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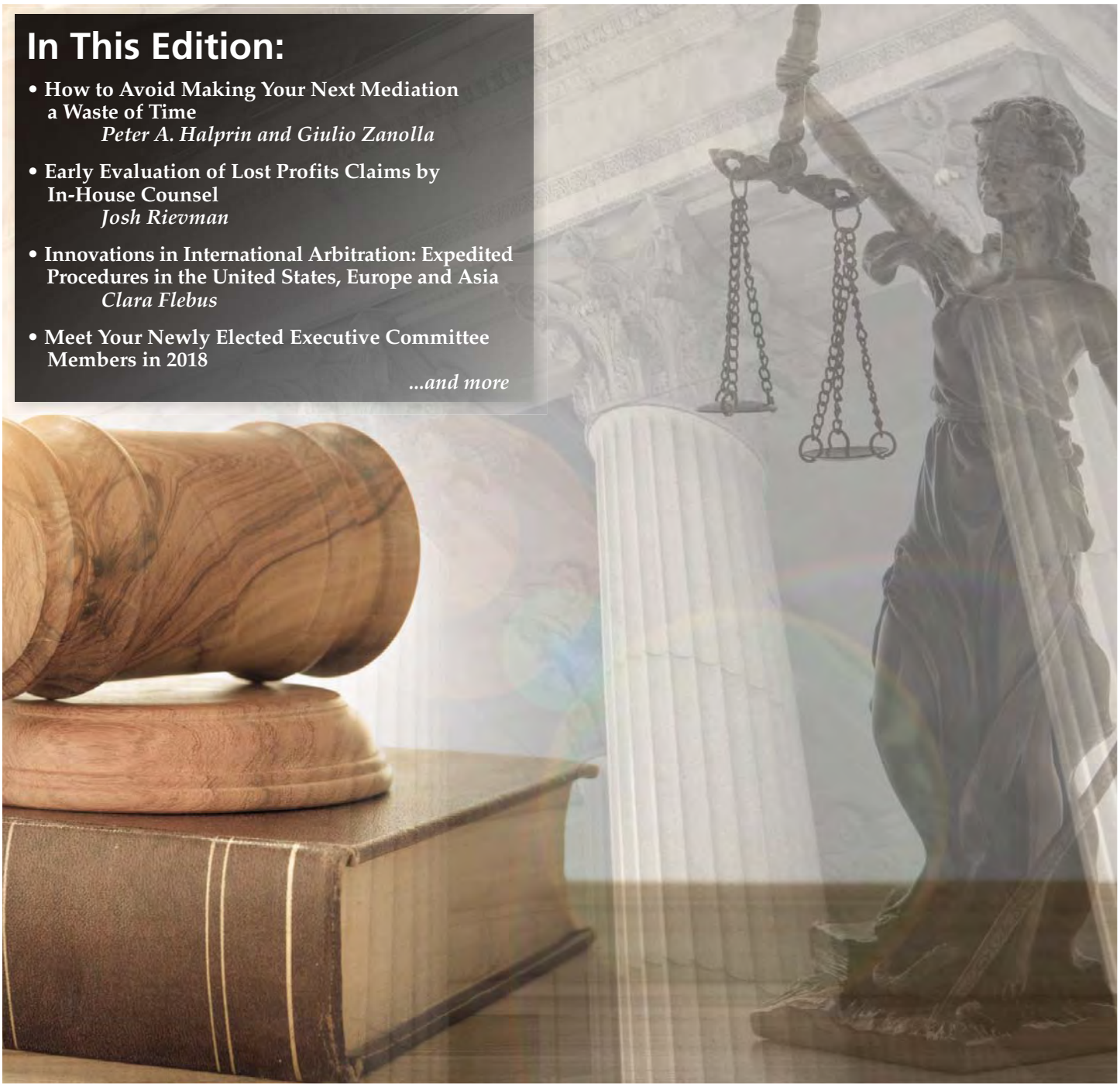

Message from the Chair and Editor

"In this bright future you can't forget your past."—Bob Marley

As you read this, I will be nearing the end of my term as Corporate Counsel Section Chair. It has been an honor to lead this Section and I am proud of all that we accomplished together. You will recall that my term began earlier than expected due to our then-Chair Jana Behe's untimely passing in August of 2017. I had originally agreed to take on the role of Chair-Elect under Jana's leadership because we had a shared vision and similar goals. Plus, I anticipated it would be fun because Jana was great to work with and we shared a growing friendship. Right before she passed we reconfirmed our plans for the upcoming year. When I expressed my concerns about filling her shoes and meeting the demands of the role, she assured me I would not be alone as she would remain actively involved and available. Indeed, I made her "pinky-swear promise" the same. While Jana was not physically present, her spirit remained and kept pushing us forward to accomplish the Section's goals. Here are a few highlights of the Section's accomplishments in 2018.

We recruited several new members to the Executive Committee. We sought people who had various years of experience and different types of in-house experience who were passionate about identifying and implementing new ideas. I invite you to meet the "new recruits" on page 18.

In the spirit of identifying ways to meet the needs of our vast and diverse membership, we began conducting one-hour luncheon webinars on timely topics impacting in-house counsel. We conducted programs such as "GDPR 1 Month to Go"; "Crisis Management for In-House Counsel" and "Blockchain and Smart Contracts 101." These programs are designed to be interactive, roundtable-style discussions so that participants can ask questions of each other and the program speakers without leaving their desks. They are also complimentary for all Section members and recorded so that members can listen later if unable to join the live session.

We also partnered with other Sections such as the Dispute Resolution and Commercial and Federal Litigation Sections to conduct joint CLE programs such as "Mediation Choices for Effective Representation and Advocacy" and "The Litigative DNA: The Underutilization of Mediation in N.Y.". Additionally, we partnered with the Lawyers in Transition Committee and the Westchester County Bar Association to conduct a live program titled "Life as In-House Counsel: How to Get There and What to Expect." These programs are also available online. We have additional programs planned for 2019 with the N.Y. Women's County Bar Association on "Breaking Through Bias to Achieve Rainmaking and Leadership Success" on January 22, 2019 and we will be doing a joint program with the Dispute Resolution Section at the Annual Meeting titled "ADR in the Boardroom and the Headlines: Not Fake News" on January 17, 2019.

We continued our tradition of the Section's Diversity Internship program, named in honor of former NYSBA President Kenneth G. Standard. The Section works with various New York law schools each year to select diverse law students to apply for summer internships in corporate law departments with New York State-based companies. You can read more about this year's program on page 20. David Rothenberg successfully led this initiative for many years but decided it was time to hand over the reins to Yamicha Stephenson, our Treasurer and a former KGS intern herself. We thank David for his service and look forward to Yamicha's leadership. The public interest fellowship portion of the program was renamed the "Jana Springer Behe Corporation Counsel Section Fellowship." The goal of the fellowship is to provide (i) non-profit organizations with diverse candidates; and (ii) diverse students with an opportunity to experience in-house legal practice. We encourage you to make a donation to further support the Fellowship and honor Jana's memory. Additional information can be found on page 28.

Thinking about the future of our Section, we have been identifying ways to engage law students. One such effort included an event with New York Law School and its First Generational Professionals Group about business dinner etiquette. Several Executive Committee and Section Members were in attendance.

As I turn over the reins to Mitchell Borger, I am confident that he will continue the Section's current efforts and implement new ones. Mitch is a long-standing member of the Executive Committee, experienced in-house counsel at Macy's and a prior Chair of the Section. Indeed, Mitch has already organized a planning committee for our 2019 Corporate Counsel Institute scheduled for October 2019.

While my term as Chair is ending, I look forward to remaining active with the Section serving as a representative of this Section in the House of Delegates and continuing as Editor. I encourage you to get involved and reach out to me and/or other Committee chairs listed on page 41. We would love to hear about your ideas on how to better serve our members and encourage you to get involved.

Thank you for your support and encouragement this year. Happy 2019!

Elizabeth Shampnoi

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How to Avoid Making Your Next Mediation a Waste of Time

By Peter A. Halprin and Giulio Zanolla

Raise your hand if you are in-house counsel and have ever participated in a mediation that seemed to be a complete waste of time. Unfortunately, it happens far too often.

It is particularly frustrating because the mediation process is intended to be an efficient tool to resolve even the most complex disputes, yet it may end up being a disappointing and futile exercise of exchanging small concessions without ever reaching the point of defining a realistic range of possible settlement options.

Most commonly the seeds of an unproductive mediation are sewn well before the mediation session. The work (or lack thereof) preceding the mediation session is a critical element in setting up the appropriate process for the particular needs of each case. Especially in factually and legally complex disputes, the preliminary phases of the resolution process bear significant weight in determining whether an in-person meeting can achieve a negotiated resolution of the case.

Many experienced advocates and ADR professionals understand that preparation is a key element in any successful mediation. While the concept is frequently promoted in advanced mediation trainings and seminars, it may remain amorphous and therefore elusive. There are, however, a number of specific actions that, if properly undertaken, will dramatically increase the chances of a successful mediation. Some of these relate to due diligence, some more specifically to case preparation, and others to process design.

Due diligence in mediation involves systematic process analysis encompassing the following elements: (1) the timeliness of settlement negotiations; (2) what information needs to be exchanged in advance of settlement discussions; (3) whether there are any apparent obstacles or possible conditions to participating in mediation; and (4) selecting the right mediator for the case.

Timeliness of the Mediation

The question of whether there is an opportunity to settle the case amicably at any given time should involve an ongoing, recurring analysis throughout the lifecycle of the case. By investigating an opportunity for mediation at every critical juncture from the inception of the dispute, it is possible to identify the earliest appropriate time to obtain an efficient resolution. If the answer to the above question is "not yet," the focus should shift on the reason why it is not yet the time for discussing settlement, which leads into the next two elements under "Due Diligence."

Peter A. Halprin

Giulio Zanolla

Information Exchange

Sometimes, getting the parties to a fruitful mediation requires a pre-mediation exchange of documents. To accomplish this, it is essential for the parties to clearly identify what information is needed in advance of the mediation and the purpose and benefit of such an exchange. For example, if a defendant needs a certain piece of documentation in their file to be able to convince upper management to settle, the plaintiff would benefit from providing the document (e.g., medical bills in a medical malpractice action) in a confidential setting. Agreeing upon and setting up a specific schedule for the exchange and the analysis of any such documents provided is essential to moving the process forward and avoiding allegations of gamesmanship and delay.

Potential Obstacles

Related to the prior point about information exchanges, there may be other obstacles or conditions that must be understood in getting the parties to a fruitful mediation. For example, in a multiparty dispute where certain parties are related entities or where multiple defendants and/or insurance companies are involved, there may be issues regarding decision-making amongst the different entities, including questions regarding how to allocate any possible settlement. Creative process solutions may be needed to address some of these preliminary issues.

The answers to these questions will allow parties and counsel to verify whether there are steps that can be taken to obtain the information needed and to overcome the obstacles that prevent settlement discussion from happening. In addition, it may become apparent that the mediation process can provide an extremely efficient forum to

exchange information and bring the parties up to speed for settlement discussions. This observation brings about an additional point about timeliness. The fact that a case is not "ripe" for settlement doesn't necessarily mean that it may not be ready for mediation. When the parties identify what information is needed to effectively negotiate a settlement and understand the potential obstacles to negotiations, they can structure the mediation process to accommodate access to needed information and address the issues preventing settlement discussions within the protected forum of mediation.

Mediator Selection

In many instances, the parties will want a mediator with previous experience dealing with the kinds of issues that have arisen in the case at hand. This is particularly true in highly specialized areas of law where the parties will not want a mediator to have to spend time getting up to speed on an issue or educating the mediator on technical issues. Beyond the right background, the parties will want a mediator both sides respect, whom both sides are willing to listen to regarding the risks associated with the case, and who can establish credibility and rapport with the parties and counsel.

Finally, in the selection of the mediator, the parties should keep in mind that a mediator's most important skill set lies in her or his ability to structure and manage the process effectively. Mediators who have gained significant experience in a vast array of dispute types may have developed a broader spectrum of tools to address the diverse types of issues arising out of complex settlement negotiations.

In addition to the four elements of due diligence described above, case preparation is also an important part of the necessary work leading up to a successful mediation session.

Case Preparation Involves

1) Engaging all stakeholders in preliminary discussion regarding process and scheduling;

2) Providing relevant information, mediation statements, analysis to the mediator and to the other side(s);

3) Analyzing the information and engaging in preliminary ex-parte and/or joint discussions, and

4) Formulating a plan for the mediation session.

Identifying All Stakeholders and Necessary Participants

Mediation is a party-centered process, the outcome of which depends on decision-makers' ability to commit to a negotiated resolution. The engagement of the key participants should include all preparatory phases, and lead to their participation in the mediation conference not only with the authority to settle, but also with an understanding of how the mediation will unfold and provide the parties with the opportunity to assess resolution options.

Exchange of Information and of Written Mediation Submissions and Documents

This should also be custom-tailored to the case. As a general consideration, it is important to set an appropriate schedule for exchanging mediation briefs and documents, in order to allow the mediator and all parties to review and process the information received. In complex cases, it may be appropriate for the mediator to invite the parties to submit additional analysis of specific issues or relevant case law, or to engage experts to opine on technical aspects of the case. Sufficient time should be allowed also for pre-mediation calls with the parties separately and/or jointly after the written submissions occurred.

One example of a realistic timeframe for setting up a mediation process could look like this:

- 8 weeks out—pre-mediation call with all parties regarding process/scheduling, case background;
- 4 weeks out—exchange of mediation statements, exchange of documents;
- 3 weeks out—separate pre-mediation calls with the parties regarding the statements/questions;
- 2 weeks out—discussion of initial positions;
- 1 week out—exchange of any further documents/information;
- 2 days before—call to discuss any last minute issues and to review process plan, and
- Mediation session.

The formulation of a mediation plan will necessarily depend on the many variables pertaining to the circumstances of each case, and the type of process that the parties, with the assistance of the mediator, design.

Analyzing the Information and Engaging in Preliminary Ex-Parte and/or Joint Discussions

In conjunction with the process described above, preparation for the mediation session requires the parties to carefully think through their positions. To do so, the parties must analyze the information and mediation statements they received. To properly prepare, parties should undertake this analysis in conjunction with the mediator and the other parties. For example, if the mediator believes that a certain issue is critical to the defendant but was not addressed in the plaintiff's mediation statement, it may be helpful for the plaintiff to provide a supplemental submission on the issue in advance of the mediation. Likewise, if one side's mediation statement suggests a lack of seriousness, the other party may want to discuss this with the mediator early on so the parties

do not waste the time and money of sitting through a day of mediation prematurely.

Formulating a Plan for the Mediation Session

While putting together a plan, consider:

1) How the joint session will be conducted (whether there will be formal presentations during the joint session, how to present the case, who will be speaking and how the presentation will be divided among the team members, whether there are questions that may be useful to ask directly to the other side and how to do it effectively);

2) The negotiation parameters (Aspirational goal, range of acceptable outcomes, BATNA, WATNA, possible non-monetary elements of the negotiation, reservation point, etc.);

3) Applicable objective criteria;

4) Concession strategy;

5) Leverage points;

6) Analysis of other side's team dynamic.

A mediation plan can be more or less detailed. In order to be effective, however, it needs to be realistic and built on solid analysis as opposed to best guesses. Keep in mind that during mediation parties may discover information that could legitimately modify their assessment of material aspects of the case. As a result, a plan should not be considered an absolute, rigid course, but rather a set of guiding parameters and references available to inform the parties' conduct during the process.

The process' structure and the design of its different phases will be consequential to the information that emerges throughout the initial stages of the discussion. An experienced mediator should have ample tools to present process suggestions to address the concerns of the parties and the type of issues involved as they arise in the preliminary conversations. Mediation has the unique characteristic of being completely flexible and adaptable. Parties and counsel should not be afraid of departing from what could be considered a typical, straightforward, caucus-based, mediator-shuttled bargaining dance. They should explore with the mediator and the other parties what type of process could be the most effective in the specific circumstances.

Conclusions

The foregoing preparation items are essential in facilitating a fruitful mediation. Only with counsel, parties, and the neutral working together to properly prepare for the mediation can counsel, parties, and the neutral engage in mediations that are not a waste of time. Mediation is a process and, as such, requires the right balance of structure and flexibility so as to enable the parties to reach a negotiated resolution.

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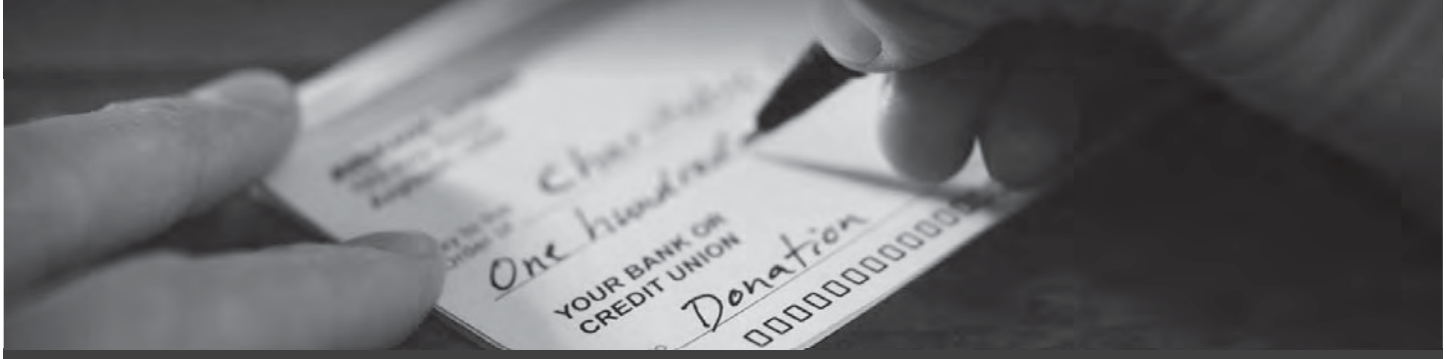

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Early Evaluation of Lost Profits Claims by In-House Counsel

By Josh Rievman

An important element of conducting a business efficiently is to control the flow of legal disputes that invariably emerge in the course of a company's activities. The ability of in-house counsel to make early assessments of the value of such disputes provides management with an invaluable tool to evaluate a dispute's potential impact. Whether as potential plaintiff or defendant, an understanding of what damages are at stake is vital to inform the course of action the company should take: to prosecute or defend a lawsuit, seek resolution through mediation, or defuse the situation informally. Of all the categories of damages at stake in business disputes, lost profits are perhaps the most common and least understood.

"A lost profits calculation is generally the subject of expert testimony. Any expert, however, needs evidence on which to base his or her opinion."

This article aims to assist the in-house practitioner by examining what lost profits are recoverable, the legal standard necessary for proving such a loss, the types of proof courts require, and some common methodologies and practical considerations concerning proving and debunking projected lost profits.

What Are Lost Profits?

Lost profits are lost net profits. More specifically, lost profits are lost revenue, directly attributable to the complained-of conduct, net of what is known as "avoided costs," over a reasonable time period. Avoided costs are those that would not be incurred because of the lost revenue opportunity, and are generally variable, rather than fixed, costs.

What Is the Legal Standard for Proving Lost Profits?

When evaluating a case early in the dispute resolution process, it is important to recognize what is required to prove an entitlement to lost profits. Generally, lost profits are proven by comparing a company's profitability before the alleged wrongdoing with its profitability during the period after it. By their very nature, lost profits are almost always unknown, because they are the profits that did not happen. Consequently, they cannot be known with certainty and must be estimated or projected.

Josh Rievman

Courts do not allow an aggrieved party free rein to claim any amount of lost damages it can justify, subject only to a defendant's cross examination. Instead, courts require plaintiffs to estimate lost profits based on objective facts, figures, and data, from which the amount of the loss can be determined with reasonable certainty. The lost profits must be directly traceable to the breach and are neither remote nor the result of intervening causes. And because lost profits are generally consequential damages and must therefore have been within the reasonable contemplation of the parties.

To be clear, while the lost profits estimate must be reasonably certain, it need not be exact. Although a plaintiff cannot recover lost profits that are hypothetical or hopeful, neither can a defendant defeat a lost profits claim on the ground that the amount cannot be perfectly calculated. What is acceptable proof lies somewhere in the middle: a projection based on documentary and testamentary evidence, adduced by acceptable methodology and reasonable assumptions, capable of withstanding cross-examination. Where a business is new and has a paucity of profits history, courts will hold that business to an even higher level of scrutiny.

The party trying to establish lost profits must also consider and eliminate other potential sources of harm. Only damages that were proximately caused by the defendant's conduct can be recovered. An examination of similar competitors and similar markets over the same time period is crucial to determine the extent to which the loss of profits resulted from the conduct in question.

What Sort of Factual Evidence Is Necessary to Establish Lost Profits?

A lost profits calculation is generally the subject of expert testimony. Any expert, however, needs evidence on which to base his or her opinion. In addition to the

testimony of key business leaders, including the CEO, CFO and business development heads, experts will need to examine and base their analysis on several categories of business documents, including financial statements, management projections and business plans, documents recording past performance, budgets, competitive or market analyses, analyst and industry reports, analyses of the relevant economic factors such as projected growth, availability of capital and credit, and even, in certain instances, geographic, climate and political forecasts.

What Are Common Methods for Calculating Projected Lost Profits?

In order to make a preliminary estimate of what a lost profits claim might be worth, in-house counsel should also be aware of the primary methods for presenting a lost profits projection. There are four primary methods for estimating lost profits: the before-and-after method; the yardstick method; the lost market-share method, and, where a contract provides for an ascertainable level of commerce, an analysis of the contract terms.

Before-and-After: This method compares profits before the complained of behavior with the level of profits that follow the behavior. The before-and-after method, of course, requires a record of historical profits and an ability to adjust for other factors that might affect profits in the later period. This method also requires the plaintiff to choose a point by which the profits are expected to recover.

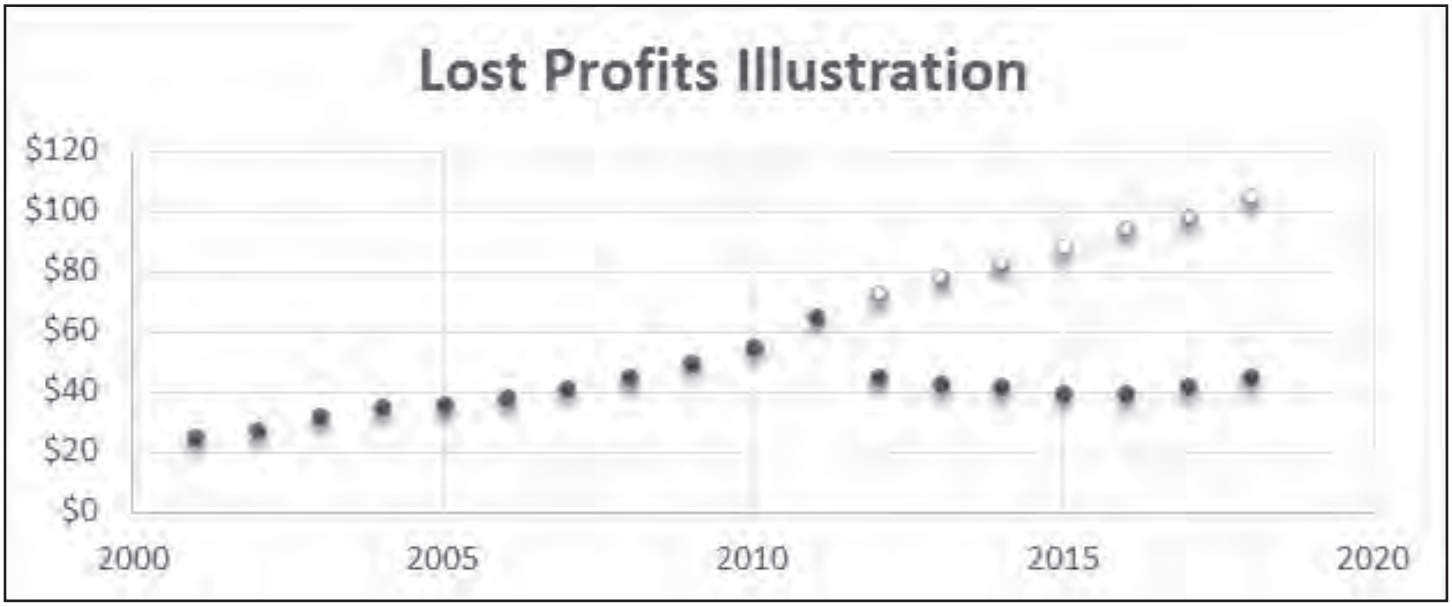
In the illustration below, actual profits are represented by the dark line while the light line represents the projection of what profits would have been in the period 2012-2018, absent the complained-of behavior. In this example, the profits had trended upward for ten years, before falling off dramatically and taking four years to stabilize and begin to recover. By 2018, once profits begin to recover, the analysis ends.

Yardstick: The yardstick method is a comparative approach that relies on actual performance of comparable companies as a benchmark for what performance would have been, absent the behavior in question. This method is useful where there is limited earning history or when a company has been driven out of business. It is important to bear in mind that because no two businesses or industries are identical, adjustments need to be made to make the comparison as credible as possible.

"While the question of the success and failure of expert presentations of lost profits projections is beyond the scope of this article, it is nonetheless important for in-house counsel at the initial stages to consider the competitive position of the company..."

Lost Market Share: This model examines the market as a whole and contemplates that the business had a consistent market share that it would have maintained but for the behavior at issue. A similar analysis can be conducted for specific opportunities lost.

Contract Terms: In cases in which there is breach of a contract that established a level of business to be done between the parties, a lost profits claim may be measured



by calculating the expected profit from that known level of future business.

How Difficult Is It for a Party to Prove or Disprove Lost Profits?

Lost profits issues are regularly litigated around the county, in state and federal courts and in specialized business courts, such as the New York Supreme Court's Commercial Division and the Delaware Chancery Court. A recent Westlaw search reveals that in the first half of 2018 alone, there were nearly 600 reported decisions discussing lost profits written by courts throughout the country.

Challenges to lost damages projections can be made through such varied arguments as a lack of underlying financial evidence, or challenges to an expert's reliability, relevance or qualification under the *Daubert* doctrine. A recent study by a major accounting firm found that during 2017 financial experts were either partially or completely excluded in 48 percent of the cases in which they were proposed to testify.[1] While the question of the success and failure of expert presentations of lost profits projections is beyond the scope of this article, it is nonetheless important for in-house counsel at the initial stages to consider the competitive position of the company, the quality of its financial reporting, the credibility of its potential fact witnesses and also the financial wherewithal to hire expert counsel and valuation professionals capable of prosecuting or defending against a lost damages claim.

Endnote

1. PWC, Daubert Challenges to Financial Experts, A Yearly Study if Trends and Outcomes, 2000-2017, available at https://www.pwc.com/us/en/services/forensics/library/daubert-study.html.

Josh Rievman is a partner at Cohen Tauber Spievack & Wagner P.C. and focuses on litigation and arbitration of commercial disputes. Josh has successfully represented clients in jury and non-jury trials in New York State and federal courts, in state and federal appellate proceedings, and in arbitration locally and internationally. Josh also counsels executive employees and employers with respect to separation, onboarding and internal investigations. In his practice, Josh represents clients on a broad range of issues, including actions arising out of domestic and international commercial transactions, breach of contract, breach of fiduciary duty, unfair competition, licensing, products liability, trademark, securities, partnerships, banking transactions, technology, professional sports contracts and bankruptcy. Josh often relies on experts to prove and disprove damages on behalf of his clients.

Volunteer Spotlight: Jessica Thaler-Parker
Regulatory Change Professional
Vice Chair and Co-Chair of the Membership Committee of the Corporate Counsel Section

Interview by Barbara Levi

In a recent issue of *Inside* I wrote to you about the Corporate Counsel Section's Pro Bono Committee, and outlined the work that Committee members Joe DeLeo, Anthony Fong and myself were starting to engage in to benefit Section members who are interested in getting involved with pro bono activities. At that time I wrote that it was our goal to provide our membership with the means and opportunity to help others in a way that is both meaningful and "user friendly," and asked readers to start to think about how they could help make a difference. I am pleased to report that a number of our fellow Section members have done more than just think about pro bono—they've lived it! And so, in this issue of *Inside*, we introduce "Volunteer Spotlight," a new feature in which we publish interviews with Section members who have volunteered in the pro bono area. We hope their stories will educate and inspire our members, and lead to thinking about the many different ways in which we, as Corporate Counsel Section lawyers, can contribute our skills and experience to individuals and organizations in need. Our first interview is with Jessica Thaler-Parker, Regulatory Change Professional, Vice Chair and Co-Membership Chair of the New York State Bar Association's (NYSBA) Corporate Counsel Section's Executive Committee, and in each issue going forward we plan to feature another Section member. If you would like to share the story of your pro bono volunteer experience, please contact me through NYSBA by emailing Kristina Maldonado at kmaldonado@nysba.org. We look forward to hearing from you.

Barbara Levi
Chair, Corporate Counsel Section
Pro Bono Committee

Jessica Thaler-Parker

Q Tell us about yourself.

A I am a corporate transactional lawyer with a focus in middle market lending, turned legal generalist, turned non-profit Chief Legal Officer, turned regulatory project manager. I have always been involved with charitable and volunteer activities. I took on leadership roles for my local undergraduate alumni organization and my law school's Recent Graduates Committee, expanding the breadth of their activities, establishing a scholarship fund and growing their respective membership bases. I also am an active member in the New York State Bar Association where I have led and participated in various committees and served on the Executive Committee of two of its Sections and in the Westchester County Bar Association where I sit on its Executive Committee.

During the period of time when I was a solo practitioner, I had the honor of being a volunteer for the Greater New York Chapter of the Make-a-Wish Foundation both as a Wish Grantor (where I acted as the liaison between the Wish Child and the Make-a-Wish office) and Wish Assist Volunteer (where I got to attend the wishes with out-of-state Wish Children and met various professional athletes, world class actors, children's book authors and fashion designers). Volunteer work often serves to fill holes in professional and personal experiences, providing "feel good" opportunities, new knowledge and perspective and often leads to many wonderful and fulfilling relationships.

Q Tell us about your volunteer experience—the organization(s) you worked with and how you connected with them.

A Due to constraints imposed by regulations and guidelines applicable to my current and past roles, as well as fact that my particular set of skills has not always been relevant to the ultimate beneficiaries of the pro bono organizations I wished to serve, I have not directly worked on legal matters for the beneficiaries of those not-for-profit organizations. Instead, I have focused my pro bono service on volunteering in many different manners and for many different organizations. One particular area of interest is assisting organizations which benefit veterans, and my connection with those groups stems from a very personal place.

In November 2015 I married my true love, a decorated combat Marine and federal police officer. In hearing the stories, hurdles and injustices he and his fellow veterans and officers so often faced, I started getting more interested in veterans' issues. I am still amazed that, rather than thanking veterans for putting themselves in harm's way in order to protect us all, even when they do not agree with the current political agenda, people blamed the veterans for that agenda. I am always pleasantly surprised when I witness the big and small acts of appreciation that are received, from a simple gesture saying, "Thank you for your service" to the establishment of programs to support their needs and fight for their rights.

Not long after my becoming a military spouse, I came to learn that the New York State Bar Association had a Committee on Veterans. It focuses, primarily, on training attorneys to assist veterans in benefit disputes and raising awareness throughout the state of the establishment of veterans' courts. Although highly important and needed efforts, these were not things that I, as a transactional attorney, could participate directly in. I began to speak with the Chair about how we could better involve transactional lawyers, such as through training on grants, loans and other benefits available to veteran clients when setting up and running a business. All of these folks come out of the military with extensive training in general leadership and management as well as skills in particular areas, some of which are very nuanced and specialized. Lawyers can help these individuals transition to civilian life by providing the legal guidance and counsel necessary to help a business start up and continue operations. For example, a high school classmate was a mechanic who worked on tanks and large diesel vehicles while serving in the Marine Corps. Now he has opened a business servicing the diesel truck fleets of many companies.

Q Tell us about the project(s) you've been involved with. What kind of legal work was involved? How did it utilize/build on/challenge your legal skills?

A There are various projects that the Veterans Committee is working on. Largely, the Committee works to set up relevant CLEs and to provide resource information to State Bar members who can then relay that information to their veteran clients. Also, the Committee is looking into such things as establishing (or coordinating the already established) lawyer referral programs for veterans. As a Committee leader, I am involved with looking at what projects the Committee is going to attempt to tackle and liaising with existing programs and groups in order to be most effective. Currently, I am working with the Committee as well as with various State Bar Sections and the Westchester County Bar Association to establish a CLE program focused on advising veteran clients in the establishment and operation of businesses. The program is in the planning stages but we are looking at having speakers on business creation, franchising opportunities, grant and loan availability and business continuity during deployment. We are tapping into solo practitioners, bank counsel, other veteran organizations and those who run established veteran programs to find our panelists. Our hope and plan is to use this program as the prototype for similar panels that we can organize with other New York State local bar associations, taking this training to lawyers and veteran clients through New York's 13 Judicial Districts and 62 counties.

Q What were the unexpected hurdles you needed to deal with and what were the unexpected benefits?

A There is always something that comes up—finding an agreeable date and appropriate and convenient program space; assessing the pros and cons of certain potential sponsors and speakers; budget issues, etc. These common hurdles are complicated when working with multiple organizations and their "sub-organizations" because there are concerns regarding the split of expenses and profits, division of use of human capital and similar issues. Also, because of the nature of these organizations, needing to be aware of and comply with the laws around gifts and reimbursements. The benefits, however, far exceed these hurdles. Once able to work through the minutia, we are left with a collaborative program with information and knowledge from both a local and statewide perspective that is able to more completely benefit our veterans' community. And, on a personal level, a much expanded personal and professional network as well as a greater knowledge of the complexities of our laws.

Q What advice would you give to someone considering taking on a pro bono project?

A Remember that the majority of the folks you are working with are volunteers and others who are also working in a pro bono capacity. They have other professional and personal obligations which, at times, will have to take precedence and may prevent, fully or partially, participating in the same manner, at the same commitment level and with the same resources and capacities that you participate. You need to allow everyone to make their contributions in their way and in their time. If something, therefore, has a time constraint, you need to be sensitive to that factor, which may mean pressing on those who have the availability to make that something happen within the needed time frame. At the same time, you want to avoid upsetting your fellow volunteer, which could negatively affect the common goal. Similarly, you need to be up front about your own time restraints and skill set so that you are not putting a project or program in jeopardy or, worse, putting an excessive burden on a fellow volunteer.

You need to also understand your capacity versus your passion. You may be fully passionate about a cause but not have the ability to serve it appropriately. For example, you may feel strongly about the injustices human trafficking victims may face, but if you are not versed in immigration law, you might be better serving the organizations that serve those victims rather than trying to serve the victims directly. In that regard, underserved populations are always in need of assistance and there are established organizations and programs that aid those communities. The best place to start is with what exists and find a role within. To the extent you have an entrepreneurial spirit or just the desire to do more, you can use what is established as a stepping off point, allowing you to use your skills to support those communities. This is what I am doing with veterans work. Within an organization I was already involved in I found a group which was serving the veterans community, albeit in a manner my skill set was not able to effectively support. I brainstormed with its leaders and its members and found a way to utilize the skills I have to expand the breadth of the Committee's work and, in turn, expand the benefits and resources available to a much deserving, legally underserved community, our veterans.

Inside Interview

Sanoj Stephen

Senior Vice President & General Counsel
Sotheby's International Realty, Inc.

Conducted by Melissa Persaud

Sanoj Stephen

Sanoj Stephen began his in-house counsel career when he joined Sotheby's International Realty in 2004. He was promoted to Senior Vice President and General Counsel in 2006 and currently manages the legal department, where he works closely with senior management to advise on the company's corporate strategy, corporate transactions, and litigation and regulatory affairs. He is also responsible for brokerage offices in several states around the country, handling government inquiries, formal and informal, from a variety of federal and state agencies. Prior to joining Sotheby's, Mr. Stephen practiced corporate law at Kramer Levin Naftalis & Frankel, LLP. During his time at Kramer Levin, he took part in a pro bono initiative, working as a litigator in the South Brooklyn Legal Services office. In addition to his J.D from Fordham Law School, he holds a B.A., *cum laude*, in philosophy from Columbia University.

Mr. Stephen currently serves on the Board of Governors of Hugh O'Brian Youth Leadership (HOBY). From 2013 to 2016, he served on HOBY's Board of Trustees and in July 2016, finished a term as President of HOBY's Board of Trustees. He is a member of the Executive Committee of the New York State Bar Association's Corporate Counsel Section, and recently served on the planning committee for the Section's Corporate Counsel Institute in November 2017.

1. As the General Counsel for Sotheby's International Realty, what is a typical day like for you?

   I'm responsible for the company-owned offices of Sotheby's International Realty. We operate 44 offices around the country, in some marquee luxury, high-end markets. My day is a mix of litigation management, compliance and regulatory issues, and advising the business team. I negotiate company agreements, advise on corporate strategy, and am fairly close to the brokerage operations. Frequently, that requires getting involved in individual transactional issues, and helping our very high caliber brokers deliver the best solutions for their clients.

   I have constant interaction with our senior management team, and work closely with the attorneys on my team and at our parent company.

2. How does your legal department interact and coordinate with the other business departments? What is challenging about managing offices in several states across the country?

   We work very collaboratively with the other departments. We work very closely with our Finance Department on acquisitions and different company initiatives; with our Marketing Department on new product rollouts, and with HR on personnel issues. We maintain direct communications with our brokerage managers in all our offices. We are part of a large public company, so we also have access to our parent company's resources. This includes specialty practice groups within the broader Legal Department. One of the challenges in working with 44 offices around the country is understanding how the real estate cultures of particular areas play into a deal. I have to make sure that my advice is not only legally sound but also appropriate for the region. Another challenge is the time difference involved and being equally accessible to all our offices.

3. How do you stay abreast of so many areas of law? What resources do you rely on?

   We stay abreast of the real estate brokerage regulations in all the states in which we operate. That is important since we are a licensed, regulated business. There are certain things common to all states, but each state does have its own variations on certain matters. We have the benefit of knowledgeable, high caliber brokerage managers in all our jurisdictions. We also have the benefit of mature and active trade associations in all our jurisdictions, and those trade associations provide alerts to their membership of significant developments impacting the industry. Being part of a large public company means that we have the benefit of many affiliated companies within our organizational structure. Some of my colleagues are regional counsel in areas

that overlap with Sotheby's International Realty's geographic footprint, and they serve as valuable resources as well.

4. What is the best aspect of your job?

   The best aspect of my job is the very talented group of people I get to work with. I am fortunate to be part of an amazing brand with a heritage going back to 1744, when the Sotheby's auction house was founded. We deal with some really special and unique properties that our clients trust us to buy and sell for them. We have a marketing reach that is unsurpassed in the industry. Our clients come to us because of our expertise, access, exclusivity and discretion; and our talented team—that I get to work with every day—is what brings it all together.

5. Before working at Sotheby's, you were an associate at Kramer Levin. What made you want to make that jump?

   The possibility of going in-house is something that a lot of attorneys at law firms think about, and it was an opportunity that I saw other attorneys at my firm take advantage of. I was a corporate associate at the firm, and gained a lot of corporate transactional experience, as you would expect. At one point, my firm loaned me out for six months to South Brooklyn Legal Services, where I had the opportunity to work as a litigator. That experience gave me the chance to grow and develop as an attorney in ways that a corporate associate rarely gets. So my time at the law firm allowed me to develop a varied set of skills that have served me well in the move to in-house practice.

   Making the move from a law firm to in-house practice is viewed as a golden opportunity by many. But finding the right fit is incredibly important. The right opportunity doesn't come around every day. You have to consider the people, the industry, and whether a particular opportunity is a good match for your own individual experience and areas of expertise. All of those things happened to have come together for me, and for that I consider myself incredibly lucky. Sotheby's International Realty presented me with a blue ribbon brand, a talented management team, a collegial environment with resources and a team of other lawyers that I was able to join. Finding the right fit is what has allowed me to be here at Sotheby's International Realty for almost 14 years now.

6. What were some of the biggest challenges you faced transitioning from a full-service law firm to an in-house position? Any advice to offer an associate who is contemplating making the same move?

   I would offer the same advice I recently saw Melinda Gates offer: get comfortable being uncomfortable. A law firm has resources that you take for granted—specialists in different practice areas, people you can turn to informally who possess a breadth of experience and knowledge in different areas, being able to bounce ideas off of other lawyers, and the use of resources that you are not paying for yourself. These are resources that may not always be available to you in-house. Many in-house legal departments don't have the amount of personnel that law firms have. You have to learn to use outside counsel judiciously, and to research things on your own. It becomes increasingly important to utilize other available resources such as the Bar Association (and in particular Sections like the Corporate Counsel Section), the Association of Corporate Counsel, and to maintain regular connections with your individual network.

   You will be called upon to advise on areas of law in which you may have little experience. It's important to be able to learn quickly, but also to get help when you need it, and perhaps more important, to recognize when you need it. You may find yourself regularly pushed outside of your comfort zone. You come to realize that when you are outside of your comfort zone, you are challenged, and that's when you grow.

7. In what ways, if any, has your degree in philosophy impacted your legal career?

   Studying philosophy was a great experience. I got to read the writings of some brilliant minds, engage in deep thoughts, examine complex concepts—some foundational concepts about how our world works, how our society functions, how individuals engage in action, emotion, rationality. As a discipline, philosophy trains you to make logical arguments, to see the flaws in others' arguments, and to develop an ability and appreciation to see multiple sides and multiple perspectives on an issue. Sounds a lot like the practice of law, doesn't it?

8. As an associate, you worked at South Brooklyn Legal Services on a pro bono basis and currently serve on the Board of Governors of Hugh O'Brian Youth Leadership. From the perspective of a lawyer and as a person, what does the word service mean to you?

"Service" means finding some way to share the gifts you have been given to benefit others, and it could be manifested in many ways—being a contributing member of your community, being a good citizen, participating in some kind of volunteer work, philanthropic activity, or being a mentor. President Obama once said that we need to remember that each of us is only here because somebody, somewhere, helped us find our path. I am no different. I owe a debt of gratitude to a lot of people; and it is a debt I can probably never fully repay. What I can do is give back in some way. I believe that when we look within ourselves and share what we have, everyone benefits.

For lawyers, perhaps, there is an added measure of responsibility. John Feerick, the former Dean of Fordham Law School, once said that the wheels of justice do not turn by themselves. They only turn because lawyers get up in the morning and go to work. It's sometimes easy to lose sight of the fact that the work we do as lawyers can have large and lasting impacts on the lives of our clients.

9. In your opinion, what is one transferable skill that you have learned through your professional career that has proven to be invaluable across all areas of your life?

   There are lots of skills that you try to cultivate in your professional career—negotiation, emotional intelligence, good listening, good judgment. One of the biggest lessons has to be that when you are a repeat player in any system—whether that be courts, government agencies; or interactions with business partners (especially relevant for in-house counsel who work with the same client day in and day out) or even competitors in your marketplace—how you make your arguments can be just as important as the substance of your arguments themselves. Maintaining good relationships, and maintaining a reputation for credibility and integrity, are incredibly valuable. Be respectful, and you will be respected and appreciated. Maintain a sense of integrity, and you will be seen as credible, your words will be persuasive, your counsel will be heeded, and you will be able to get a lot done.

10. Why did you get involved with NYSBA? What are some of the benefits in doing so?

    Many years ago, I attended the Corporate Counsel Institute, and I felt it was one of the best CLE offerings around. More recently, I ran into a friend from law school who was actively involved in the Corporate Counsel Section, and he introduced me to the Section's Executive Committee. In 2017, I helped organize the biannual Corporate Counsel Institute. The New York State Bar Association seeks to provide value to its members and to help the legal community. If I can be some small part of that effort, then great. And, of course, I've gotten to know and work with some talented people.

11. Any advice for law students who are interested in an in-house counsel career?

    Try to figure out what kind of work you like to do, and will be challenged by. Seek ways to grow. Don't expect anyone else to have a roadmap for your career. Develop good relationships at work. If you like the people you work with, that makes all the difference. You'll need to put in some time developing expertise and gaining experience. Work hard at that and don't expect to go right from law school to your dream in-house job. It takes time, including for you to figure out for yourself what is the right fit for you. But if you are passionate about something, and you've taken the time to figure out what you really want, then go for it. Don't let fear hold you back. Take Sheryl Sandberg's advice and ask yourself: What would you do if you weren't afraid? Remember that the fear will always be there. The key is to act anyway. Do your research. Look into the industries and the companies that you are interested in. Seek opportunities to learn more. Show initiative and take action. Go for it.

Melissa Persaud is a third-year law student attending Brooklyn Law School. She is an editor of the *Journal of Law and Policy* as well as a member of the Alternative Dispute Resolution Honor Society. She is interested in intellectual property and corporate law. As a recipient of the Kenneth G. Standard Diversity Internship, Melissa is currently working at Consolidated Edison, Inc. in its regulatory department. Melissa can be contacted via email at melissa.persaud@brooklaw.edu.

Meet Your Newly Elected Executive Committee Members in 2018

Evette Stair-Radlein

Evette is associate counsel at Schrödinger, a computational chemistry software company. She focuses on technology transactions and commercial contracts. She is most looking forward to helping the Section create professional value for its members (networking, programming etc.) and working toward making sure membership is diverse and that all of our members feel they are represented by the Executive Committee.

Miya Owens

As Assistant General Counsel of the Jewelers Vigilance Committee, Miya Owens brings exceptional regulatory knowledge and legal experience to a practice focused on compliance and business guidance, working with a diverse client base that includes well-known luxury goods and jewelry brands. In her role, Miya also acts as a mediator in disputes between jewelry industry members and consumers, helping all parties reduce legal costs and avoid court intervention in purchase-related disputes. Prior to going in-house, Miya worked as an Associate in the Business Litigation/IP Department at Robins Kaplan LLP and practiced the same areas of law at the boutique firm Jacobs & Burleigh.

Miya is excited to work as the Corporate Counsel Section's new Young Attorney Representative and looking forward to getting more young attorneys involved in the Section.

Mark Belkin

Mark Belkin is an Attorney in New York who focuses on business, intellectual property, and technology law. He currently works for Boies Schiller Flexner LLP, and does consulting for companies regarding emerging Blockchain technology and privacy matters. His goal is to create programs and initiatives in emerging technologies for the Section, and would appreciate ideas and collaboration. He and his wife recently had their first child. In his spare time, Mark writes about comic books for a national blog, and will soon have his own comic book coming out.

Sanoj Stephen

Sanoj Stephen began his in-house counsel career when he joined Sotheby's International Realty in 2004. He was promoted to Senior Vice President and General Counsel in 2006 and currently manages the legal department, where he works closely with senior management to advise on the company's corporate strategy, corporate transactions, and litigation and regulatory affairs. He is also responsible for brokerage offices in several states around the country, handling government inquiries, formal and informal, from a variety of federal and state agencies. Prior to joining Sotheby's, Mr. Stephen practiced corporate law at Kramer Levin Naftalis & Frankel, LLP. During his time at Kramer Levin, he took part in a pro bono initiative, working as a litigator in the South Brooklyn Legal Services office. In addition to his J.D. from Fordham Law School, he holds a B.A., *cum laude*, in philosophy from Columbia University. Mr. Stephen currently serves on the Board of Governors of Hugh O'Brian Youth Leadership (HOBY). From 2013 to 2016, he served on HOBY's Board of Trustees and in July 2016 finished a term as President of HOBY's Board of Trustees. He recently served on the planning committee for the Section's Corporate Counsel Institute in November 2017.

Jillian Petrera

Jillian recently joined Reed Smith's Entertainment & Media Group to broaden her experience. Prior to joining Reed Smith, Jillian spent six years as in-house counsel at Pernod Ricard USA, where she advised on a full range of alcohol beverage, advertising and marketing matters. Jillian was also an elementary special education teacher before going to law school. Jillian looks forward to working with the Section.

Nikki Adame-Winningham

Nikki Adame-Winningham is Corporate Counsel in the Environmental Law Group of the Legal Division at Pfizer Inc. Nikki provides timely, business-sensitive legal advice on global environmental, health, and safety matters including transactional matters, regulatory and compliance matters, enforcement defense, legal support to Global EHS programs, and policy support to the company on environmental sustainability and climate change matters. Prior to joining Pfizer, Nikki practiced environmental law at Lowenstein Sandler in New Jersey and Vinson & Elkins and Fulbright & Jaworksi in Texas. She is most looking forward to getting to know other in-house counsel and what they need from the Section. And maybe picking up some helpful guidance in the process.

Michael Kreitman

Michael Kreitman is a Senior Counsel in the Macy's Law Department. Michael counsels management on all aspects of employment and labor law, and handles matters before local, state and federal agencies. Michael is also on the Southern District of New York's Mediation Panel for Employment Disputes. Prior to joining Macy's in 1998, Michael was in private practice in New York City. Michael previously served on the Executive Committee of the Corporate Counsel Section, and looks forward to working on the upcoming Corporate Counsel Institute.

Kenneth G. Standard Diversity Internship Program

Celebrating the success of the Kenneth G. Standard (KGS) Diversity Internship Program's 13th year, Pryor Cashman LLP hosted a lovely reception on July 24, 2018 honoring the current class of KGS interns, along with the host companies which generously provided internship opportunities.

The program is named in honor of former NYSBA President Ken Standard and his commitment to initiatives aimed at increasing diversity in the legal profession. Ken spoke at the reception, sharing the trajectory of his personal journey and offering words of guidance going forward to all who are working toward the goal of a vibrant, diverse legal community.

The Class of 2018 interns was made up of eight women and three men representing eight New York State law schools; they were hosted by eight organizations, as follows:

- Faneeza Ali, Albany Law School, Chubb
- Corinne Chen, New York Law School, AllianceBernstein L.P.
- Shan (Jessica) Chen, New York Law School, Consolidated Edison, Inc.
- Isabela DeJesus, Brooklyn Law School, Visiting Nurse Service of New York
- Brandon Joseph, Columbia Law School, Salesforce
- Sunny Mangal, Benjamin N. Cardozo School of Law, PepsiCo Inc.
- Kathleen McCullough, Fordham University School of Law, Salesforce
- Kenny Moy, Maurice A. Deane School of Law at Hofstra University, PepsiCo Inc.
- Melissa Persaud, Brooklyn Law School, Consolidated Edison, Inc.
- Olivia Sanchez, Brooklyn Law School, Safe Horizon
- Cheryl Walker, CUNY School of Law, Urban Justice Center

This year marked the first time we have hosted an intern in honor of the Immediate Past Chair of the Corporate Counsel Section, Jana Springer Behe, through the New York State Bar Foundation, following Jana's untimely passing last year.

The evening also marked the transition of the role of Chair of the KGS Diversity Internship Committee. David Rothenberg, Vice President, Goldman Sachs Partners Family Office, under whose leadership the number of opportunities offered to students each year more than tripled, is succeeded in the Chair role by Yamicha Stephenson, herself a former KGS intern and currently Senior Consultant, Deloitte Transactions and Business Analytics LLP.

For both students and hosts, the internship program is a superbly rewarding experience. As noted by Shan (Jessica) Chen, "working at Con Edison as a KGS intern this summer was truly a valuable and rewarding experience. It allowed me to dive deeper into corporate counsel which I had already been so passionate about and opened my eyes to another new aspect of the law that I did not think I would be interested in."

We are actively seeking additional companies interested in hosting students in what is a proven "win-win" for all. If you think your organization may have an interest in supporting the KGS Diversity Internship Program please contact Yamicha at ystephenson@deloitte.com for more information.

And finally, we are always looking for volunteers to join the Internship Committee—the work of implementing the program is on-going throughout the year, and we welcome all. Please contact Yamicha for more information on how you can help.

You can find photos of the program on the following pages.

To make a donation in Jana's memory, please consider giving to the Jana Springer Behe Corporate Counsel Section Fellowship (formerly the Corporate Counsel Section Fellowship Fund), which focuses on identifying and supporting in-house internship opportunities for law students from a diverse range of backgrounds.

Please go to www.tnybf.org/donation, click on "Restricted Fund" and choose the Jana Springer Behe Corporate Counsel Section Fellowship, or send in the form on page 28.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If you haven't yet checked it out, we are pleased to introduce you to an Internet-based private online professional Community for the Corporate Counsel Section. We invite you to participate! Members of our Section run the gamut from law students and newly admitted attorneys who are just finding their way to well seasoned and experienced attorneys. We want all of you to share your experiences and your knowledge while also being free to ask questions of others in the Section and participating in the intellectual discussion we hope to generate. You can find our Community at www.nysba.org/corpcommunity.

The Arbitration of Intercreditor Disputes Among Financial Institutions

By Richard M. Gray

Lenders have historically resisted arbitrating disputes under credit agreements, instead preferring what they regard as more reliable results obtained in court. Because they view a borrower's obligation to repay loans with interest to be not only straightforward but also sacrosanct, they tend to be concerned that arbitrators might simply "split the baby." Also, in the belief that deep-pocketed financial institutions make unsympathetic defendants, they avoid subjecting themselves to claims of lender liability in a forum they fear may not apply the strict letter of the law. Whatever the merits of these concerns, they are unlikely to change soon.

Disputes Among Financial Institutions

However, it is important to recognize that these concerns relate to disputes with borrowers, not with other lenders. Disputes among lenders under syndicated credit agreements used to be rare. Financing structures were simple, and syndicates of lenders consisted of relatively homogenous, same (or at least similar)-thinking, conflict-averse commercial banks that expected to do many deals together over time. Now, financing structures are more complex, often involving several classes of senior and subordinated creditors with different collateral packages. The universe of lenders includes diverse financial institutions—banks, hedge funds, CLOs and others—with differing views of how to work out a troubled loan and less interest in cooperating with other lenders solely for the sake of maintaining relationships. It is not unusual for a distressed debt investor to analyze credit documentation for ways to gain advantage over other lenders, including by acquiring a blocking or controlling position to gain leverage under the collective action provisions. Tensions and the likelihood of disputes between creditors increase at times of financial distress.

There is currently increasing attention to and acceptance of arbitration as a means of settling financial disputes. The International Chamber of Commerce released a summary report on this subject in 2016 and is expected to release a more comprehensive analysis later this year. Other examples include the optional arbitration clauses adopted by the International Swaps and Derivatives Association (ISDA) and the Loan Syndications & Trading Association (LSTA) in some of their model documentation, and the growing prominence of the Panel of Recognized International Market Experts in Finance (PRIME Finance), which works in cooperation with the Permanent Court of Arbitration in the Hague to resolve disputes concerning complex financial transactions. Of particular interest, some U.S. bankruptcy judges recommend that parties in pending cases submit selected issues to arbitration for the sake of judicial economy. This comes at a time of increasing acceptance of arbitration by bankruptcy courts, generally for "non-core" issues.

Disputes Relating to Ratable Treatment

Although there are many areas of possible contention in intercreditor relationships, the most important are those that directly or indirectly affect the ranking of claims, including the ratable treatment of similarly situated creditors. Although ratable treatment is generally provided by the credit documentation at the time of signing, subsequent amendments or tactical steps taken in connection with bankruptcy cases can give rise to disputes. For example, in *Prudential Ins. Co. of Am. v. WestLB AG, NY Branch,* the court addressed a dispute between lenders under a common credit agreement following their successful credit bid for two ethanol plants in their borrower's bankruptcy. Title to each plant had been taken by those lenders, but preferential interests were allocated only to the subset of those lenders that agreed to provide exit loans to the bankrupt borrower. The lenders that had declined to provide the exit loans sued, complaining that the preferential interests violated the ratable treatment protections of the credit agreement, while the lenders who received the preferential interests defended those interests as separate compensation for providing the exit loans.

Another case, one that attracted significant attention in the syndicated loan markets and continues to worry market participants, involved a credit facility for NYDJ Apparel, LLC. In that case, a lender used its controlling position under a syndicated loan agreement to effect an amendment that enabled it to provide new, super-priority loans and junior super-priority loans in exchange for its existing loans. The lenders holding the minority position were not offered the same opportunity, and their existing loans—which before the amendment had ranked equal with the loans of the controlling lender—fell to a third-place ranking. In November 2017, the minority lenders sued in New York Supreme Court, alleging violations of the credit agreement (including an implied covenant of good faith and fair dealing).

Benefits of Arbitration for Intercreditor Disputes

The foregoing cases are just two examples of a trend of increasing friction among lenders. When the friction evolves into live disputes, the usual benefits of arbitration over litigation apply, but some benefits are worth emphasizing.

Cost and Speed: Although the circumstances of intercreditor disputes vary and the outcomes are fact-specific, many cases are more legally intensive than fact-intensive and therefore require less discovery. However, the questions of fact are frequently sufficient to survive a motion for summary judgment, which might tempt parties into more protracted and costly, but possibly unnecessary, discovery in a litigated proceeding. This could be avoided or mitigated in arbitration.

Expertise: Documentation for syndicated lending can be complex for the uninitiated, especially when the transaction includes multiple classes of creditors, collateral and one or more intercreditor agreements. The resolution of a single issue may involve many overlapping provisions and an understanding of how subtle differences in wording can reconcile apparently inconsistent clauses (or an understanding of how truly inconsistent clauses should be reconciled). One of the principal attractions of arbitration, of course, is the ability of the parties to select arbitrators with the requisite expertise.

Finality: The dollar amounts involved in loan transactions can be large, but they will rarely rise to the level of "bet the company" disputes for the lending institutions. Adverse parties will want to resolve disputes expeditiously without endless appeals, and then move on. The limited grounds for vacating arbitration awards gives them the ability to do so.

Pre-Dispute Arbitration Clause or Post-Dispute Submission Agreement

Any arbitration agreement would ideally be contained in the primary contract at initial signing, before any dispute arose. Obtaining such an agreement, however, would be difficult. That contract, usually a multiparty credit agreement, is signed by the borrower, the syndicate of lenders and their administrative agent. For the reasons stated above, lenders are unlikely to agree to arbitrate disputes with borrowers. While it may be possible in theory to craft a clause narrowly to cover disputes only among lenders, arbitration clauses with carve-outs can be tricky to draft in practice and subject to avoidance in application. Many transactions that involve multiple classes of creditors—first/second lien financings are one example—have standalone intercreditor agreements that could contain arbitration clauses. But they are still integral parts of the overall financing with the borrower, and it would be difficult to know in advance whether or how a specific issue in any future intercreditor dispute might affect or be affected by the borrower's rights and obligations. Indeed, borrowers are often parties to intercreditor agreements for this reason. These considerations, as well as the relative novelty of arbitrating intercreditor disputes, help explain the absence of pre-dispute arbitration clauses in intercreditor arrangements for loan transactions.

Notwithstanding the absence of pre-dispute arbitration clauses, the author is aware through personal experience and anecdotal evidence of the arbitration of intercreditor disputes pursuant to post-dispute arbitration submission agreements. Even though—as the conventional wisdom goes—it is difficult for parties in an active dispute to agree on anything, there are good reasons to wait for a dispute to crystallize before parties agree to arbitrate. Financial institutions do have experience with arbitration in other types of cases, but there is not a long track record for this type of case. Proceeding slowly and cautiously on a case-by-case basis will give them the opportunity to become more comfortable with the arbitral process for these disputes. Also, it may be preferable to make a decision to arbitrate based on the nature of the specific issue and circumstances. Parties could make an assessment of how the resolution might affect the rights and obligations of the borrower and then decide whether to arbitrate or bring a lawsuit involving all parties. Parties could also consider the need for extensive discovery and whether it is important to establish judicial precedent on an important legal issue in order to avoid future, similar disputes in other transactions. Even if parties initially preferred litigation, they could subsequently change their minds and decide to arbitrate based, for example, upon their mutual assessment of an assigned judge's lack of expertise in the area.

Conclusion

Although there is evidence of a small, emerging trend to arbitrate intercreditor disputes between financial institutions, the novelty of arbitration for those disputes and the possibility of issue-specific concerns preclude any expectation of widespread pre-dispute arbitration clauses in the near future. When such disputes do arise, however, parties should seriously consider arbitration on a case-by-case basis.

Endnotes

1. These concerns are more acute for U.S. domestic borrowers. In the cross-border context, they may be outweighed by the easier enforcement of arbitral awards as compared to foreign judgments. The Loan Market Association (LMA) and the Asia Pacific Loan Market Association (APLMA), the leading industry organizations for loans syndicated in Europe and Asia, provide optional arbitration clauses in their model documentation for borrowers located in jurisdictions where enforcement of foreign judgments may be problematic.
2. The collective action provisions specify the minimum principal amount of loans required to be held by lenders to entitle them, among other things, to direct action by the administrative agent, to consent to amendments or waivers and to exercise remedies. A single lender that acquired a majority of the loans would have significant leverage.
3. *Financial Institutions and International Arbitration*, Report of the ICC Commission on Arbitration and ADR Task Force on Financial Institutions and International Arbitration (2016). The report describes arbitration in derivatives, sovereign finance, investments, regulatory matters, international financing, Islamic

finance, international financial institutions, development finance institutions, export credit agencies, advisory matters and asset management.

4. This practice is more modest than proposals to use international arbitration to further the goals of the Model Law on Cross-Border Insolvency, drafted by the United Nations Commission on International Trade Law (UNCITRAL). *See, for example,* Allan L. Gropper, *The Arbitration of Cross-Border Insolvencies*, 86 Am. Bankr. L.J. 201 (2012).
5. Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy,* 15 Am. Bankr. Inst. L. Rev. 183 (2007); Arbitration Agreements and Bankruptcy: Which Law Trumps When? NABTalk, Journal of the National Association of Bankruptcy Trustees (Summer 2010).
6. The validity of amendments, particularly those relating to ratable treatment, can be the subject of disputes, especially as to whether an amendment adopted by a simple majority of lenders also required the consent of other lenders. Also, some credit agreements that provide for ratable treatment of all similarly situated lenders allow that treatment to be amended by lenders holding a majority of the loans, a result that could defeat the original purpose of the ratable treatment protection.
7. 2012 N.Y. Misc. LEXIS 4822 (N.Y. Sup. Ct. 2012).
8. The plaintiffs prevailed.
9. After the court denied the defendants' motion to dismiss, the credit agreement was amended again—this time to afford the minority lenders the same opportunity to exchange their lower ranking loans for higher ranking loans. The possibility of an appellate decision was thereby lost.
10. In these financings, two groups of creditors obtain liens over the same or overlapping items of collateral and agree by contract to their relative priorities.

Richard M. Gray is a retired partner of Milbank, Tweed, Hadley & McCloy LLP, where he was a bank finance lawyer for more than 30 years. He is now an independent arbitrator at Gray Arbitration LLC, Richard.gray@grayarbitration.com.

***This article was first published in the Fall 2018 edition of the* New York Dispute Resolution Lawyer.**

An Invitation from the Corporate Counsel Section

In honor of our friend and colleague, Jana Springer Behe, Esq. please consider making a donation in her memory to The New York Bar Foundation for the Jana Springer Behe Corporate Counsel Section Fellowship Fund.

Enclosed is my check for:

☐ $100 ☐ $25

☐ $50 ☐ Other _____

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Innovations in International Arbitration: Expedited Procedures in the United States, Europe and Asia

By Clara Flebus

Introduction

Clara Flebus

In recent years, leading international arbitral institutions around the world have introduced new rules to make arbitration faster and more efficient. This global trend has been spurred primarily by clients' growing concerns over increasing costs and length of arbitral proceedings that have become more complex, overly sophisticated, and highly resource-intensive. The expedited procedures seek to reduce time and costs by creating greater efficiency in the management and conduct of the arbitration. They provide flexible procedural mechanisms to shape the proceedings so that costs and duration are commensurate with the value or complexity of the dispute and appropriate in light of the claims and issues involved. Key features designed to control time and costs include using a sole arbitrator and expediting the appointment process, limiting written submissions, managing and minimizing discovery, deciding the case on documents only, and encouraging efficient conduct of the arbitration. Set out below is an overview of the expedited procedures recently adopted by prominent arbitral institutions including the ICC, SCC, SIAC, JAMS, ICDR and HKIAC.

I. ICC

The International Court of Arbitration of the International Chamber of Commerce (ICC) currently offers "Expedited Procedure Rules" for smaller claims.[1] The new rules went into effect on March 1, 2017, along with other revisions of the ICC Rules of Arbitration, and include a reduced scale of fees. The expedited procedure applies automatically to claims up to $2 million in proceedings based on arbitration agreements executed after March 1, 2017, unless the parties expressly opt out by agreeing that those rules will not apply. Parties can also agree to the application of the expedited procedure in cases with amounts in dispute that exceed $2 million (opt in).

To streamline the arbitration process, the expedited procedure empowers the ICC Court to appoint a sole arbitrator to hear the dispute, even if an arbitration agreement executed after March 1, 2017 provides for a panel of three arbitrators. While this provision may be viewed as challenging the principle of party autonomy in designing the arbitration process, parties are assumed to know the content of the ICC Rules, which now allocate this power to the ICC Court. The rationale for this provision is that a sole arbitrator will typically reach a decision quicker than a panel, and her fees and expenses will be lower.

The expedited procedure contains distinctive features specifically designed to facilitate increased efficiency and cost savings. For example, there is no requirement to draft the Terms of Reference—an effort that often ends up delaying the process. The parties may not raise new claims after the tribunal has been constituted, unless they have been authorized to do so. A case management conference must be convened within 15 days after the date on which the case file was transmitted to the arbitral tribunal. The arbitrator has the power to decide the case solely on the basis of documents, without an oral hearing or examination of witnesses and experts. If a hearing is appropriate, it may be conducted by videoconference, telephone or similar means of communication. In addition, the arbitrator has the discretion to limit the requests for document production or the number, length, and scope of written submissions, witness statements and expert reports.

The expedited procedure requires that a final reasoned award be rendered within six months of the case management conference. However, the ICC Court may extend this time limit pursuant to a request from the arbitral tribunal or on its own initiative. The award is then reviewed by the ICC Court.

II. SCC

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) administers expedited arbitrations under a separate set of procedures named "Rules for Expedited Arbitrations," which became effective on January 1, 2017.[2] Unlike the ICC Rules, the SCC expedited arbitration rules apply only if the parties have agreed to them in their arbitration clause or after the dispute has arisen. After receiving the statement of claim and the answer, the SCC may invite the parties to "upgrade" to the regular arbitration rules of the institution. The assessment of whether a dispute is suitable for expedited arbitration is not based on the value of the parties' claims. Rather, a determination is made in view of the complexity and nature of the dispute.

The SCC expedited arbitration is decided by a sole arbitrator. The parties may agree on a procedure for the appointment of the arbitrator, but if they are not able to choose one within the time limits, the SCC Board will make the appointment. The rules emphasize the role of the tribunal in handling the dispute in a cost-effective way. The arbitrator is instructed to conduct the proceedings "in an impartial, efficient and expeditious manner," by giving each party an equal and reasonable opportunity to present its case, but "considering at all times the expedited nature of the proceedings."[3]

A notable feature of the SCC expedited rules is that the Request for Arbitration also constitutes the Statement of Claim, and the respondent's Answer also constitutes the Statement of Defense.[4] The purpose of "front-loading"

the case is to save time by providing the arbitrator with a case file that already contains the primary submissions. Promptly after receiving the case, the arbitrator must hold a case management conference, and no later than seven days from the referral of the case she must set a timetable for the conduct of the arbitration. The parties can make one supplementary written submission, which must be brief and filed within 15 working days. Generally, the arbitration should be decided on documents only. However, a hearing can be held if it is requested by a party and if the arbitrator finds compelling reasons for having it.

The expedited rules also provide for a "summary procedure," pursuant to which a party may ask the arbitrator to resolve one or more issues of fact or law, pertaining to jurisdiction, admissibility or even the merits, by adopting a proposed summary procedure that is appropriate to the case.[5] The adversary may submit its comments to the request. The arbitrator must issue an order granting or dismissing the application by considering whether the summary procedure would contribute to resolving the dispute more quickly and efficiently.

A party may request a reasoned award. The arbitrator must issue the final award within three months from the date the case was referred to her. The SCC Board, however, may grant the arbitrator an extension.

III. SIAC

The most recent revisions of the arbitration rules of the Singapore International Arbitration Centre (SIAC), effective August 1, 2016, refined its already popular expedited procedure contained in the 2013 edition of the rules.[6] The maximum amount in dispute was raised from SG 5 million (approximately U.S. 3.73M) to SG 6 million (approximately U.S. 4.47M), including the claim, counterclaim and any setoff defense.[7] Notably, the expedited procedure does not apply automatically, but only if the parties opt in by filing an application with the SIAC Registrar, or in cases of exceptional urgency.

The rules provide for the appointment of a sole arbitrator to hear the case, unless the SIAC President determines that the matter should be referred to a multiple-member tribunal. To increase the efficacy of the expedited procedure, the revised rules removed the requirement that the arbitrator hold a hearing for the examination of any fact or expert witnesses or for oral argument. Under the current rules, the arbitral tribunal may consult the parties and determine if a hearing is necessary or if the dispute may be decided based on documentary evidence only. Interestingly, the rules contain a "fallback provision," which states that, upon an application by a party, the tribunal may order that the proceedings will not continue under the expedited procedure where such procedure is no longer suitable. The final award is to be made within six months from the date the tribunal was constituted, unless exceptional circumstances require an extension of the deadline.

In addition to amending the expedited procedure, the 2016 revisions to the SIAC arbitration rules introduced a new procedure for early dismissal of claims and defenses—a change also geared to promote efficiency in arbitration. A party may submit an application to the tribunal seeking the early dismissal of a claim or defense on the basis that the claim or defense is "manifestly without merit" or "manifestly outside the jurisdiction of the tribunal."[8] If the tribunal allows the application to proceed, both parties have an opportunity to be heard and the tribunal is required to render its decision within 60 days of the filing of the application.[9]

IV. JAMS

JAMS, the largest private ADR provider in the world,[10] revised its International Arbitration Rules effective September 1, 2016. Among several other trendy innovations, the updated rules incorporate expedited procedures setting forth mechanisms for fast-track resolution of smaller claims.[11] The procedures provide that a party may apply to the institution's Administrator for the arbitral proceedings to be conducted under the expedited rules if any of the following criteria are satisfied: (a) the amount in dispute does not exceed $5 million; (b) the parties agree to the application of the procedures; or (c) in cases of exceptional urgency, as initially determined by JAMS and then subject to review by the tribunal.[12]

Under the expedited rules, the tribunal determines if the dispute should be decided on the documents alone or if a hearing is necessary to examine witnesses and for oral argument. However, to avoid additional expense and time, the tribunal has the discretion to hold the hearings and hear witnesses by remote means. The award must be issued within six months from the date when the tribunal is constituted, unless the Administrator extends the time. The tribunal may state the reasons upon which the award is based in summary form.

V. ICDR

The International Centre for Dispute Resolution (ICDR)—the international division of the American Arbitration Association (AAA)—issued a revised set of international arbitration rules including novel "International Expedited Procedures" on June 1, 2014.[13] The expedited procedures apply in cases where no disclosed claim or counterclaim exceeds $250,000, exclusive of interest and cost of arbitration. However, the parties may also agree to use the rules for expedited arbitration in other matters of any claim size (opt in).

The procedures provide for the expedited appointment of a sole arbitrator with party input. The institution submits an identical list of five proposed arbitrators to each party. If the parties fail to agree on any of the arbitrators, or if acceptable arbitrators are unavailable to act, the institution may make the appointment without the circulation of additional names.

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The arbitration process is simplified in an effort to reduce the time, cost and complexity of the proceedings. The arbitrator may schedule a conference call requiring the participation of parties and their representatives, and within 14 days of the appointment she must issue a procedural order including a timetable for completion of any written submissions. After the arbitrator is appointed, the parties cannot submit any new claim, counterclaim or setoff without the arbitrator's consent.

Under the rules, there is a presumption that cases up to $100,000 are resolved based on written submissions only, unless the arbitrator deems that an oral hearing is necessary. If a hearing is required, it must take place within 60 days of the date of the procedural order, unless the arbitrator extends that period. Hearings may be conducted in person, via video conference or through other suitable means and cannot exceed one day unless the arbitrator determines otherwise. The arbitrator is required to issue a written award within 30 days from the close of the hearing or from the date established for the receipt of the parties' final written submissions.

It is worth noting that the ICDR International Arbitration Rules were revised in 2014 to include other efficiency-oriented provisions. Significantly, the revised Rules exclude the use of U.S. litigation procedures by expressly providing that depositions, interrogatories and requests to admit are generally not appropriate procedures for obtaining information in arbitration.[14] Another helpful provision states that requests for electronic documents should be narrowly focused and structured to make searching for them as economical as possible, and that the tribunal may direct testing or other means of focusing and limiting any search.[15]

VI. HKIAC

The Hong Kong International Arbitration Centre (HKIAC) provides for an expedited procedure in its Administered Arbitration Rules, which came into existence on November 1, 2013.[16] Expedited arbitration was first introduced in the prior edition of the HKIAC rules in 2008. The rules were revised in 2013 to effect two key changes. First, the monetary cap was raised from U.S. 250,000 to HK 25 million (approximately U.S. 3.18M), based upon the aggregate of any claim and counterclaim (or any setoff defense).[17] Second, the application of the procedure became elective, rather than automatic as it was before. As a result, now a party may ask that the arbitration be conducted pursuant to the expedited rules where the dispute amount is below the monetary cap, or in circumstances in which both parties agree to the application of the rules, or in situations of exceptional urgency.[18] The HKIAC may grant or deny the request for expedited arbitration.

The expedited procedure provides that the case is to be heard by a sole arbitrator, unless the arbitration agreement requires three arbitrators. The rules presume that the tribunal will decide the dispute on the basis of documentary evidence only. However, the arbitrator retains the power to hold one or more hearings if deemed appropriate. The tribunal must render the award within six months from the date it received the case file—a time limit that can be extended in exceptional circumstances. Also, the tribunal must state the reasons supporting the award, but the parties may agree that no reason needs to be given.

Conclusion

Many arbitral institutions have followed the recent trend of adopting expedited procedures to increase efficiency in international arbitration. The procedural simplicity of the rules discussed above has made expedited arbitration an increasingly attractive method to resolve disputes arising out of relatively limited and straightforward business transactions where the amount at stake would render regular arbitration cost-inefficient. The expedited rules give parties the option of receiving a fast and fair resolution to their case, and remind us of the simple nature of the arbitral process in its early history, as illustrated by Redfern & Hunter: "Two merchants, arguing over damaged merchandise, would settle their dispute by accepting the judgment of a fellow merchant."[19]

Endnotes

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3. *See* Article 24(2) of the SCC 2017 Rules for Expedited Arbitration.
4. *See* Articles 6 and 9 of the SCC 2017 Rules for Expedited Arbitration.
5. *See* Article 40 of the SCC 2017 Rules for Expedited Arbitration. The 2017 SCC regular Arbitration Rules also contain a provision for summary procedure in Article 39, which can be found at http://sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf.
6. The SIAC Expedited Procedure can be found in Article 5 of the SIAC Rules 2016 available at: http://www.siac.org.sg/our-rules/rules/siac-rules-2016.
7. Currency conversions made on May 10, 2018.
8. *See* Article 29(1)(a) and (b) of the SIAC Rules 2016.
9. *See* Article 29(3) and (4) of the SIAC Rules 2016.
10. *See* JAMS Fact Sheet, available at https://www.jamsadr.com/files/Uploads/Documents/Corporate-Fact-Sheet.pdf.
11. The JAMS Expedited Procedures are set forth in Article 22 of the JAMS International Arbitration Rules, available at https://www.jamsadr.com/international-arbitration-rules.
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18. *See* Article 41(1) of the HKIAC 2013 Administered Arbitration Rules.
19. *See* Alan Redfern and Martin Hunter, Law And Practice of International Commercial Arbitration, 1-03 (4th ed. 2004).

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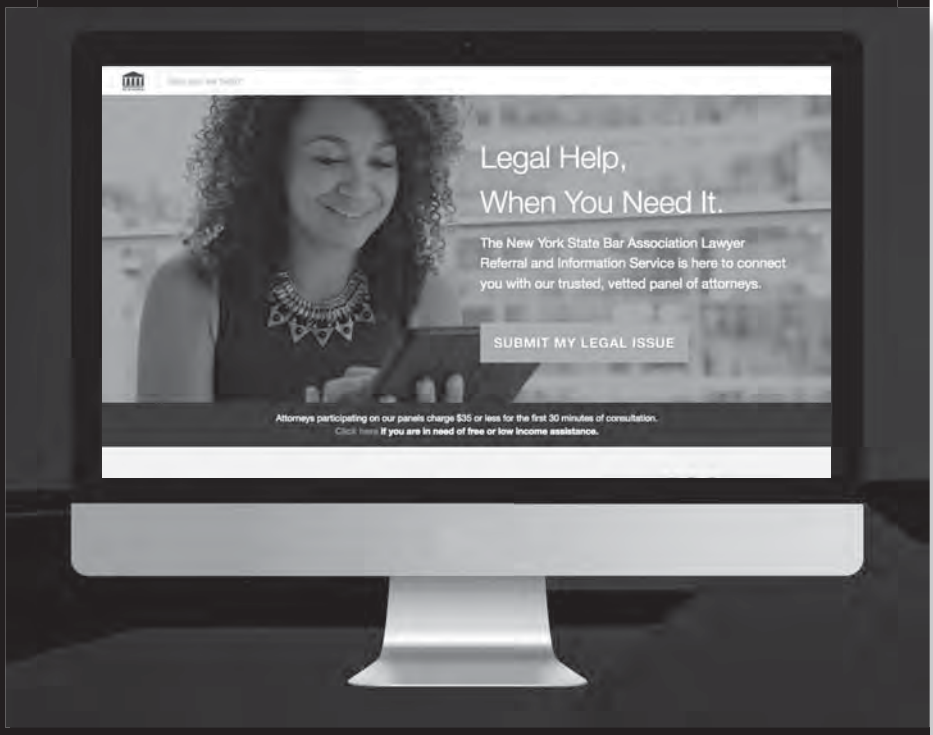

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The Power of Inclusion: Treating Others Well Is Essential to Our Well-Being

Cecilia B. Loving

Knowing your life's purpose is important to achieving both a meaningful and healthier life.[1] Thus, the American Bar Association's 2017 report on *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* not only encourages us to take care of our emotional needs, physical health, occupational goals, intellectual endeavors, and networking opportunities, but also to determine our purpose in life.[2] Determining our life's purpose is easier said than done because it is rarely revealed through an epiphany but is the result of a continuous process. Regardless of our individual goals and desires, at its core our purpose is to develop universal compassion for others.[3] In other words, our calling or greater purpose is not merely to satisfy our egos but exists to serve "something larger than ourselves."[4] We are here to contribute to the well-being of those around us, which is what inclusion is all about. Inclusion is not merely a lofty workplace goal but a mindset that will enhance our own well-being by welcoming the best in everyone.

Silence Reveals a Deeper Awareness of Purpose

The question remains: how do we cultivate better alignment with our purpose and through that awareness become more inclusive? We cultivate a deeper connection to purpose when we are calm, relaxed, and focused,[5] which is achieved in silence. As lawyers, we rarely pause long enough to appreciate the power of silence.[6] We need to remind ourselves that silence is a space where we can slow down long enough to do nothing but pay attention to our breath. Being in the silence is one of the most powerful things we can do, a moment where we stop trying to control the outcome, and just listen, without judgment. Only when we slow down long enough to observe the incessant chatter of our thoughts, and take the time to be still in silence, do we become aware of something greater than ourselves.

We can leave our daily stress and the accompanying worry, threat, blame, and shame of the brain, or at least be able to observe our thoughts, by various practices of mindfulness or meditation. This is important because despite our evolution to what we call a civilized state, our brains still function, at times, in primitive survival mode. We are still guided, in part, by our primitive brain that only focuses on survival. In other words, the same neural responses that drove us toward food or away from predators is often in charge.[7] Even though we no longer have to defend ourselves against wild animals, we are just as stressed out. In such a stressful state, which is the norm for many of us, we cannot focus on our purpose. When we are stressed, there is reduced blood flow to the frontal lobes of our brains that help us carry out higher-order mental processes. We have less processing capacity to think loftier thoughts like how we can be our best or contribute to the well-being of others. Without a practice of meditation, we are not much different than our ancient hunter-gatherer ancestors, who had to devote all of their energies to protecting themselves from environmental danger. Today, our greatest enemy is ourselves and our daily stressors and triggers, which can be better managed by simply paying attention to our breath in the silence.

Cecilia B. Loving

Take a moment right now, and breathe. Pay attention to the way your body feels. Allow yourself to relax the moment. Close your eyes and breathe in and out a few times. Pausing for a single moment is a meditation.

Gratitude Lifts Us Above Negativity Into a Consciousness of Connection

In order to connect with our purpose and increase our ability to appreciate others, we need to limit or eliminate our negativity bias. No matter how positive we are, we all have a negativity bias, and for lawyers, it's even greater. Dr. Larry Richard, an expert on the psychology of lawyers and owner of a consulting group called LawyerBrain, reminds us that in addition to being hardwired as human beings to be negative, lawyers' brains compound negativity as the result of being trained to be skeptical, to look for faults, to learn what is wrong, to anticipate what could go wrong, and to be adversarial and vigilant about the motives of others.[8] We also embody the historical trauma of our ancestors, as well as our own personal experiences that perpetuate stress.[9] Our jobs are much more than places where we collect a paycheck. Our work environments are complex webs of social systems that are experienced by our brains as stressful, triggering the same defenses required in the harsh terrain thousands of years ago when physical survival was our greatest concern. Therefore, we have to recalibrate our emotional alarm system so that we can manage the voices of our own inner critics and create an inclusive mindset that is more grateful than negative.

In *Mindfulness Redefined for the Twenty-First Century*, Dr. Amit Sood of the Mayo Clinic says the attention that many mindfulness practitioners seek is not enough alone to lift us above the fray of this inherent mindset of negativity. Dr. Sood concludes that "[i]ntentional attention needs the guidance of gratitude and compassion to preserve its strength and serve an altruistic purpose."[10] Gratitude is not merely saying thanks. Gratitude is a catalyst of transformation, providing a lens of greater appreciation of everyone and everything within our experience. Appreciating others is not merely internal. We can be proactive about letting others "know that we see them, hear them, and care about them" by creating opportunities to express appreciation through meetings, conversations, email, and day-to-day interactions.[11] Instead of internalizing the feeling that we do not have enough, gratitude gives us a new focus. Mindfulness teacher Sharon Salzberg says by being grateful "we can recognize that the world is in fact magically providing, with just what it is providing."[12] We can pause from wanting and just be thankful for the ordinary, and even what appears adverse. Dr. Sood teaches that "[g]ratitude for adversity is the perfect antidote for burnout. . . . Gratitude for adversaries takes away their power over us."[13]

Take a moment and pause in gratitude for everything, everyone, and every situation that has brought you to this moment. In this breath of appreciation, we stop clinching, worrying and regretting and instead connect a higher purpose whose goal is to fill us with joy and happiness. Send gratitude to everyone who comes to your mind. Send an email, text, or note to someone of another background, culture or religion, preferably someone to whom you've never given thanks.

Compassion Is the Key to an Inclusive Mindset

We have spent a lot of energy in the last several decades focusing on diversity, but we have scarcely scratched the surface of inclusion. Our greater purpose in being more diverse is to be more inclusive: to welcome everyone with the tools and opportunities to succeed. A genuine welcome does not force anyone to assimilate into our norm of what we believe they should be but to welcome their individuality as part of a collective whole with the potential to offer more because of everyone's unique contribution. An inclusive mindset is important to the well-being of everyone. We all need to feel welcomed. When we give others an opportunity to succeed, we respond to our core purpose to serve something greater than ourselves. When we receive an opportunity to succeed, our well-being is also enhanced. Otherwise, we are subject to the emotional stress of exclusion, which we experience as a neural impulse as powerful and painful as a physical blow.[14]

Consider this: if you are not actively including, then you are excluding. The best way to develop a mindset of inclusion, which has empathy and compassion for everyone, is to care for ourselves, as well as to be more welcoming and appreciative of others. Compassion "helps you recognize others' struggles, validate them from within their perspectives, create intention to help, and take action to relieve their suffering." Compassion not only reduces stress but also reduces illness. One study showed that patients actually reduced their hospital stay and subsequent need for medical care through the presence of a more compassionate physician.[15] Compassion is not a weakness but a strength that enhances our capabilities, relationships and achievements. One of the most important lessons that I learned as a young litigator, which was fortunately modeled by lead counsel at both of the firms where I worked, was that we could be compassionate with our adversaries and opposing counsel and still win. On several occasions, after the case was won, our adversaries even sought us as counsel.

At its core, compassion is the goal behind all purpose. In the diversity, equity and inclusion space, we are looking to establish a heart of compassion through a mindset of inclusion. The power of inclusion is that it is not merely something we give to others but an opportunity to connect with the greater purpose of our own lives, and through that fulfillment experience true wellness. The ultimate goal is for compassion to become so "integrated, systemic and deeply embedded" in our work environment that it touches "every aspect" of our workforce, workplace and community.[16] We embody our purpose when we support the value of everyone's contributions, not just those who look or act like us. Our differences are the connections that give us the opportunity to grow in consciousness.

A young white man once encouraged me to adopt the belief that we are "one race." I appreciated his use of science to address exclusion. Race is a social construct; "all human beings are 99.9% identical in their genetic makeup."[17] The young man realized that our differences are only superficial experiences that should not divide us but be opportunities for growth, creativity, innovation, and compassion. The South African Ubuntu saying is "I am because you are." When I celebrate myself, I connect with part of the collective whole that includes me as one of many expressions representing all that we are.

Take a moment and feel compassion and reverence for yourself, for all of your mistakes and errors and falls that have contributed to who you are, as well as for all of your gifts, talents, and achievements. Hug yourself with compassion and allow this re-connection to embrace every being. Breathe deeply in this embrace. Whenever you can, take a walk, and send this loving energy of compassion to everyone in your midst.

The power of inclusion is realizing that being there for you is the best way that I can show up for me. I invite you in, welcoming you as a part of me that I need. By this step, I do not only honor you, but I am better.

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17. National Human Genome Research Institute, https://www.genome.gov/19016904/faq-about-genetic-and-genomic-science/ (last accessed Nov. 30, 2018).

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☐ Attorneys admitted 2014-2015	120
☐ Attorneys admitted 2016 - 3.31.2018	60

OTHER

☐ Sustaining Member	$400
☐ Affiliate Member	185
☐ Newly Admitted Member*	FREE
☐ Law Student Member	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS

Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS

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Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS

Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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