is making $65,000 less than Barry and that Barry's wife was actually hired, not just given a recommendation, when Barry was hired.

This scenario could represent even more of a problem if, despite Jerry's recommendation for employment, Samantha's husband is unemployed and still looking for an engineering position after Samantha's employment begins.

Assessment

In assessing this scenario, was Jerry consciously discriminating against Samantha? Were Samantha's concerns truly unwarranted when she felt Jerry's initial offer was based upon stereotypes? I think the answer to both of these questions could legitimately be no.

Now this scenario assumes that Jerry was not consciously taking into account Samantha's ability to obtain a better job offer elsewhere, an assumption that might also unconsciously be stereotypically biased on Samantha's presumed lack of information about competing job opportunities.

As a result, Jerry consciously thought he was treating Samantha the same way he had treated Barry. Unfortunately, Samantha was not operating with the same information as Barry; it was not even close. …

* * *

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THE ORGANIZATION AS NEGOTIATOR

BY ADRIAN BORBÉLY AND ANDREA CAPUTO

Taking Negotiation to the Organizational Level

So how do we go from training better negotiators to ensuring that the organization as a whole negotiates more efficiently?

In other words, how do we ensure that negotiation serves its role in fulfilling the organization's strategy and reaching its objectives? Approaching the question from this angle can permit us to merge fundamental negotiation theories (as discussed in other sections of [the Negotiator's Desk Reference]) with research on sales management, dispute resolution systems design, social dialogue, happiness at work (which largely deals with "invisible" everyday negotiations), and corporate strategy.

We recommend that these efforts begin with an attempt to determine whether various companies consider negotiation as anything more than an individual skill to nurture among their employees. We need to know how companies structure their negotiation efforts. … [See www.ndrweb.com for full citations.]

We should also carefully define "efficient negotiation processes" by identifying and mapping the different processes and settings of negotiation throughout the organization, in a systematic way, such that inter-organizational and cross-cultural comparative studies are made possible.

This also mandates the establishment of efficiency indicators, either on a longitudinal basis, or as rigorous, cross-sectional dependent variables.

Whether we follow [the] idea of "emerging strategy," or we approach strategy formulation as a top-down phenomenon, strategy needs to be diffused within and around the organization, in part through negotiation among different actors and stakeholders. [See www.ndrweb.com for full citations.]

One may therefore hypothesize that, across the board, the efficiency of such negotiations will positively impact the success of the strategy, and therefore the organization's performance. If we postulate that organizations that negotiate better perform better, can we justify this with empirical data? This will require us to use the existing performance indicators for strategy (or create new ones) and build the appropriate key performance indicators for negotiation.

It will also mandate a careful look for (possibly numerous) exogenous factors that may mediate the relationship between negotiation and strategy.

The way people negotiate within an organization may impact its strategy in terms of how well that strategy is implemented, but also in other ways. For example, one may also hypothesize whether efficient negotiation practices, consistently applied throughout the organization, lead to less conservative, more entrepreneurial strategy formulation, with more risk-taking and innovative potential.

[An example earlier in this chapter] seems to suggest this: companies that perform persistently well in negotiation may be able to set, and reach, more ambitious objectives. A structured approach to negotiation at all levels of the organization may profoundly impact its culture, for example through employee participation processes and collective feedback on negotiation practices, which may in turn lead to more creative strategy ideas.

A systematic map of different organizational practices regarding negotiation may enable us to isolate best practices. Some structuring efforts may work, others may not, and some may only work in certain circumstances. [Commentator] Ertel suggests giving more freedom to negotiators and incentivizing them to search for creative deals. [See www.ndrweb.com for full citations.] This may work for some functions of the firm or in certain industries, and prove non-productive in others.

A structured approach to negotiation practices does not have to follow the organization chart. Often, the cases showcased by the different sources talk about purchasing, sales, human resources, or strategy formulation.

Beyond helping specific functions of the firm negotiate better, can a structured approach to negotiation help all functions of the firm to achieve better results? We conclude that the coherence of negotiation practices across the various functions of the firm (one is tempted to use

here the phrase "negotiation culture") may have a significant impact on overall performance. …

* * *

Borbély is a mediator, negotiation consultant and teacher in France. He was previously an Assistant Professor of International Negotiation at IESEG School of Management in Lille, France. Caputo is a Reader in Entrepreneurship at the Lincoln International Business School in Lincoln, U.K.

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MAKING DEALS ABOUT POWER SHARING

BY JOHN H. WADE

Gradations of Legal Decision Making Power

What follows is a gradation or scale which gradually moves future decision-making power from total power for one person, to a solution of total power in the hands of the other negotiating party.

A negotiator or mediator who has ready access to such a gradation or range adds normalcy, structure, visibility and predictability to the negotiation. As with a "numbers" negotiation (dollars, acres, steak knives), each party can prepare on a confidential chart its preferred starting solutions about future power, what moves to make and how quickly to make them, and where resistance will probably occur based on current "facts" and emotions.

Moreover, guesses can be made about the same concepts for the other negotiating parties, who may be moving from somewhere near to the opposite end of the range. Of course, a "loss" of decision-making power "down" the gradation scale will often be, and can be reframed as, a potential "gain."

For example, negotiating some degree of power sharing with another may:

- Placate a disruptive dissident and tribal supporters.
- Add new expertise for future decisions.
- Test abilities of and educate potential future leaders.
- Enable blame shifting for future decisions.
- Create an obligation to return favors later.
- Distribute exhausting workloads.
- Create mutually shared "agreement" language.
- Encourage commitment to an organization.

In summary, a gradation from *total* "legal" power via 13 incremental losses to *no* "legal" power is as follows:

- Total Power
- Time-Limited Total Power
- Rotation of Power
- Duty to Report
- Criteria as Guidance to the Exercise of Power

Business Talk

The excerpts: In a concluding Part 3 of adaptations from the new Negotiator's Desk Reference book, four segments look at the ways organizations approach the science of bargaining.

It's not just one to one? No. It's about organizational strategy. A company that presents an efficient and effective approach to negotiating may be more entrepreneurial, be willing to take more risks, and potentially be more open to innovation.

Hot topic: '[T]he time is now ripe for industrial, commercial and other relationships to benefit from demonstrated successful experience with these tools.'

- Division of Topics and Categories of Power
- Mandatory Consultation Processes—Secret or Publicized
- Entrenchment of Restrictions on Future Decision Making
- Deadlock: Agreed Mandatory Negotiation or Mediation Process
- Deadlock: Agreed Mechanisms to Trigger Resolution: automatic formulae; an independent arbitrator or judge;
- Qualified Veto Power by Other
- Veto Power by Other
- Total Power to the Other Party

Three of these gradations will be expanded briefly in what follows [with analysis of each of the 13 in the Negotiator's Desk Reference]:

Total Power

One party has or claims complete power to decide in the future—what repairs to the apartment complex, by whom and at what cost; how much will be spent on marketing; who will be appointed as employee or judge; who decides about children's medical treatment.

Where one party trusts another, they may be willing to grant total power to that trusted other in certain areas of decision-making. Conversely, a claim (and inherent threat) of absolute power may be disguised by veneers of nominal consultation, rigged elections, a history of benign dictatorship, the smile of a crocodile, or reassurances of wisdom and expertise. Some long-term bosses, rulers, spouses and chiefs are experts at recycling smiling veneers during negotiations.

Time-Limited Total Power

One gradation less than total decision-making power is where that capacity is limited in time. The president/boss/spouse/business partner/parent/tribe agrees to be "in charge" for X years, whereupon power will shift to another named person automatically, or an unnamed person via an election process.

Of course, this model of time-limited total power has been negotiated into many national constitutions by the founding parents of those nations.

Rotation of Power

A further diminution of decision-making power can be agreed upon whereby that power mandatorily rotates every X years between tribes, factions, university departments or individuals. Today's boss will be tomorrow's servant until his/her turn comes around again. So be kind today, in order to avoid payback tomorrow.

This solution is adopted in some families where children or separated parents feud over holiday destinations. Therefore the parents agree that child one decides in year one; child two decides in year two; child three decides in year three; and then start again.

This solution has also been adopted in some tribal societies, where automatic leadership rotation between tribes provides an attempt to modify nepotism. It also operates in academic departments where the chair position might regularly rotate. …

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ADR Techniques

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The author is an emeritus professor of law at Bond University, Queensland, Australia. He practiced as a lawyer in Australia between 1987 and 2012, and also had an active mediation practice in organizational, family and commercial conflicts during those years. He has taught more than 300 mediation and negotiation courses in Hong Kong, New Zealand, London, Canada, the U.S. and Australia, and published more than 100 books and articles.

* * *

THINKING AHEAD

BY JAMES P. GROTON, CHRIS HONEYMAN & ANDREA KUPFER SCHNEIDER

In 2007, two of the authors of this chapter, with three other colleagues, wrote an article that attempted to analyze a puzzling phenomenon: a pattern of large organizations, with predictable conflict in the offing, nevertheless routinely—or even deliberately—failing to think ahead.

That article reviewed the consequences of recent failures to anticipate or prepare for events, analyzed causes and explanations of these failures, reviewed the resources that make it possible to do strategic anticipatory planning, and outlined possible ways in which appropriate skills can be brought to bear to advance the field of conflict anticipation and management. Chris Honeyman, Julie Macfarlane, Bernard Mayer, Andrea Schneider & Jeff Seul, "The Next Frontier Is Anticipation: Thinking Ahead about Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance," 25 *Alternatives* 99 (June 2007).

The article also argued that it was time that our field developed a new professional specialty, of assistance to companies and other organizations to encourage them to take the proactive steps necessary in their organization's medium-and longer-term interest.

Even at that time there were already in existence some well-established examples of parties doing exactly what we were suggesting: successful uses of proactive steps to anticipate and manage conflict. A prime example was the construction industry, which had, during the past 40 years, developed a sophisticated suite of tools for preventing, solving, de-escalating, and achieving almost instantaneous resolution of problems and potential disputes.

Other examples of similar tools existed in the fields of labor relations and international relations. And use of these tools had spread to many segments of business.

The value of such tools should have been widely appreciated, for they exemplify time-honored "best practices" that have become legend:

- "An ounce of prevention is worth a pound of cure."
- "A stitch in time saves nine."
- "Fortune favors the prepared mind."
- "Blessed are the peacemakers."

Yet it must be admitted that in the decade since that original article, there has been less to show as new development in this area than we would have liked. There has also been recent evidence, particularly in the financial industry in its conduct before and since the 2008 financial crisis, that some elements in business and government—and even in the dispute resolution professions—see it as antithetical to their interests for conflict to be handled, as we might put it simply, better and less expensively.

We believe the time is now ripe for industrial, commercial and other relationships to benefit from demonstrated successful experience with these tools. This chapter illustrates how existing tools for conflict anticipation and management can be used in a wider variety of business and public service contexts, and then advocates how dispute professionals can adjust their thinking and practices to advance a new "anticipation and prevention movement."

There are three principal classes of tools that are being used to anticipate and prevent conflict: tools for Problem Prevention, Problem Solving, and Dispute De-escalation and "Real Time" Resolution. They are most effective if they are mutually agreed upon by contracting parties before any conflicts or disputes have arisen. …

* * *

Groton is a retired partner in the Atlanta law firm of Sutherland, Asbill and Brennan (since 2016, part of Eversheds Sutherland), where he headed its Construction and Dispute Prevention and Resolution practice groups. Groton has conducted research and written extensively on—and advocated for broader use of—processes used in the construction industry and other relationship-based businesses to prevent and de-escalate disputes (see www.jimgroton.com). Honeyman and Schneider are co-editors of the Negotiator's Desk Reference, the volume in which these excerpts appear. See https://www.ndrweb.com/about-the-editors.html.

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Most *Alternatives* readers are practitioners, and invariably time-pressed. We think that what is most likely to work for a practitioner reader is the particular chapter that deals with a problem anticipated to arise in tomorrow's meeting, or the particular concept needed to review promptly for other reasons: In other words, a classic reference-book approach.

We've therefore put some effort into linking outwards in the Editor's Note for each chapter to other chapters that may be the best next thing to look at even if they are not contiguous. At the same time, for those who prefer to read in a linear fashion, we hope that each section will bring enough complexity and internal debate to serve as a mini-course on that precise set of negotiation concepts. Knowing that the need for bite-size chapters has been served, we also remind the reader that a full dinner menu is often offered by our authors in their reference pages.

We should also note here that our process of discovery continues, with explicit provision in the Web edition made for a third volume of the NDR. The new volume will be added to gradually as we find exciting new research, and fill gaps.

In fact, at the time of this writing, and with the cooperation of the American Bar Association, we have just posted the first 12 chapters of that volume—these represent some chapters from our original Negotiator's Fieldbook which we continue to see as cutting-edge even though their authors were unable to update them for the NDR.

We hope you find the excerpts in this article series and the entire Negotiator's Desk Reference helpful, informative and engrossing to read—as we have felt throughout its long gestation period. The entire Canon of Negotiation process has been one of discovery; we think the newest result may stand as a demonstration that our field has finally come of age.

The Master Mediator/Part 3 of 3

Good Luck Has Arrived: Positive Emotions Means Successful Mediation Is at Hand

BY ROBERT A. CREO

JOY & SERENITY

When you enter a state of mind dominated by joy, you usually feel all is right and good.

In this state, your body undergoes chemical changes with the release of specific neurotransmitters. As the complex mix of chemicals and context interact, and if there is no crisis or urgent need on the immediate horizon, people typically feel tranquility and peace of mind.

It is being in the state where you feel relaxed, and where you are calm, optimistic, and satisfied.

If you apply the mediation goals of transformation and, the ultimate success, the transcendence of the dispute, serenity is an outcome. Although serenity can be reached in life and mediation without the precondition of joy, my experience is that the joy following beating the challenges of conflict precedes serenity.

We as mediators and advocates generally use the term "closure" as our blunt tool. Although it can be surgical in the sense that specific positive consequences of resolution have been elicited during facilitative questioning, closure provides unique benefits to each and every participant, including the mediator.

Everyone wants to be happy. No one wants to truly believe, and live, a ruined life without pleasure or serenity. These goals align with resolution.

Although there are many ways to open the door, here are some potential questions or comments:

1. If you could wave a magic wand, not to change the past, but to structure the future, what would happen? What would it look like?
2. Do you have any beliefs, spiritual practices, or community values that might be promoted by a resolution?
3. Is the resolution sufficient to provide a platform of security, contentment, growth, etc.?
4. Is seeking revenge or punishment of others important to you?
5. Will a resolution promote your own sense of self (identity) or reputation?
6. Is it important that you are perceived as a good person, or as having taken the high road?
7. Do you see where any good could come from a resolution?

See "Stay Positive: How and Why Joy and Serenity Emerge at the Bargaining Table," 35 *Alternatives* 147 (November 2017)(available at https://bit.ly/2JD5htH).

HOPE

Hope is the incubator of resolution.

Although the mediator is often the silent cheerleader of hope, it is often translated into the basic mediator tool of persistence. Mere admonishments to the participants not to give up hope and to "hang in there" must be accompanied along a realistic pathway with both short- and long-term goals.

Experienced mediators navigate interim goalposts, often starting at opposite ends of the path for each disputant, and flame hope by advancing a participant to the next hope-marker.

This also may involve maintaining hope for an acceptable outcome early in the process, dashing hope for an outlier outcome. It may involve imparting to participants their own

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

THE THEME

Master Mediator Columnist Bob Creo has concluded a long look at emotions in mediation, summarizing in three new articles the more than 20 columns in a series that stretches back to the July/August 2016 issue. This month's column is the final installment. The wrap-up trilogy began in November discussing negative emotions, with "A Roundup: The Emotional Journey Review," 36 *Alternatives* 149 (November 2018)(available at https://bit.ly/2QiAWXq), and included Part 2 last month, focusing on neutral emotions in "It's No Surprise: Empathy and Humor Can Help—or Hurt—at the Mediation Bargaining Table," 36 *Alternatives* 163 (December 2018)(available at https://bit.ly/2Br6HEa). The premise is that emotions are present in all participants in a mediation session, including the mediator, and regardless of setting. You can read the columns in the Wiley Online Library at http://bit.ly/1BUALop. A box at the end of this article provides additional resources; last month's feature included cites and links to the Master Mediator columns on emotions.

The Master Mediator

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weaknesses in the context of the reality that they are unable to control the outcome once the final decision is relegated to the judicial system. See "How Hope Can Confront Even the Most Hellish of Problems," 35 *Alternatives* 163 (December 2017)(available at https://bit.ly/2zC8gOL).

KINDNESS

Aristotle wrote that kindness involves "helpfulness towards someone in need, not in return for anything, nor for the advantage of the helper himself, but for that of the person helped." Friedrich Wilhelm Nietzsche contended that kindness and love are the "most curative herbs and agents in human intercourse."

The school of thought called "legal positivism" argues that kindness and sympathy have no role in interpreting and applying legal rights. Legal positivism views the legal system as based solely on logic, where correct outcomes are deduced from predetermined legal rules without input from social or moral considerations.

Mediation is not derivative of legal positivism, and is more aligned with natural law theories of jurisprudence, which contend that law and morality are interconnected.

Here is a checklist with guidelines for the practitioner:

1. Don't force kindness. It flows naturally from authenticity and transparency.
2. Don't fear showing kindness in joint session or caucus.
3. Acts of kindness do not erode neutrality or mediator impartiality.
4. Kindness should not be self-aggrandizing or a strategic tool.
5. Kindness creates a safe environment for successful decision making.
6. Self-determination is a form of risk-aversion from uncertainty and the unforgiving, and often unkind, procedures and dictates of the litigation process.
7. Small talk about the disputants, not the mediator, is healthy and creates a platform for acts of kindness.
8. Use pauses, the word "and," or other conventions in place of the natural usage of "but."
9. Daily acts of compassion cultivate and hone the naturalness of empathy and kindness.

See "Be Kind … Purposely, Not Randomly," 36 *Alternatives* 23 (February 2018)(available at https://bit.ly/2Doy2ub).

The Good Stuff

So far: Master Mediator columnist Bob Creo is summarizing a two-year study of emotions. Last month he reviewed the neutral emotions, like surprise, which need context to tilt one way or the other at the bargaining table. Part 1 was the negatives. This is the wrap: The feel-good feelings.

How does this work in a business setting? Here's the good news: Regardless of the matter, this is where people want to be. If there are contented feelings to be found, then it's the neutral's job to bring them out.

Are good feelings an actual mediation goal? Put it this way: Positive emotions are a precursor to settlement.

GRATITUDE

Gratitude implicates a number of concepts, including selfless action, reciprocity and "paying it forward."

Gratitude can be contagious, which is a huge benefit in the mediation room. It can serve as a catharsis that permits people to "let it go" and move onward.

This is the proverbial "venting" touted in basic mediation training as a core element of alternatives to litigation—a procedure that suppresses feelings and other irrelevant evidence.

Gratitude may form a core element of a disputant's identity, which drives major decisions.

Here is a brief checklist and guidelines for the practitioner:

1. Gratitude, even if expressed as a vulnerability, can be a strength.
2. Gratitude should be sincere and not be self-aggrandizing or a strategic tool.
3. Gratitude shows respect for the other participants.
4. Gratitude begets gratitude, and furthers a positive atmosphere for constructive dialogue.
5. Gratitude and apology go hand-in-hand.

At our best, mediators foster attitudes of forgiveness, gratitude, and grace that can lead to reconciliation, or settlement, that closes the case by the hands of the participants. Our job is their accomplishment. See "The Contagious Emotion: Gratitude Is Us," 36 *Alternatives* 39 (March 2018)(available at https://bit.ly/2qqFagU).

HUMILITY

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

SOURCES AND ADDITIONAL READING

- Brene Brown, "Daring Greatly, How the Courage to be Vulnerable Transforms the Way We Live, Love, Parent, and Lead" (Avery Reprint 2015).
- Antonio Damasio, "Looking for Spinoza: Joy, Sorrow, and the Feeling Brain" (Harvest 2003).
- Antonio R. Damasio, "Descartes' Error: Emotion, Reason, and the Human Brain" (Penguin Books Reprint Edition 2005).
- Joseph Epstein, "Envy: The Seven Deadly Sins" (New York Public Library Lectures in Humanities)(Oxford University Press 2003).
- Nachman Ben-Yehuda, "Betrayals and Treason: Violations of Trust and Loyalty" (Perseus 2001).
- Daniel Shapiro with Roger Fisher. "Beyond Reason: Using Emotions as You Negotiate" (Penguin Books 2006).

pride, results in a number of cognitive biases. These are defects in thinking or rational decision making.

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

I believe that when mediators focus on the people and problem at hand, and are guided by their own positive emotions and virtues, especially kindness, gratitude, and humility, the authenticity creating the connections between people arises in an organic and natural manner. See "The Humble Neutral, at Your Service," 36 *Alternatives* 55 (April 2018)(available at https://bit.ly/2RD3ub5).

* * *

Even the driest of cases have emotional content.

Legal entities are comprised of sentient human beings. Conflicts are driven by decisions people make, either individually or as a group.

Unless artificial intelligence completely takes over, emotions will drive aspects of the decision making process. Maybe. Even the HAL 9000 computer in Stanley Kubrick's 2001: A Space Odyssey displayed a range of emotions, and made a very human course of choices motivated by self-survival.

There is no right or wrong way to address emotions as they arise in the mediation room, including the mediator's emotional reaction and response. The reality is that being tuned into the current understanding of the science of emotion is helpful in our daily work.

* * *

With the conclusion of the series of mediation emotions and this three-part summary, Master Mediator columnist Robert A. Creo moves this long-running monthly feature to every other month in Alternatives. *He returns in March with a look at how "The Overconfidence Effect" operates in mediation. The archive of his monthly columns, beginning in November 2012, as well as earlier* Alternatives *articles, are available at altnewsletter.com. His previous CPR Institute Master Mediator columns, published on CPR's website, are archived at www.cpradr.org and can be found by using the search function.*

ADR Processes

(continued from front page)

and teams contained reserve clauses—provisions that essentially bound players to the team they originally signed with for as long as the team wanted to keep them.

Once these clauses were pulled back, and free agency was adopted, Major League Baseball and its players sought a new method for making sure players were receiving fair market value for their salaries—and, likewise, that the teams were paying these players at the fair market rate. See Benjamin A. Tulis, Final Offer "Baseball" Arbitration: Contexts, Mechanics and Applications, 20 *Seton Hall J. Sports & Ent. L.* 85 (2010)(available at https://bit.ly/2Pc2edp).

FOA was adopted as a means for resolving these salary disputes. The MLB and MLB Players Association negotiated a system in which players' arbitration rights were tied to their years of service.

For example, players who had been with a team for at least six years were entitled to free agency. But during their third through sixth years with a team, they are entitled to participate in an FOA process. Before the third year, the team mostly holds contract rights.

In this version of FOA, the player and his team submit proposed salary figures to a panel of arbitrators if the two sides cannot agree upon that figure among themselves. Based on party presentations at a hearing, the tribunal selects the salary figure that is closest to fair market value as the arbitration award.

In collective bargaining disputes (baseball or otherwise), FOA was viewed as a fair way to address power imbalances that had arisen in negotiations. But it was also seen as a way of stemming the risks associated with allowing an arbitrator to render awards without specific direction from the parties.

In 1975, Peter Feuille wrote about the "chilling effect" of baseball arbitration—a theme that is common in our discussions of arbitration even now. In the literature of the time, it was posited that the insertion of an arbitration process would "chill" any potential for sensible negotiations between parties. See Peter Feuille, "Final Offer Arbitration and the Chilling Effect," *Industrial Relations: A Journal of Economy and Society*, 14: 302-310 (1975) (available at https://bit.ly/2zIKj9l).

The theory was that parties would lobby for the respectively highest or lowest award in attempts to moderate the ultimate wild card in arbitration: the perceived whims of the arbitrator and the likelihood that the arbitrator's award would always split the difference between the parties' valuations.

It was almost necessarily assumed that an arbitral award would result in splitting the difference between two numbers, another common concern expressed today despite numerous studies that have disproven this urban legend. See Ana Carolina Weber et al., Challenging the "Splitting the Baby" Myth in International Arbitration, Vol. 31 *Journal of Int'l Arbitration* No. 6: 719 (2014)(available at https://bit.ly/2rh9N8N).

The introduction of FOA processes sought to eliminate these risks. With FOA, parties could add controls to a process that otherwise felt too susceptible to corruption and inefficiency. It also came with the added incentive for parties to think more critically about making more concerted efforts towards fruitful negotiations prior to hearing—thus obviating the need for the arbitral process altogether.

This point is most intriguing—creating an arbitral process that was seemingly founded in order to avoid arbitration altogether. In nearly every sector that has been studied, the result of introducing FOA has been the same: the presence of a FOA clause often leads to a negotiated settlement prior to the need for a hearing.

THE PSYCHOLOGY OF FOA

In the years after FOA was introduced to Major League Baseball, its practice was studied by lawyers, psychologists and sociologists alike. The fascination with this process primarily stems from the effect that it has on the decision-making processes of the parties and the arbitrators.

For example, take early studies conducted by Henry Farber and Max Bazerman in the

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ADR Processes

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1980s where they sought to understand arbitrators' decision-making processes by introducing hypothetical arbitration exercises to groups of volunteer arbitrators. See Henry S. Farber and Max H. Bazerman, "The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final Offer Arbitration," National Bureau of Economic Research Working Papers Series (1984)(available at https://bit.ly/2reJjVF); Max H. Bazerman and Henry S. Farber, "Divergent Expectations as a Cause of Disagreement in Bargaining: Evidence from a Comparison of Arbitration Schemes," National Bureau of Economic Research (1987)(available at https://bit.ly/2RlrdN4).

Chief among the concerns under review was the theory that arbitrators "split the difference" in rendering their awards, in order to stave off party anger with them and hopefully ensure the arbitrators' own future employment.

In the 1984 Farber-Bazerman study, volunteer arbitrators were given a series of hypothetical fact patterns and were then asked to produce conventional arbitration awards and also respond to FOA scenarios for those same disputes. The purpose of the experiment was to observe the variance among arbitrators' awards where they had free reign to make a decision versus the final offer cases where the arbitrator was forced to choose between two proposals submitted by the parties.

Interestingly, while there were differences in the final determinations rendered by arbitrators across the pools of hypothetical conventional arbitration and FOA cases, arbitrators' methods for making decisions demonstrated "a substantial degree of underlying consistency." The awards studied tended to show that arbitrators based their awards on the facts presented and relied less on the demands or offers made.

Years later, in a study published in 2005, John D. Burger and Stephen J.K. Walters examined data from MLB arbitrations, where information was often public. John D. Burger and Stephen J.K. Walters, "Arbitrator Bias and Self-Interest: Lessons from the Baseball Labor Market," *J. Labor Res.* 26: 267 (2005)(available at https://bit.ly/2Rqu4Vb).

In this study, the researchers looked for a better understanding of the equity and efficiency provided in baseball arbitration. But here, the data showed that arbitrators tended to side with teams and against players more often. An even stronger bias was found against African-American and Latin-American players.

David Dickinson studied the negotiation patterns of parties involved in FOA processes. See David L. Dickinson, "The Chilling Effect of Optimism: The Case of Final-Offer Arbitration," Economic Research Institute Study Papers, Paper 259 (2003) (available at https://bit.ly/2Ci9VeN). This time, the research focuses on why parties would allow for a decision to be directed to an arbitrator, instead of keeping the decision-making power to themselves. The sophistication of parties to the negotiation, along with their relative optimism about their positions, were examined to understand how parties approached the process.

Controlled experiments confirmed that parties' optimistic expectations increased the distance between their final offers. The findings here demonstrate the importance of more fully informing party expectations as an effective way of improving negotiated outcomes. The study also highlighted an important consideration in managing one's expectations—the value in considering counter-party valuations and the merits of an opposing party's case.

One concern often expressed with FOA is that if parties have not appropriately valued their positions, and attribute little or no credibility to the opposing side's position even where it has some merit, the fact the arbitrator is limited to selecting one of two outcomes means that 50% of the time one side will deem the finding to be unfair.

Similarly, where final offers are divergent, this risk of a dramatically different value can serve to facilitate negotiations but party overconfidence or lack of appropriate valuations can blind a party to the opportunity.

To the extent that parties are able to move toward limiting—or eliminating—the biases in their own expectations, they would most likely reach voluntary settlements more often. Where FOA is still invoked, the process will be more agreeable with more balanced approaches to evaluation because the arbitrator would be asked to choose between less extreme final offers.

Planning the Endgame

The process: Final Offer Arbitration. Baseball arbitration is synonymous, though the practice has variations.

The methodology: Get offers on the table. Choose one. Settle a case.

The paradox: You're 'creating an arbitral process that was seemingly founded in order to avoid arbitration altogether.' But the presence of an FOA clause often leads to a negotiated settlement prior to the need for a hearing.

TODAY'S APPLICATION

Colloquially, we know well of FOA's prominence in collective bargaining disputes. But the application of this process is much more far-reaching. International negotiations over trade and political issues, mergers and acquisitions disputes, real estate, tax, insurance, and other commercial matters are routinely submitted for FOA.

For example, the U.S. Department of Justice and the Federal Communications Commission maintain FOA programs involving media, communications, licensing, program access, and retransmission consent disputes.

The Organization for Economic Co-operation and Development (OECD) Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting also contains a default FOA provision. See https://bit.ly/2gTnHee. While states may opt out of the final offer-type of arbitration, favoring the "independent opinion" proceedings instead, most signatories have included the FOA provision to date.

To provide parties with guidance on how to craft a fair and efficient FOA process, some arbitral institutions now maintain rules incorporating FOA in domestic and international contexts. The CPR Non-Administered Arbitration Rules have been adapted by par-

ties to include FOA provisions. See https://bit.ly/2IZtBs7. [The CPR Institute publishes this newsletter with John Wiley & Sons.]

The American Arbitration Association and its International Centre for Dispute Resolution issued Final Offer Arbitration Supplementary Rules in 2015 that provide a tailored framework for the conduct of an FOA. See https://bit.ly/2rgjdRW.

* * *

Various iterations of FOA have emerged since the process was adopted for collective bargaining disputes. One thing that these various processes have in common is that they are largely adopted by parties to manage cost, efficiency and the risk perceived in arbitration.

While FOA may not work for every dispute, careful planning and consideration can produce a fruitful process.

* * *

In Part 2 next month, the authors will review the various forms of FOA, best practices for drafting FOA provisions before and after a dispute is in play, and guidance for structuring and facilitating an efficient FOA process.

ADR Brief

OPTING OUT OF MEDIATION SHOWS STRONG TURKISH RESULTS

BY GIUSEPPE DE PALO & RUSS BLEEMER

There's new data indicating that requiring an initial and reasonable mediation effort is producing results in Europe.

It's not mandatory mediation, and the results are limited to one country's efforts. But Turkey's program allowing litigants to opt-out of mediation—mandatory referral but what proponents consider an easy exit, and which is seen as having more impact on litigation volume than programs that merely offer the ADR alternative—is clearly producing a lot of settlements.

Initial reports early last year, after Turkey reformed its labor law to push more mediation options, by the nation's Ministry of Justice indicated remarkable uptake in just the first month. It showed a 72% settlement rate—4,637 out of 6,423—for the mediations conducted after more than 30,000 mediation requests. See Leonardo D'Urso, "How Turkey Went from Virtually Zero to 30,828 Mediations in Just One Month," *Mediate.com* (Feb. 22)(available at http://bit.ly/2GRW2DB).

D'Urso noted that the number of cases was much higher than ever before in Turkey and even "since, and despite, the 2008 [European Union] Mediation Directive."

De Palo is Ombudsman for United Nations Funds and Programs, and a professor of alternative dispute resolution law and practice at Mitchell Hamline School of Law, in St. Paul, Minn. Bleemer edits *Alternatives*.

The directive, which mandates mediation options in cross-border disputes, sparked EU nations' internal mediation reforms, but hadn't produced a large increase in numbers of mediation. See, e.g., Leonardo D'Urso, "A New European Parliament Mediation Resolution Call on Member States and the EC to Promote More Use," 36 *Alternatives* 19 (April 2018) (available at https://bit.ly/2Ej8q25).

More Table Talk

The objective: Increasing mediation use in Europe.

The results: As part of a long-running effort by the EU across borders, by nations in their domestic ADR schemes, and individual true believers, moves to encourage mediation are finally showing promising returns. Litigants are sent to mediation, and may opt-out if they don't want it.

The latest: Turkey installed the opt-out into a new labor law last year, and mediation sessions are booming. And opponents already are saying it's mandatory, and pushing for a rollback. A victim of its own success? Or a precursor to much wider adoption?

The new Turkish law, similar to the 2013 Italy mediation law that led to that nation's opt-out mediation program, appears to have accelerated use and results. See Leonardo D'Urso, "Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation," 36 *Alternatives* 49 (April 2018)(available at https://bit.ly/2E8iNoD).

Seçkin Arıkan, a Turkish attorney and an ADR expert, has provided an update about the impact of the reform, which features a required pre-trial mediation meeting of minimum two hours. During the Jan. 1-Nov. 8, 2018, period, the Turkish Ministry of Justice says 294,505 cases have been mediated. Of these, 179,576 cases, or 61%, resulted in an agreement.

While mediation has previously had high success rates in Turkey, the opt-out method has produced 15 times as many mediated settlements as opt-in, when there was no requirement for litigants to make a structured mediation attempt in front of a mediator, before filing a suit.

With the old opt-in model in place, during the period from November 2013 to November 2018, a total of 67,476 cases were mediated—around 13,500 per year. Arikan reports that during that five-year period, the mediation settlement rate was extremely high—around 90%.

Still, he also points out that per year rate then cannot compare to a total expected to exceed 200,000 by year-end 2018.

The Turkey results accompany an active 2018 in international mediation. The European Commission for the Efficiency of Justice adopted a Mediation Development Toolkit at the end of June to aid countries in installing improved ADR programs into their court systems. See Russ Bleemer, "Summer Moves: UN, Council of Europe Seek to Install More Official Mediation Processes," 36 *Alternatives*

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ADR Brief

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124 (September 2018)(available at https://bit.ly/2RpaxVq).

In part, the toolkit seeks to improve uptake under the 2008 Mediation Directive. See also Giuseppe De Palo, "A Ten-Year-Long 'EU Mediation Paradox' When an EU Directive Needs to Be More … Directive" (European Parliament Policy Department for Citizens' Rights and Constitutional Affairs Nov. 21, 2018)(available at https://bit.ly/2QKD36A).

And Working Group II of the United Nations Commission on International Trade Law, best known as Uncitral, announced a new mediation treaty expected to be formally introduced in Singapore this spring, and available for nations' ratification in August.

The treaty, the United Nations Convention on International Settlement Agreements Resulting from Mediation, will provide for universal court enforcement of agreements reached in mediation in states signing on. See the convention, passed by the working group in June, at https://bit.ly/2UqQZS4.

Not surprisingly, work is already afoot in the Turkish legislature to extend the opt-out mechanism to most commercial disputes early this year. At the same time, other lawmakers are reflecting discomfort with the mandatory processes, and have introduced counter-legislation. See Serdar Bezen, et al., "Turkey: Legislative Proposal to Amend Mandatory Mediation on Labour Disputes," *Mondaq* (Nov. 13, 2018)(available at https://bit.ly/2rp0DYd).

But if the government accompanies an extension with activities aimed at protecting mediation quality, and assessing users' satisfaction, the global mediation community should follow closely the developments of the Turkish mediation movement.

For more on the opt-out method requiring mediation but allowing an easy opt out, see Briefing Note for the European Parliament, which discusses the process as a "Required Initial Mediation Session" at https://bit.ly/2F5cG2e, particularly at page 11.

CLARIFICATION AND CORRECTION

An ADR Briefs article on recent conflict resolution developments in California, Michael Heller, "Making Waves: A Roundup Of New California ADR Law," 36 *Alternatives* 158 (November 2018)(available at https://bit.ly/2ziaqnb), notes that "as long as one of several conditions are met," out-of-state attorneys may provide services in "international commercial arbitration or related conciliation, mediation or alternatives dispute resolution proceeding[s]" under a law signed last summer by Gov. Jerry Brown.

But in listing the five conditions as requirements, the conjunction "and" appeared to have created reader confusion that all of the five statutory conditions must be met, instead of just one of them. The article paraphrases the conditions, and the bill lists them in the statute at 1297.16.(a) here: https://bit.ly/2ycZyqe. If any conditions are met, the representation may be undertaken.

Alternatives apologizes for any ambiguity.

* * *

In an October CPR News item at 36 *Alternatives* 130 (October 2018) previewing the November CPR Institute Corporate Leadership Award dinner, a listing of the prior award winners named the 2015 award winner and used its general counsel's title, but due to a production error dropped the GC's name. The 2015 CPR Institute Corporate Leadership Award was presented to 3M, and its Senior Vice President of Legal Affairs and General Counsel Ivan K. Fong.

Alternatives apologizes for the error.

CPR News

(continued from page 2)
departments on dispute prevention and resolution. I will be joined in this endeavor by CPR board member Richard Ziegler, who will be retiring from his partnership at Jenner & Block at that time.

"And you can count on us to be CPR members going forward. I will continue to be reachable at nhanft@cpradr.org. Warm wishes for the holidays!"

CLA 2018: CPR HONORS J&J AND GC MICHAEL ULLMANN

The International Institute for Conflict Prevention and Resolution honored Johnson & Johnson and Michael H. Ullmann, the company's Executive Vice President, General Counsel, with its 2018 Corporate Leadership Award for leadership in dispute resolution on Nov. 13.

It was the 15th time CPR has presented the award, known as the CLA, which took place at a black–tie dinner at the American Museum of Natural History in New York.

Johnson & Johnson, headquartered in New Brunswick, N.J., also was the first company to be honored with the CPR Corporate Leadership Award twice. The broadly based healthcare company was previously cited in 2006, along with then-General Counsel Russell Deyo, who also attended the November dinner.

Ullmann returned the honor, telling attendees, "For over 20

CPR News

Michael Ullmann

years [the] CPR Institute has helped us resolve disputes and preserve business relationships so that we could continue to develop and provide these medicines, devices and products. It is no exaggeration to say that CPR has helped us help people live longer, healthier and happier lives. And that is certainly something worth celebrating."

The event was CPR's biggest CLA, setting records with more than 800 attendees, and with revenue raised of about $2.4 million. CPR dinner committee chair Charles Morgan told the crowd that the donations fund CPR's public policy research and programs as well as international initiatives.

Johnson & Johnson is a longtime CPR Institute member. As general counsel, Ullmann was honored by CPR for continuing to embody and apply the organization's ADR principles, guiding the organization and setting a high standard for others to emulate—with employees, business partners, vendors and the community.

"We have an honoree who is not only extraordinarily deserving of this award, but one who exemplifies what CPR stands for," said Noah Hanft, CPR's president and chief executive officer, in his dinner remarks. He added that Ullmann's and the J&J Law Department's "emphasis on dispute prevention and resolution, and how important it is, not just to the bottom line, but to their customers, is a living and breathing example of CPR's mission at work."

In addition to his duties as the company's general counsel and executive vice president, Ullmann is a member of the J&J's Executive Committee, and has worldwide responsibility for Legal, Worldwide Government Affairs & Policy, Global Security, Global Aviation and Health Care Compliance & Privacy.

Ullmann—excerpts of his dinner remarks appear at right—joined Johnson & Johnson as a mergers and acquisitions attorney in 1989 and has held various management positions in the Company's Law Department since 1999. He served as General Counsel of the Worldwide Medical Devices Group for six years and assumed his current position in 2012.

Attorneys in Johnson & Johnson's Law Department or those previously associated with J&J say that ADR is ingrained into the company's litigation approach, with the vast majority of its cases on an arbitration path. They cite the importance of the arbitration approach in international matters to reduce variations in approaches in different court systems.

Mediation also arises in a wide variety of cases but is most prominent in employment matters.

"Mike Ullmann's leadership has ensured that the integration of ADR into J&J case management is now standard operating procedure," said CPR Board Chairman Carlos M. Hernandez in presenting the award to Ullmann and Johnson & Johnson.

"Conflict is inevitable, whether we're talking about businesses or societies, but sadly conflict resolution is not," noted Noah Hanft in his remarks, adding,

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THE HONOREE SPEAKS

Below is a portion of J&J General Counsel Mike Ullman's remarks on receiving the 2018 CPR Institute Corporate Leadership Award in New York in November:

> Our Law Department's first responsibility is to the patients, doctors, nurses, mothers and fathers and all others who use our products. Those are the people we serve. Every day Johnson & Johnson partners with other companies to develop, license and supply our medicines and devices. And for over 20 years, we have relied on ADR through the CPR Institute in our contracts with these suppliers, vendors and other business partners.
>
> All of us here tonight know that CPR enables businesses to prevent and resolve commercial disputes effectively and efficiently, without the cost, publicity, unpredictability and acrimony of litigation. But for us at J&J this is about more than efficiency, time and cost. It's about people's lives. When there is a commercial dispute between us and our partners, it's not just the companies who lose … medicines may not get developed, licenses to new life-saving technologies may be terminated or other life-enhancing products may not be produced.
>
> For over 20 years, [the] CPR Institute has helped us resolve disputes and preserve business relationships so that we could continue to develop and provide these medicines, devices and products. It is no exaggeration to say that CPR has helped us help people live longer, healthier and happier lives. And that is certainly something worth celebrating.
>
> Tonight we are joined by many of the law firms and lawyers with whom we have worked over many years and decades. We thank you for your friendship and collaboration. You are essential partners in helping us fulfill our Credo. [*Editor's note*: See www.jnj.com/credo.] And whether you've worked with us on arbitrations, acquisitions, litigation, IP, FDA issues or other matters, you have made a difference in helping us help patients and the people who use our products. So thank you.
>
> On behalf of Johnson & Johnson, our Law Department and myself—thank you for this Award, thank you for this recognition, thank you for this great night. But most of all, thank you to CPR and the law firms here with whom we partner for helping us help millions of patients and people around the world lead longer and healthier lives.

CPR News

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I believe a distinguishing factor of companies that thrive over the years and are "built to last" is the ability to approach and resolve disputes thoughtfully and effectively. It makes a big difference to its customers, its employees and its shareholders. And, J&J, Mike and his team understand this and put it into practice every day. And that is why it is such an honor for me to be here today honoring Mike and J&J.

* * *

The 30-member CPR Corporate Leadership Award Dinner Committee was led by longtime chairman Charles R. Morgan, of the Morgan Group, and included J&J's Mike Ullmann, as well as CPR Board Chair Carlos M. Hernandez, who is chief legal officer of Fluor Corp.

The committee included past CPR Corporate Leadership Award honorees Ivan K. Fong, Senior Vice President, Legal Affairs and General Counsel, of 3M Co.; Craig B. Glidden Executive Vice President and General Counsel at General Motors Co., and David R. McAtee II, Senior Executive Vice President and General Counsel of AT&T Inc.

Other dinner committee members included John H. Beisner, Skadden, Arps, Slate, Meagher & Flom; Joseph Braunreuther, Deputy General Counsel at Johnson & Johnson; Kristopher D. Brown, of Goodwin Procter; Mary Beth Cantrell, Senior Associate General Counsel at Amgen Inc.; Janet Langford Carrig, Senior Vice President Legal, General Counsel and Corporate Secretary, of ConocoPhillips; William F. Cavanaugh Jr., Patterson Belknap Webb & Tyler; Kelly S. Crawford, Riker, Danzig, Scherer, Hyland & Perretti; Eric A. Dubelier of Reed Smith; Dianne B. Elderkin, at Akin, Gump, Strauss, Hauer & Feld; William M. Gage, at Butler Snow; Gregory S. Gallopoulos, Senior Vice President, General Counsel, and Corporate Secretary at General Dynamics Corp.; Anthony B. Haller, of Blank Rome; Michael Holston, Senior Vice President and General Counsel, General Electric Co.; John Q. Lewis, Tucker Ellis; Joseph Lucci, Baker & Hostetler; James F. Murdica, Barnes & Thornburg; Steven A. Newborn, Weil, Gotshal & Manges; Robert Particelli, Vice President, Deputy General Counsel, Litigation, Hewlett Packard Enterprise Co.; Ethan M. Posner, Covington & Burling; David T. Pritikin, Sidley Austin; William A. Ryan, Senior Vice President and Assistant General Counsel, AT&T Inc.; Thomas J. Sabatino Jr., former General Counsel of Aetna Inc., Susan M. Sharko, Drinker Biddle & Reath, and Robert I. Townsend III, Cravath, Swaine & Moore.

In addition to CPR Board Chair Hernandez, Sabatino is the CPR Institute's board vice chair; Cantrell, Gallopoulos, and Glidden are CPR Institute board members.

REFLECTING ON 2018, AND LOOKING AHEAD

The CPR Institute has been seeking members' reflections on their views of the most significant dispute prevention and resolution developments of the past year.

CPR is collecting them and plans to share them at its CPR Speaks blog, which can be found at https://blog.cpradr.org.

What New Year's dispute resolution resolutions have you made? What should others adopt? What do you think will be the ADR hot topics of the New Year?

Please submit your comments to the CPR Institute's Tania Zamorsky at tzamorsky@cpradr.org, with "2018 Reflections" in the subject line. And if you would rather author a dedicated blog post on your topic, please put "Article Proposal" in the subject line of your email.

INT'L ARBITRATION TRAINING SET FOR HOUSTON JAN. 26-28

There's still time to register for a two-and-a-half-day CPR Institute Joint International Arbitration Training in conjunction with the Chartered Institute of Arbitrators' North American Branch later this month.

The weekend Houston sessions run from Saturday, Jan. 26 at 9 a.m., with a full-day session Saturday and Sunday, and concluding Monday, Jan. 28 at 1:30 p.m.

The Houston office of Locke Lord LLP will host. It is located at the JPMorgan Chase Tower, 600 Travis—Suite 2800.

The joint three-day international arbitration training and qualification program leads to the Chartered Institute's prestigious Fellow status.

The Houston Accelerated Route to Fellowship Program is designed for attorneys with about 10 years of litigation or dispute resolution experience.

The program focuses on applicable laws and procedures for the conduct of efficient arbitration hearings in complex international cases. Satisfactory assessment of performance in role-play exercises will permit registrants to take the award-writing examination for qualification as a Fellow of the Chartered Institute of Arbitrators, which will be administered as part of the program.

Fellowship status allows the use of the designation "FCIArb." The program is expected to provide continuing legal education credits, which are pending in Texas, California, Massachusetts and Illinois, for eight to 12 credit hours.

The program will begin the day after the Sixth ITA-IEL-ICC International Energy Arbitration Conference. All participants will receive a VIP invitation to CPR's Cocktails and Conversation panel

CPR News

and networking event taking place at BakerHostetler's Houston event space on Jan. 23.

The specific timing and scheduling has the workshops beginning at 9:00 a.m. Saturday, Jan. 26, concluding at 5:00 p.m. on Sunday, Jan. 27. The award-writing examination will begin at 9:00 a.m. and conclude at 1:30 p.m. on Monday, Jan. 28.

There will be a cocktail and dinner for attendees/FCIArb candidate and faculty on Saturday, Jan. 26 at 6:30 p.m., the cost for which is included in the tuition fee.

The trainers are:

- Retired Ambassador David Huebner, C.Arb, who has more than 25 years' experience as an arbitrator and advocate in international, investment, and complex commercial arbitrations. He is a member of CPR's Panels of Distinguished Neutrals. He served as the U.S. Ambassador to New Zealand and the Independent State of Samoa from 2009 to early 2014, appointed by President Obama.
- Trey Bergman, FCIArb, is the current chair of the Alternative Dispute Resolution Section, State Bar of Texas, and past chair of the Texas State Bar's Continuing Legal Education Committee. He has served as single arbitrator, panelist and chairman on hundreds of national and international arbitrations since 1990 in cases ranging from complex multi-party to simple disputes.
- Lucy Greenwood, C.Arb, is a past chair of the Chartered Institute of Arbitrators, North America Branch, as well as a Chartered Arbitrator and a CPR neutral. She is a Texas attorney and a solicitor of the Supreme Court of England and Wales, and is recognized in Who's Who Arbitration, Legal 500 and Global Arbitration Review.
- James Reiman, FCIArb, is the Chair of the Chartered Institute of Arbitrators, North America Branch and a CPR neutral. In addition to serving as an arbitrator and mediator in commercial disputes, he is a corporate board director and member of the faculty of the University of Oxford's Oxford Programme on Negotiation.

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The three-day Accelerated Route to Fellowship Program comprises three elements:

- Oral Assessment—Two days of oral assessment are based on a case study of a dispute. FCIArb candidates will be assessed on

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CPR News

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their knowledge, judgment and presentation on a series of problems, written exercises, and role play (as well as their reasoned award writing ability).

- Written Assessment—Written assignments will be part of the assessment process during the workshop. One of the written assignments will be prepared in advance and will be collected early on the first day of the workshop.
- Award-Writing Examination—This element consists of a written open-book examination in which an award must be written and fully reasoned, based on the evidence in an arbitration proceeding. The exam is administered as part of this program. To receive a passing grade, the award must meet international enforcement standards. This element is included in the tuition cost of this program.

Following successful completion of the three elements, candidates may apply for a Peer Interview. There is a separate charge for the Peer Interview process which is not included in the program's tuition cost.

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The fees are $1,650 for CPR members and CIArb members upgrading to Fellow status; $1,750 for group pricing for three or more registrants from same firm, and $1,950 for non-CPR and non-CIArb members.

Fees include all workshop materials; coffee; refreshments; continental breakfast, lunch and dinner on Jan. 26; continental breakfast and lunch on Jan. 27; a continental breakfast on Jan. 28, and the VIP invitation to CPR's energy-insider panel and networking event on Wednesday, Jan. 23.

Tuition for Accelerated Route to Fellowship Program includes the oral assessment and award-writing examination. For applicants requiring a visa letter there is an additional cost of $75 to defray expenses.

Payment can only be made in U.S. dollars.

Cancellation fees apply until Jan. 12. While no tuition refunds will be made after that date, the full tuition sum paid, less $500, may be credited toward a future Accelerated Route to Fellowship program offered by the North America Branch of the Chartered Institute of Arbitrators. Please note CPR and CIArb reserve the right to cancel for low enrollment.

Email info@cpradr.org for more information. For detailed information, see https://bit.ly/2Eb9nsz.