Alternatives
TO THE HIGH COST OF LITIGATION
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ADR Techniques/*Part 2 of 2*

Can Conflicting Styles Be Detected? How Personality Screens Make Tribunal 'Matches' for More Effective Arbitration

BY PETER L. MICHAELSON

Last month, the author described the "Arbitrator Assumption," the belief that because accomplished professionals have solid tribunal experience they will find a way to mesh with future fellow panelists. Following the earlier discussion of the assumption's inherent risks, this month's conclusion examines candidate screening, and argues that personality-type testing should be a component of today's commercial arbitration practices.

* * *

Would clashing styles be revealed through a suitable personality screen, and then avoided by seeking arbitrators with compatible personalities, temperaments and negotiating styles? Quite possibly.

Psychology literature teaches a rich variety of different psychological instruments sometimes referred to as personality screens or tests, aimed at discerning personality type.

The screens appear to be relatively benign in their approach and application, though not completely free of professional controversy. Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, "Beyond Winning—Negotiating to Create Value in Deals and Disputes" 327-328, n. 11 (2000). They seem suited for screening candidate arbitrators. They are: the Myers-Briggs Type Indicator, the Keirsey Temperament Sorter, the Thomas-Kilmann Conflict Mode Instrument, and DiSC Classic.

Theories of personality type describe ways people differ in their preferred approaches to acquiring information, using that information to make decisions, and interacting with their external environments. Don Peters and Martha M. Peters, "Maybe That's Why I Do that: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing," 35 *N. Y. L. Sch. L. Rev.* 169, 173 (1990).

People are not monolithic—they are neither entirely consistent nor predictable in their responses. Every individual exhibits different character traits at different times depending on a given situation. Illustratively, during a negotiation, each of us can exhibit traits of a competitor, an accommodator or an avoider depending on our perception of a current circumstance and how we react to it.

Therefore, personality type cannot be accurately determined merely by assessing an individual's response to one situation at a single instant in time. Over an extended period, however, general psychological tendencies predominate over others. The patterns

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CPR News

IT'S IN THE ARCHIVES: *ALTERNATIVES*' NEW E-DELIVERY FORMAT

The CPR Institute and John Wiley & Sons have changed the delivery method for the electronic edition of *Alternatives*.

Effective last spring, *Alternatives* became available as a single PDF. Each issue, usually 16 pages, can be downloaded in one convenient file.

The electronic edition comes out early each month—an advance edition of the hard copies, which are mailed to subscribers and CPR members about a week later. The electronic edition is sold to nonmembers at the Wiley Online Library at http://onlinelibrary.wiley.com.

Individuals at CPR member organizations can sign into the CPR website, at www.cpradr.org, and get unlimited access to the electronic advances.

In addition, late last year, Wiley digitized every cited *Alternatives* article that has appeared since the publication was founded by former publisher James F. Henry in January 1983. The archival material has been posted at the Wiley site in PDF files, usually containing one article, under the issue dates. The files are easily accessible via the CPR site's *Alternatives* page after members log in.

The archives are available free as part of CPR membership, and for pay downloads, on-demand, for nonmembers and nonsubscribers.

The Wiley site was overhauled last summer, and now offers improved full search functions for the entire *Alternatives* archives. *Alternatives* will continue to be available and searchable in full text on Lexis and Westlaw, with content dating back to the early 1990s.

The CPR and Wiley websites have alert and RSS options to notify users when a new issue appears.

Wiley expects to announce a new *Alternatives* web presence, and an iPhone app that will allow handheld *Alternatives* access, in the near future, too.

For more information on accessing the newsletter, E-mail *Alternatives*@cpradr.org. Also new in *Alternatives* in 2010 is sponsorships. For information on supporting *Alternatives*' work, please contact Julie DeSarbo at jdesarbo@cpradr.org, or visit www.cpradr.org.

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CPR

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Worldly Perspectives

Mediation Finds a Home in Poland, Slowly

BY GIUSEPPE DE PALO AND MARY B. TREVOR

One cause of low competitiveness of the Polish economy is the long duration and high cost of recovery of claims in business disputes, which constitutes a barrier to the growth of entrepreneurship. . . . In my opinion, too little use by business people of alternatives to state court methods of claim recovery is one of the causes of this situation.

—From a letter by Adam Szejnfeld, Secretary of State, Ministry of Economy, to the president of Polish Arbitration Association, Aug. 8, 2008.

* * *

The Republic of Poland has a long history marked by glorious victories and endless wars with her neighbors that date back to the 10th Century.

In more recent history, during World War II, Poland was occupied by both Germany and the U.S.S.R.; after the war it became a Soviet satellite state. Social and political turmoil in Poland during the 1980s initiated by the Solidarity trade union movement led to the eventual overthrow of Soviet influence in 1989, when Poland was the first Eastern Bloc country ito declare its independence.

De Palo is co-founder and president of ADR Center, a member of Jams International. He is based in Rome. He also is the first International Professor of ADR Law & Practice at Hamline University School of Law in St. Paul, Minn. Trevor is an associate professor of law and director of the legal research and writing department at Hamline. Flavia Orecchini, of the ADR Center International Projects Unit, is assisting the authors with research. This month's column was prepared in collaboration with Sylwester Pieckowski, an international partner who arbitrates and mediates as the head of litigation and dispute resolution of Chadbourne & Parke's Warsaw office. Pieckowski currently holds the titles of president of the Polish Arbitration Association; deputy director of the Business Mediation Center in Warsaw, co-founder and first vice president of the Arbitration Court at the Polish Confederation of Private Employers Lewiatan; and vice president of the Civic Council on ADR at the Ministry of Justice, which is discussed in the article.

Since 1989, Poland has undergone rapid economic change. In 1999, Poland joined NATO, and in 2004 it became a member of the European Union.

Today, Poland consists of 16 provinces and has its capital at Warsaw. Poland has a population of about 38.5 million. The ethnic groups include: Polish (96.7%), German (0.4%), Belarusian (0.1%), and Ukrainian (0.1%). More than 97% of the population speaks Polish.

Poland operates under a civil law system. The government consists of executive, legislative, and judicial branches. In 2010, Bronisław Komorowski was elected president for a five-year term. In the executive branch, the head of government is Prime Minister Donald Tusk and the Deputy Prime Minister and Minister of Economy is Waldemar Pawlak.

The legislative branch is made up of a bicameral legislature that has a Senate, the upper house, and a Seim, the lower house.

The judicial branch contains both a Supreme Court and a Constitutional Tribunal. The courts below the Supreme Court consist of the "common courts": district, circuit, and courts of appeal. They hear criminal, civil, and other matters.

[The sources for this information include https://www.cia.gov/library/publications/the-world-factbook/index.html; http://www.nyulawglobal.org/globalex/poland.htm#_The_Court_system; and http://ec.europa.eu/civiljustice/org_justice/org_justice_pol_en.htm.]

LEGAL FRAMEWORK

Poland was one of the first European Union Member States to enact detailed and complete legislation on mediation in civil and commercial matters. The Law of July 28, 2005 (See "The Journal of Laws", No. 172, item 1438 (2005); referred to here as "the Law") amended the Civil Procedure Code and introduced mediation as a separate part of the code. The Law entered into force on Dec. 10, 2005.

The Law introduced mediation to Poland's civil procedure, thereby creating an alternative to the traditional adjudication of civil disputes by state courts.

Under the Law, mediation should become the most convenient form of dispute resolution because it allows disputants to reach a fast and satisfactory resolution. The drafters hoped to make mediation a reality by making it as attractive for the parties involved as practicable.

To this end, the provisions of the Law were intended to be simple and straightforward, with the goal that mediation should both facilitate dispute resolution in civil matters and duly protect the rights of the parties participating in the process.

Having in mind such objectives, the Law provides that all disputes in civil matters that qualify for amicable agreement can be resolved by means of a settlement reached through the facilitation of a mediator.

When the court confirms a settlement that was reached via mediation, the settlement has the same legal status as a settlement made before the court.

The Law provides for comprehensive regulation of both types of mediation in civil matters: (i) conventional or contractual mediation, and (ii) mediation in court proceedings—that is, court-annexed mediation.

VOLUNTARY PROCESS

The Law makes contractual and court-annexed mediation legitimate alternatives to civil court adjudication of disputes.

It also includes a financial incentive for plaintiffs to reach a settlement in court-con-

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nected arbitration: the return of three-quarters of the court fee already paid.

Mediation under the Law is a voluntary process in which a neutral mediator helps the parties conduct their negotiations. For contractual mediation to occur, there must be a pre-dispute agreement to mediate future disputes, or a post-dispute agreement to mediate the existing dispute. The parties must agree to court-referred mediation in order for it to take place: the Law allows a party to stop the process by objecting to mediation within seven days of the court's referral.

To protect the parties' rights, the Law provides that embarking on mediation interrupts the running of statute of limitations. If mediation is unsuccessful, then the statute of limitations runs anew from the time of the suspension.

CONFIDENTIALITY PROVISION

The Law contains a limited confidentiality provision. Under the Law, the mediator is prohibited from disclosing facts learned during the mediation proceedings.

The only exception is if the mediator and the parties agree otherwise. Furthermore, the Law protects the mediator from having to testify as a witness in civil proceedings related to the mediated dispute.

THE PROCEDURES

The provisions on mediation procedure call for the mediator, based on the parties' preferences, to establish the date and place of the joint mediation session.

The Law requires the mediator to draft and sign a report specifying the mediation's place and time, the names and addresses of the parties and the mediator, and the results. If the parties enter into a settlement, the settlement agreement must be signed by the parties and included in, or attached to, the report. If a party refuses to sign or simply does not sign, then the reason for the refusal or inaction should be stated in the report.

If a settlement is reached in court-referred mediation, the mediator is supposed to submit the report to the referring court. A party to the mediation may ask the court to approve, or approve and enforce, the settlement.

The court may refuse to approve a mediation settlement, in whole or in part, if it is contrary to the law or principles of social coexistence, or it is incomprehensible or contradictory. The court may approve a settlement by issuing a decision after an in camera session. To enforce a settlement upon a party request, the court will stamp an enforcement seal on the settlement document.

Enthusiastic Adoption, But Hurdles Remain

The setting: *Worldly Perspectives* visits Poland.

ADR assessed: The stage is set for usage. But the numbers aren't there yet.

The prognosis: For mediation to succeed, the nation will have to deal with paying for it, and the media will have to support it.

MEDIATOR SERVICE

The Law allows any person to serve as a mediator who has full legal capacity to make "legal representations." The explanatory memorandum submitted by the government states that a "[m]ediator's abilities do not rest in mediator knowledge but in his personality. Therefore, in order to make it easier for the parties to undertake mediation, no specific requirements as to a mediator's education are foreseen."

Although the Law does not contain any standards to assure the quality of mediators, the Civic Council for Alternative Methods of Conflict and Dispute Resolution, established by the Minister of Justice in 2005, adopted a code of ethics and training standards, as well as conduct standards for both mediators and mediation proceedings.

TALLYING PARTICIPANTS

According to the Law, associations and public organizations may establish mediation centers and maintain lists, or registers, of permanent mediators. This information is to be provided to the president of the circuit court of the appropriate jurisdiction.

As of June 2008, the official statistics reported by the circuit courts indicated that there were 331 associations in Poland dealing with mediation; 72 mediation centers; and 2,676 permanent mediators.

USAGE, REPORTED

The statistics in the table below, collected by Poland's Ministry of Justice, show the categories and numbers of disputes referred by courts to mediation from 2006 to 2009. The statistics are based on the reported activity of mediation centers and institutions that conduct private mediations, and on research studies undertaken by the Ministry of Justice.

POLAND COURT-ANNEXED MEDIATION USE STATISTICS

2006 Civil	Commercial	Labor	Family	Juvenile	ALL
1,448	256	33	270	298	**2,305**
2007 Civil	Commercial	Labor	Family	Juvenile	ALL
1,399	258	74	326	276	**2,333**
2008 Civil	Commercial	Labor	Family	Juvenile	ALL
1,455	210	107	427	223	**2,422**
2009 Civil	Commercial	Labor	Family	Juvenile	ALL
1,842	540	252	716	256	**3,606**
6,144	**1,264**	**466**	**1,739**	**1,053**	
Total Mediations 2006-2009					**10,666**

The statistics indicate that civil mediation has found a home in Poland. But they also confirm the sobering fact that the usage rate within society, though growing, is still quite small.

Nevertheless, Polish ADR experts and regulators are cautiously optimistic that the numbers will grow. Initiatives at multiple levels—by Polish lawmakers, courts, legal professionals, mediation institutions, and the media—are needed to increase the popularity of mediation.

On the policy side, mediation cannot grow significantly without clear and steady support by the state and its governing bodies. There is an urgent need for lawmakers to enact legislation to address the financing of civil mediation.

At the same time, Polish judges must develop an in-depth understanding and appreciation of mediation. If judges do not support the process, efforts to increase the volume and quality of mediation may not succeed. Courts also need to develop procedures to implement steps already taken that provide for court-annexed mediation, ethical standards for neutrals, and a roster of trained mediators.

In addition, mediation centers need to focus on training mediators and developing a program to certify them. These centers also need to establish ethical standards for mediators in private mediation and procedures for mediation proceedings, and to help develop effective mediation techniques.

Moreover, all parties—lawmakers, mediation centers, judges, and the media—must convey a positive message about mediation to business leaders, entrepreneurs, and individual consumers. The message is that mediation is the best, fastest, and least expensive way to resolve their disputes, and that therefore they should try mediation first, before resorting to arbitration or litigation.

The media must accept mediation as a top issue for societal development and improving legal discourse. This is absolutely mandatory for the ultimate success of mediation in Poland.

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Next month, Worldly Perspectives *visits the Slovak Republic.*

ADR Techniques

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are reasonably well revealed by a carefully designed and properly interpreted instrument. The screens are described below.

Myers-Briggs Type Indicator: The MBTI was developed in the 1940s by Katharine Cook Briggs and her daughter Isabel Briggs Myers. This indicator is predicated on a theory devised by eminent psychologist Carl G. Jung which says, in essence, that seemingly random variation in human behavior is actually quite orderly and consistent due to variations in the way individuals prefer to use their perception and judgment.

Perception involves all the ways of becoming aware of things, people, happenings or ideas. Judgment involves all the ways of reaching conclusions about what has been perceived.

If people differ systematically in what they perceive and in how they reach conclusions, then it is only reasonable for them to differ considerably in their interests, reactions, values and skills. Isabel Briggs Myers, "Introduction to Type," 15 (1998 6th Ed.); see also MBTI Basics, The Myers & Briggs Foundation (available at www.myersbriggs.org/my-mbti-personality-type/mbti-basics).

The MBTI contains four indices that reflect an extent to which four basic human preferences affect a person's use of perception and judgment. These indices indicate what people prefer to do in given situations and how they prefer to draw conclusions from what they perceive. The four scales are:

(a) Sensing-Intuition (SN) is whether in acquiring information a person prefers to rely primarily on sensing or a process of intuition. A sensing preference signals primary reliance through observable facts or happenings. An intuitive preference focuses on patterns, possibilities and meanings when attending to or gathering information.

(b) Thinking-Feeling (TF) indicates whether in making judgments a person prefers to rely on impersonal logical consequences, or personal or social values.

(c) Extroversion-Introversion (EI) is whether a person focuses attention externally to objects and people in the environment, or internally. Extroverted people tend to prefer active involvement with others, think best when talking, tend to be action-oriented and are prone to leap into tasks with little preparation or planning. Introverted people enjoy solitude, introspection, and engage in careful planning before acting. They focus inward on their own thoughts and ideas.

(d) Judging-Perceiving (JP) is whether a person, in making decisions affecting his or her external world, prefers a process of structured decision making, seeking closure, planning and goal-setting—collectively, judging—or an unstructured, flexible, possibly spontaneous approach that includes postponing decisions to continue observing and receiving information.

The MBTI's primary purpose is to measure a person's aggregate preferences along the SN, TF, EI and JP indices. These preferences merely reflect habitual choices between rival alternatives.

All individuals—at various times and depending on the situation and one's perception and reactions to each—exhibit both opposite personality traits as measured by each scale. Not at the same time, of course. But over time, an individual's overall habitual preferences, much like left-handedness or right-handedness, will predominate.

The MBTI screening process involves presenting a series of questions to an individual—for which there is no right or wrong answer—where each question requires that person to choose between two seemingly inconsequential, normal events.

Through appropriate scoring of the responses, the resulting MBTI indicator yields a combination of four letters, such as "ESTP" or "ISTJ." These letters indicate a person's preference along each of the four indices, yielding 16 possible different outcomes. Specifically, the personality type preferences are ISTJ, ISFJ, IN-

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FJ, INTJ, ISTP, ISFP, INFP, INTP, ESTP, ESFP, ENFP, ENTP, ESTJ, ESFJ, ENFJ and ENTJ. All of these types are equal; no one type is better than any other.

Individuals exhibiting certain MBTI types are likely to be more compatible and complement each other. Correlatively, those exhibiting other types are not. Given that, this author surmises that MBTI-type information can be used in selecting appropriate arbitrators from a candidate pool.

Consider the following process. Once the pool of qualified candidates is identified through use of conventional selection metrics, a first arbitrator is selected. Then, a second arbitrator is identified not only through the same metrics but also through MBTI determination and selection.

The second arbitrator would be one of the candidates whose MBTI personality type indicates that his or her personality is likely to be compatible with and appropriately complementary to that of the first arbitrator. Similarly, the third arbitrator would be selected from the remaining candidates as one whose MBTI type indicates a compatible or complementary personality with the two previously selected arbitrators.

If no one is found to be compatible with or complementary to the first and second arbitrators, then other candidates can be substituted for either or both of those arbitrators, and so forth, until an appropriate tripartite panel, all having suitable personalities, has been selected from the pool.

Keirsey Temperament Sorter: In 1978, David Keirsey and Marilyn Bates, building on the MBTI, found that correlations resulting from combining the Myers-Briggs "intuition" with "judging" functions, NT and NF, and "sensing" with "perceiving" functions, SJ and SP, lead to four temperaments: artisan, guardian, rational and idealist. David Keirsey and Marilyn Bates, "Please Understand Me: Character and Temperament Types," 28, 30-66 (5th ed. 1984), and David Keirsey, "Please Understand Me II—Temperament, Character, Intelligence," 18-20, 26 (1998).

Keirsey defines temperament as a configuration of observable personality traits, such as habits of communication, patterns of action, and sets of characteristic attitudes, values and talents. A temperament encompasses personal needs, the kinds of contributions an individual makes in a workplace, and the roles that individual plays in society. See "About 4 Temperaments" (available at www.keirsey.com); see also, Please Understand Me, at 27-28, and Briggs at 34.

More generally, temperament is "that which places a signature or thumbprint on each of one's actions, making it recognizably one's own" (Please Understand Me at 27)—in essence a "configuration of inclinations," predisposition, or simply "the inborn form of human nature." Please Understand Me II, at 20.

Suitable Neutrals, Better Arbitration

The proposal: Sophisticated processes require more sophisticated screening of neutrals.

What are companies doing wrong? They're making the 'Arbitrator Assumption.' But hiring professionals doesn't mean they will be able to work together.

The good ideas: (A) screen individuals for personality type, or (B) hire an entire successful panel again, en masse.

An individual can determine which of the four temperaments he or she tends to exhibit, and more specifically one of four underlying character types for each temperament, by taking a multi-question test instrument, the "Keirsey Temperament Sorter." Similar to the MBTI, the instrument sorts through four pairs of bipolar personality preferences: extroversion/introversion, sensing/intuiting, thinking/feeling and judging/perceiving.

Thomas-Kilmann Conflict Mode Instrument: Kenneth W. Thomas and Ralph H. Kilmann developed the TKI in the early 1970s. It is based on theoretical refinements made by Thomas of a 1960s model of management conflict styles. Kenneth W. Thomas, "Introduction to Conflict Management: Improving Performance Using the TKI" (2002).

The TKI broadens the generalized three-style model of conflict-handling in negotiation from one involving just competitors, avoiders and accommodators, as noted above, to one encompassing two additional styles: collaborator and compromiser.

The five modes, for any individual, are measured along two orthogonal dimensions: assertiveness and cooperativeness.

A competitor takes. That person is assertive and uncooperative, and tries to satisfy his or her own concerns at the expense of someone else.

A collaborator is both assertive and cooperative and tries to find a win-win solution that completely satisfies the concerns of those involved. A compromiser, being somewhat assertive and somewhat cooperative, attempts by both "giving and taking" to find an acceptable solution that only partially satisfies those concerns.

An avoider is both unassertive and uncooperative, preferring to avoid conflict without satisfying anyone's concern. An accommodator is unassertive but cooperative, and attempts "by giving" to satisfy the other people's concerns at his or her own expense.

This model accommodates the extent of joint satisfaction, i.e., the "pie." When competing, compromising or accommodating, the pie is generally large enough to satisfy the interest of one side, or partially, that of both. Hence, one side claims value at the expense of the other: a classic distributive zero-sum, win-lose situation. Collaboration often expands the size of the pie so that more value can be claimed by each side, thus affording win-win scenarios.

Here too, individuals, through their behavior, exhibit characteristics, either consciously when it is perceived to be advantageous to do so, or unconsciously, of each of the five modes as a given situation warrants.

Nevertheless, over an extended time a person's behavior will indicate a preference for one of these modes over others. Personality clashes, similar to those noted above, can likely arise between people exhibiting markedly different TKI preferences.

Since the way arbitrators serving on a tripartite panel handle conflict and divergent opinions to resolve an issue might be the most critical aspect of their own interaction, the

TKI may be the most efficacious of the four instruments. An extreme competitor would probably impede resolution, while a compromiser might facilitate positive outcomes, according to Yona Shulman, a Colts Neck, N.J., organizational psychologist.

DiSC Classic: Another psychological assessment instrument, here based on the work of psychologist William Moulton Marston in the late 1920s and early 1930s, is the DiSC Classic. This instrument measures characteristic ways people behave in particular environments, i.e., "surface traits." By contrast, the MBTI describes how people approach their environment intellectually and attitudinally, and how they process information.

The DiSC Classic test instrument attempts to classify individuals in a four-dimensional model of human behavior as exhibiting: dominance (D), which produces activity in an antagonistic environment; inducement or influence (I), which produces activity in a favorable environment; steadiness (S), which produces passivity in a favorable environment; or compliance or conscientiousness (C), which produces passivity in an antagonistic environment.

The four dimensions are grouped in a grid, with D and I sharing the top row and representing extroverted aspects of personality, and C and S below representing introverted aspects. D and C then share the left column and represent task-focused aspects; I and S share the right column and represent social aspects.

Through this scheme, an individual can exhibit a combination of these types, e.g., a predominant D trait with a strong I trait, and so forth. The test instrument, similar to the MBTI and Keirsey Temperament Sorter, requires a participant to select an answer for each question in a series.

Each of the four assessment instruments is administered through a multiple-choice test followed by a report interpreting the results. An online self-administered version, in which an individual can take the test and receive a corresponding report, typically is less than $200, though the report's comprehensiveness will vary from one provider to the next.

A major drawback of these instruments is that they rely on candid self-reporting. They require the test-taker to candidly provide answers to the questions so that the results are valid and truly descriptive of the personality style and preferences of that individual.

But if the test-taker believes that certain responses would be more "socially desirable" than others and tries to reflect one personality type over others to try to engineer a match, then that person may provide false answers to deliberately skew the results. To reduce this concern, these instruments include a "lie scale" which, according to psychologist Yona Shulman, detects inconsistencies in the responses that might reflect their deliberate manipulation.

Though obviously a candidate arbitrator could attempt such manipulation, this author believes that the likelihood of it occurring is quite low, if not nearly negligible. Since arbitrators closely work together and often over considerable time periods, that person should realize that it is in his or her best interests to be completely candid and thereby be matched with someone compatible. The alternative for the individual is to suffer the repeated anger, frustration, and prolonged tension and stress of serving with someone with whom that person is clearly not a good match.

And the alternative for the parties is worse.

WHERE TYPE FITS IN

Personality type should never be a sole or even predominant metric for arbitrator selection. It's not foolproof. Yet, screening and compatibility matching based on type may provide added insight into a pool of qualified candidates. And, in so doing, it may sharply reduce the risk of inadvertently selecting incompatible panelists and the horrendous costs and delay that might otherwise arise.

Having a psychologist administer a suitable instrument to a modestly-sized candidate pool, interpreting the resulting scores to provide appropriate assistance in suitably screening the candidates—all of which in this author's view is well advised—may cost a few thousand dollars, with the exact charge depending on the number of individuals screened and the particular organization or professional performing the screening.

Other approaches, such as face-to-face interviews of candidates by such professionals, may yield additional in-depth data than would a written test, though likely at a markedly increased cost.

The nature of a given dispute, including the ramifications of its resolution, will determine whether the added time and fees are warranted. Where a comparably large amount is in dispute or the issues involved are sufficiently important to the parties (and possibly to nonparty public constituencies in investment treaty arbitrations involving a government entity), then the additional information provided by personal interviews may lead to increased confidence in selecting compatible panelists that justifies the increased cost.

With arbitral claims, particularly in international and increasingly domestic disputes, now routinely running in the hundreds of millions of dollars and extending upward beyond the single-digit billions into the $10 billion-plus range, the consequences of selecting what ultimately becomes a dysfunctional panel can be devastating.

Therefore, the need to employ these instruments has never been more critical. The Arbitrator Assumption is anachronistic and potentially dangerous. The cost of using psychological tools to identify and screen out potentially incompatible candidate panelists and avoid such a result is minuscule compared with the overall cost structure of a major commercial arbitration. To this author, the choice is clear.

Institutions should collect personality type data of all arbitrators on their respective rosters and appropriately supplement each arbitrator's biographical information. During the arbitral selection process for each new proceeding, institutions should supply the supplemented information for potential nominees to counsel. Counsel, in turn, should use all the information, including personality type data, in selecting proper arbitrators.

First, institutions could query all the panelists on their rosters for their personality type data (if known), and then supplement each panelist's profile accordingly. Alternatively, institutions could query each roster panelist as that person is being considered for a proceeding during a selection process. Either the institution could administer a screening instrument, or it could be performed through a suitable professional hired by counsel. The candidate's profile could be supplemented accordingly.

For those seeking entry onto a roster, the institution could simply supplement its panel-

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ist questionnaire to include a response field for each applicant to provide his or her type information. If the MBTI data is being used, then soliciting data can entail nothing more that providing a grid or list of the 16 MBTI types with a check box next to each one, and a request to the applicant to check off the box for his or her type, or fill out a blank line.

Since type data is based on personality preferences that predominate over an extended time period, this data is not likely to change appreciably. Put another way, it won't go out of date easily. Since it is in an arbitrator's self-interest to work with others with whom they are likely to be compatible or complementary, then little incentive exists for a person to lie about or even modify the personality type information from his or her original assessment.

For existing panelists, an institution can collect data (a) by querying en masse, whether via E-mail or postal mail, all the members of its roster; (b) by testing made available at a suitable conference sponsored by the institution and at which roster members are likely to attend; or (c) on a proceeding-by-proceeding basis during a corresponding selection process.

The advantage in using personality type data accrues not only to the parties and counsel in reducing the potential for interpersonal strife, tension, and incompatibility on the tribunal, but also to the tribunal itself. The data can result in a tribunal of individuals who, more likely than not, are able to work effectively with each other. That potentially increases efficiency, reduces time, and lowers costs.

Moreover, those advantages are not confined to tripartite panels. Benefits flow from incorporating that data into the selection of sole arbitrators, and even mediators, by increasing the likelihood that the individual, selected in part on such data, will exhibit a suitable personality and temperament compatible with the parties, counsel and their needs.

To adequately safeguard each arbitrator's privacy, obtaining and disseminating personality type data—or the results of any other suitable personality assessment instrument which provides insight to that person's personality and temperament—for any candidate or an existing panelist, must be purely consensual. The data collection must not be a mandatory requirement for admission to an institutional roster or continued inclusion on a roster.

As with any highly sensitive, personal and confidential applicant data, risks may exist in improperly obtaining and using personality type information, in terms of possible exposure under privacy, employment and other laws. Each potential user, including institutions, needs to seek suitable counsel in order to implement a careful, informed, well-considered approach that is compliant with all applicable laws and regulations.

The utility for collecting and using such data to match candidate panelists for selection is not to provide other criteria that parties and counsel can merely "game" for their own advantage, but rather to seriously improve the entire arbitral process by enhancing the likelihood that compatible arbitrators ultimately will be selected and serve on a given matter.

USE PROVEN PANELS

Once an arbitral tribunal has demonstrated its ability to conduct an effective, efficient proceeding that meets the expectations of the parties, attorneys and the associated institution, that institution should not only recommend each panelist on the tribunal for appropriate reappointment in suitable future proceedings, but also recommend reappointment of the entire panel.

That is, nominations should not just be of individual panelists but of entire tripartite panels that, by their prior actions, have established their own competence and the ability of their panel members to effectively work together. Those panels exhibit a track record of successful outcomes.

They embody desirable psychological traits of openmindedness, intellectual flexibility, good listening and a sustained ability to constructively and effectively channel discrete episodes of interpersonal conflict, likely resulting from candid and often intense debate of different issues that arise over the course of a prolonged arbitration, into corresponding instances of problem-solving and ultimately resolution.

Once a panel has been selected using type or another psychological-based metric, whether through a formal assessment instrument or simply informal qualitative information gleaned during an interview process, and has proven itself, common sense dictates that it should be reappointed in appropriate cases.

This isn't an endorsement for repeat players. It's an acknowledgment that high stakes, individualized cases have the common requirement of a need for a panel that cooperates to produce an effective resolution, and doesn't break down. The ability to work together becomes a basis for consideration, as a group, down the road.

The Arbitrator Assumption doesn't cut it in today's business world.

Traditionally, institutions appear to have focused on appointing individual arbitrators regardless of whether they have served together. But institutions apparently have paid little attention, if any, to assessing and reappointing proven panels.

Selecting an entire panel might initially be thought to entail added obstacles inasmuch as the panel, as an entity, needs to address its ability to serve whether as a result of conflicts in time, subject matter, prior relationships or other factors. But since these tasks need to be independently performed by each of the panel members anyway, that's going to occur with the conventional selection of three individual arbitrators. Testing is little additional burden for the selection process when the approach would be made to a complete panel or several complete panels in the course of a matter.

Personality assessment instruments have some inherent error and thus do not completely remove a risk of incompatibilities inherent in selecting individual panelists who have no experience in having worked together. But that residual risk may be ameliorated by simply reappointing a proven panel.

A PERSONAL EXPERIENCE

About six years ago, this author served as an arbitrator on a tripartite panel convened by the CPR Institute to handle a large domestic patent dispute concerning coronary stents. The proceeding lasted about 18 months.

Due to its intensity, the matter called for substantial interaction amongst the panelists. On several occasions, the three panelists exhibited considerable differences of opinion, some of which were rather strongly held.

Nevertheless, the panelists efficiently, diligently, and thoughtfully worked through each and every one of those differences to arrive at a unanimous decision, supported by rigorous logic, analysis and mental testing. After closing arguments concluded, lead counsel for both sides approached the panel and complemented the panel for the job it did during the entire proceeding.

Moreover, not only did we work exceedingly well together, the three of us emerged as friends. A couple of years after the arbitration concluded, I had a chance encounter at a CPR Annual Meeting with in-house counsel for one of the parties.

I reminisced about this experience with that counsel and asked whether the parties employed some type of psychological screening of its candidate arbitrators—though none had been apparent to me during my selection interview. That counsel replied, "Yes, we did."

I wasn't surprised. The lesson: Arbitration counsel need to do this, because it works!

* * *

A considerable number of businesses use personality testing as part of their hiring processes. People use personality testing to evaluate business partners. Even lawyers use personality testing to analyze criminal behavior, undertake litigation profiling, witness examination and jury selection.

Why not use it for candidate-arbitrators?

Selecting tripartite tribunal members, using traditional criteria supplemented by personality screening, may well increase the likelihood of appointing a panel of compatible individuals that ultimately contributes to an efficient, high-quality arbitral process.

These days, you just can't afford to make the Arbitrator Assumption.

ADR Briefs

PART II, THE RESPONDENTS' SIDE: MORE SUPREME COURT AMICUS ON ARBITRATION FAIRNESS AND FAA PREEMPTION

BY CHARLES S. HWANG

Last issue, *Alternatives* presented highlights from 11 amicus briefs in *AT&T Mobility v. Concepcion*, No. 09-0893, which was argued on Nov. 9 at the U.S. Supreme Court. See accompanying box on page 214 for argument highlights.

The briefs presented were filed first, all in support of the petitioner wireless service provider, which seeks to overturn a Ninth U.S. Circuit Court of Appeals ruling that found the company's class arbitration waiver contract provision unconscionable under California law.

This month, *Alternatives* begins to present the views of the 15 amicus filed at print deadline in support of the original plaintiffs, in response to AT&T Mobility's case before the nation's top court. Four briefs are discussed below; the remainder will appear next month.

The principal common thread of the respondent amici arguments is that the Federal Arbitration Act does not preempt state law, and that the Ninth Circuit's application of California's unconscionability doctrine is protected by the FAA's "savings clause" embodied in Section 2, which preserves state law.

The author is a CPR intern this fall and a student at New York Law School.

From The Consumer's Perspective

The case: *AT&T Mobility* puts arbitration fairness in the Supreme Court.

The decision likely will hinge on: Preemption. Amicus for the respondent cell phone purchasers say Federal Arbitration Act § 2 preserves California's consumer protection.

Will class arbitration waivers be gone? Maybe, but regardless of the decision, class arbitration will still be rare.

Many of the respondents' amicus argue that class actions play a crucial role in vindicating consumer rights. They say that class actions must be preserved to continue the viability of their application in civil rights and employment cases. To these amicus filers, class actions are an essential vehicle for social change that must not be eliminated.

For more background on the case, see, "The Amicus, Part I: Arbitration Fairness at the Supreme Court," 28 *Alternatives* 199 (November 2010).

* * *

Constitutional Accountability Center: This Washington, D.C. law firm and think tank—"dedicated to fulfilling the progressive promise of our Constitution's text and history"—says that AT&T Mobility's contention that the Federal Arbitration Act preempts California law goes against fundamental federalism principles.

The CCA backs the respondents in a brief that also warns against a Constitutional interpretation "[d]isplacing state law for broad, implied purposes—especially where a statute contains a savings clause indicating that state law should be preserved. . . ." See more on the savings clause below, and in the box on page 214.

The brief tells the Court that it should stick with the FAA's plain-meaning, because "divining the 'purposes' of legislation is questionable enterprise."

The CAC brief argues that the petitioner's suspicion—as well as that of its amicus brief supporters—that California courts harbor an animosity toward arbitration in interpreting the state's contract law has no merit.

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ADR Briefs

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American Association for Justice: The AAJ is a national bar association whose members primarily represent individual plaintiffs in civil actions. The major concern of the organization, formerly known as the Association of Trial Lawyers of America, is the potential of limiting state authority over contract law to the detriment of consumers.

The AAJ argument rests on the so-called savings clause of FAA §2, which exempts preemption of state actions based on "grounds [that] exist at law or in equity for the revocation of any contract." As long as the state statute does not treat arbitration agreements different from other agreements, it cannot "impliedly be preempted" by §2.

It follows that the next prong of the amicus argument is that California law does not purposefully discriminate against arbitration, protecting it from preemption by FAA §2. California law under *Discover Bank v. Superior Court,* 113 P.3d 1100 (Cal. 2005), and *America Online Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001), invalidate class waivers in both, respectively, arbitral and judicial forums.

The brief argues that California unconscionability law is more concerned with the vindication of substantive rights than the arbitration clause itself, and doesn't discriminate between the forums. In fact, the brief quotes *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007)(holding that the FAA doesn't preempt Washington law deeming unenforceable certain class waivers in arbitration contracts), noting that "the arbitration clause [at issue in *AT&T Mobility*] is irrelevant" to the class waiver's unconscionability.

The brief was prepared by attorneys at the Center for Constitutional Litigation, P.C., a Washington, D.C. law firm that focuses on constitutional cases dealing with

AT&T Mobility Under Discussion

The Nov. 9 oral argument in *AT&T Mobility v. Concepcion*, No. 09-893, centered on how California can apply unconscionability laws.

Andrew Pincus, a Washington, D.C., partner of Mayer Brown, said repeatedly in his argument for the petitioner wireless provider that Federal Arbitration Act Sec. 2 doesn't mean that arbitration and litigation must be treated in the exact same way.

FAA Sec. 2 deals with validity and enforceability of an arbitration contract, backing ADR provisions' use "save upon such grounds as exist at law or in equity for the revocation of any contract"—the so-called savings clause that was at the heart of the case.

Pincus's asked the Court to overturn the Ninth U.S. Circuit Court of Appeals' unconscionability determination in *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), to avoid grafting full litigation procedures into the arbitration setting—specifically, discovery.

That, argued Pincus, would hurt the FAA's protections for expedited arbitration.

The state isn't applying general principles of unconscionability, he argued. It is applying a three-pronged examination standard, according to Pincus: the existence of unconscionability at the time of the dispute, not at the contracting stage; the overall effect on third parties; and whether the arbitration provision shocks the conscience. Pincus said that California only deploys this standard in the context of the *AT&T Mobility* and *Discover Bank* cases. (See the accompanying article.)

Specifically, Pincus, in responding to the Court's newest justice, Elena Kagan, said, "It is a doctrine that applies only in the context of class waivers. . . . If the State were to adopt a general statute that said, for unconscionability purposes henceforward we will look in assessing the unconscionability of every provision at third parties, at the impact on third parties and whether it's fair to them, perhaps they could do that."

Pincus urged the Court to review whether California had applied the three-pronged standard in other cases. "There are none," said Pincus, "and that's the problem."

At the outset of the questioning of Deepak Gupta—attorney for the Concepcions, who is at the Public Citizen Litigation Group in Washington, D.C.—Chief Justice John G. Roberts Jr. used Pincus's test, asking how California can analyze the effect on third parties to determine whether a class arbitration waiver is unconscionable.

Gupta responded that California has a history of looking to "the public effects[—] the effects of similarly situated people that are parties to the contract." He mentioned an early 20th century banking contract case in which the contract's fairness, he said, was judged by "the interests of the banking public."

Roberts rejected Gupta's analysis:

> Well, it's a general rule of contract law that contracts contrary to public policy could be unenforceable. It seems to me that's quite different than saying we're worried about third parties that are in the same position as these particular parties. In other words, it's not simply adverse public consequences, but it's a different mode of analysis than I'm familiar with under basic contract law.

Under questioning from Associate Justice Ruth Bader Ginsburg, Gupta said the *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (April 27, 2010), rule banning class arbitrations unless the parties agreed doesn't apply.

AT&T Mobility "has specified in its arbitration agreement that if the class-action ban is invalidated, it would prefer to face any class-wide proceedings in court," Gupta told Ginsburg, "and that choice is up to the defendant. . . . California law doesn't impose any particular procedures on the party. It just insists that in circumstances where the ban would function as an exculpatory clause, that there is some avenue for class-wide proceedings, where claims wouldn't feasibly be litigated individually."

In his rebuttal, Andrew Pincus rejected, among other things, Deepak Gupta's argument about public interest in a case for analyzing unconscionability. California case law focused on matters "in which public services are being performed and that are otherwise imbued with a public interest," said Pincus. "It's not looking at all at the effects on third parties."

—Russ Bleemer and Charles S. Hwang

ADR Briefs

Longtime *Alternatives* Contributor Dies

Cartoonist Leo Cullum, whose not-always-gentle pokes at the legal profession were a staple of his work in the *New Yorker* for more than three decades, died Oct. 23 in Los Angeles. He was 68 and lived in Malibu, Calif.

Cullum, who retired from his job as a TWA pilot after more than 30 years, was a longtime contributor to *Alternatives*. His work first appeared in these pages in September 1989 (see below). Cullum's cartoons ran periodically until, by the mid-90s, his work began alternating monthly appearances with cartoons by Yakima, Wash., artist John Chase.

In an Oct. 25 obituary, the *New York Times* reported that Cullum had published 819 cartoons in the *New Yorker*. Many of his best-known cartoons involved animals' views of the human world. In a January 1998 *Alternatives* cartoon, a wolf, sitting across a desk from a pig in a tailored suit, declared, "Yes, I huffed and puffed and I blew your house down. And, yes, I'm asking you to defend me in court."

His *Alternatives* work focused on attorneys and the legal system. His lawyers often stumbled, worrying more about their bills ("I've reviewed the documents and will need a somewhat larger retainer, as you have no case") than their sense of justice or conflict resolution ("It hurts when I throw the book at someone.")

Cullum's first cartoon for *Alternatives* is reproduced below.

access to justice issues. The center has close ties to the AAJ.

"Contracts Professors": According to the brief joined by 35 contract law professors, the unconscionability doctrine serves two purposes: the preservation of mutual assent, and preventing drafters from escaping liability through the use of fine print, instead forcing contract writers to conform to the law. They argue that AT&T Mobility distorts these principles and forces its narrow application of unconscionability—"a version of the unconscionability doctrine that simply does not exist"—on courts and consumers.

The professors consider California's unconscionability standards are the "runaway *leading* approach" (emphasis is in the brief), noting that at least 19 states have adopted California's application. Furthermore, they say that that the petitioner is ignoring case law, in California and elsewhere, that found class action bans to be unfair both in and outside of the arbitration context.

Most pointedly, the professors state that AT&T Mobility's contention that the current use of the unconscionability doctrine "bear[s] no resemblance whatever to the traditional unconscionability principles," is wrong. They contend that the petitioner relies on an outmoded definition of substantive unconscionability requiring a "shock the conscience" standard which speaks to "intrinsic fraud," and which is inapplicable to the wireless contract.

Rather, the professors state that modern unconscionability is a hybrid between the rules governing intrinsic fraud and equitable unconscionability—which considers whether the provision is one-sided, unreasonable, or lacks justification—along with elements of procedural unconscionability.

Another facet of this argument is that despite the efforts designed to make arbitration provisions more attractive to consumers, the class action ban drives up consumer risk by requiring the consumer to monitor every aspect of AT&T Mobility's conduct; acquire information on the lawfulness of the conduct; and affirmatively seek relief for the any alleged misconduct.

States of Illinois, Maryland, Minnesota, Montana, New Mexico, Ten-

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ADR Briefs

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NESSEE, VERMONT AND THE DISTRICT OF COLUMBIA: These states are interested in preserving state sovereignty for refusing to enforce unconscionable contracts when the agreements are deemed offensive to public policy. They also seek to preserve their ability to develop and enforce contract law. They argue that preempting state law would eliminate an important synergy between state and government efforts in protecting consumers from fraud.

The states argue that the FAA's enactment forbids the courts from singling out arbitration agreements. The law, the brief says, requires courts to treat agreements to arbitrate on an equal footing with other types of contracts. They argue that this has the effect of preserving state contract law.

Allowing the FAA to preempt state law would give arbitration agreements special treatment. Under the California approach, the states argue, agreements to arbitrate are treated on equal footing with all types of contracts. This supports the FAA's purpose of abolishing judicial distaste toward arbitration.

Furthermore, the states emphasize that the power to decide whether to expand FAA preemption of state law should be placed with Congress, not with the Court.

Finally, the states argue that the ability to pursue claims as a class is one that complements and supplements government measures to punish misconduct. According to the states, the benefits of class action—i.e., notice of injury to victims, deterrence, and public education of questionable business activities and practices—are important functions that should not be disregarded. "The efforts of 'private attorneys general' are especially valuable in this era of state budget cuts and limited resources," the brief notes, "and petitioner's attempt to do away with consumer class actions is a further affront to the States' interests."

(For bulk reprints of this article, please call (201) 748-8789.)

CPR News

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BRENNAN TALKS DISPUTE PREVENTION WITH AN IRAQI DELEGATION

Last winter, CPR Senior Vice President Lorraine M. Brennan participated in a training held by the U.S. State Department at Columbia University.

The unusual private event was held in conjunction with the U.S. Embassy in Iraq, and developed by the State Department's Commercial Law Development Program in Washington, D.C.. The program provided a conflict resolution information program for top Iraqi officials. In addition to Iraq government employees, the session hosted Iraqi lawyers, engineers, and geophysicists.

The purpose is to rebuild Iraq's resources and infrastructure—specifically, to assist the Iraqis in negotiating and carrying out long-term oil contracts between the Iraqi government and international oil companies as part of the nation's future security and independence. The amounts at stake, according to Brennan, who focuses on international ADR issues at CPR, are in the trillions of dollars, and the time frame for the contracts' completion is as long as 25 years.

The 20-person Iraq delegation traveled from various Iraq cities and towns to attend meetings in New York, Washington D.C., Texas, and Massachusetts.

The New York leg of the trip consisted of three days at Columbia Law School in February. The sessions discussed arbitration and ADR, and how these processes could be used to assist the Iraqis in their dealings with international oil companies.

The first day featured a mock arbitration and a lecture on arbitration enforcement issues.

The second day, Brennan was joined in a panel discussion by James Groton, an Atlanta mediator and arbitrator long active in CPR construction ADR efforts as a partner in Atlanta's Sutherland Asbill (see http://jimgroton.com), and Robert Rubin, who also focuses on construction legal work as an of counsel in the New York office of McCarter & English.

The panel spent an hour identifying the types of disputes likely to arise as a result of the international contracts that the Iraqis are working on. The panel then spent two hours on dispute prevention techniques, including early neutral evaluation, and standing neutrals. See Groton's cover story, "The Standing Neutral: A 'Real Time' Resolution Procedure that also Can Prevent Disputes," at 27 *Alternatives* 177 (December 2009).

The second day, the Iraqis reviewed five hypotheticals on issues that might occur during the life of an oil contract, such as personal injury matters, environmental damage, and technical discrepancies. The delegation was asked to analyze each situation based on the tools that the panel had described.

Brennan says that the Iraq delegation's feedback was positive. She reports that she has had discussions with the Iraqi officials about conducting future programs.

MORE FROM THE MEETING: HIGHLIGHTS FROM CPR'S ANNUAL NYC GATHERING

Below are more highlights from the 2010 Annual Meeting sessions, picking up where the summaries left off in the September issue.

CPR News

Mark your calendar: The date and place have been finalized for CPR's 2011 Annual Meeting. The event will be held on Thursday, Jan. 13 and Friday, Jan. 14 in New York. The full details, including the agenda, appear at www.cprmeeting.org.

* * *

The CPR Institute, and WestLegalEdcenter.com, a unit of Thomson Reuters, have posted six of the January 2010 meeting sessions for on-demand CLE credit. Full details at the WestLegalEdcenter cite and at CPR's Training/Events tab at www.cpradr.org.

Because the online sessions are accredited in dozens of jurisdictions nationwide, annual meeting attendees were urged to encourage colleagues and staff that couldn't come to New York to "attend" via the CPR Annual Meeting on-demand seminars online.

Individuals at CPR Institute member organizations receive a 25% discount by registering for the courses using their work domain E-mail address.

The CPR Institute has partnered with WestLegalEdcenter.com to provide 36 sessions, and 26 for-credit podcasts for CLE on the go. See the websites for full information on the six sessions, and links.

* * *

Dispute prevention was a CPR Annual Meeting hot topic.

Joseph T. McLaughlin, of counsel to Bingham McCutchen in New York, and a neutral with JAMS, opened a Jan. 14 seminar on prevention by noting that it requires a full corporate commitment led by a "senior champion" for ADR processes who can instill the mindset throughout the organization's legal, financial and human resources functions. McLaughlin, a CPR Institute board member, said it also requires training, and allocation of costs to individual business units to motivate the commitment.

Panelist James P. Groton, a retired partner of Atlanta-based Sutherland, Asbill & Brennan, described "a brave new world of dispute prevention," where step negotiations escalate not only the attention to a developing problem, but also the level of individuals tapped to resolve them.

"Because disputes are handled when they come up," he said, "there is almost no need for discovery."

Panelist Susan C. Levy, of Chicago, who is managing partner of Jenner & Block, agreed that "top people" need to get involved to prevent disputes in contracting and deals. She noted that prevention is "not litigator-friendly."

Lawrence E. Susskind, president of Cambridge, Mass.'s Consensus Building Institute Inc., provided commentary on the panel members' techniques. With the audience members, Susskind discussed writing clauses with incentive bonuses for prevention. He questioned why so little attention is paid to avoiding litigation.

Susskind, a professor at the Massachussetts Institute of Technology, and the program on Negotiation at Harvard Law School, summarized his view, as well as audience discussion. He declared that if there was an incentive system for avoiding disputes—that is, if the prevention "bonuses" were high enough—law school students would be demanding prevention techniques courses.

* * *

A session providing New York state continuing legal education Ethics credit to eligible attendees provoked a fiery Annual Meeting discussion on the limits of hybrid ADR practice.

Lovells partner MaryBeth Wilkinson moderated "Mediator v. Arbitrator: Disclosure and Other Ethical Issues." Panelist Jeff Kichaven first picked on an issue that has bothered him for some time: requests to mediators to declare a settlement fair. Kichaven reiterated his strong objection to mediator fairness opinions. See his detailed views at Jeff Kichaven and Jay McCauley, "Mediators, When the Court Comes Calling, Remember: It's Not Your Business to Declare this Settlement to Be Fair," 27 *Alternatives* 115 (July/August 2009).

Panelist A. Stephens Clay, a partner in Atlanta's Kilpatrick Stockton, agreed. Addressing mediators in the audience, he said, "You are there to facilitate the parties to reach an agreement. You are not there to say it is fair to either side."

Panelist Kathleen M. Scanlon, a New York attorney-neutral and former CPR Institute senior vice president, said that med-arb—where a neutral is asked by parties to decide a case after a mediation has failed to produce an agreement—could be effective, but warned that the use must be determined case by case, and it shouldn't be forced or coerced. She discussed the London-based Centre for Effective Dispute Resolution's recent rules on settlement in arbitration. The rules are examined at "CEDR Rules Try to Push Arbitration Toward Settlement," 28 *Alternatives* 82 (March 2010).

Scanlon said that the goal of hybrid processes is to encourage flexibility, as long as the parties proceed with care. Jeff Kichaven strongly disagreed on using med-arb, noting the inherent conflict, and criticized the CEDR rules.

* * *

The 2010 CPR Annual Meeting closed with a look at the future of ADR legal practice. It was moderated by the host of CPR's *International Dispute Negotiation* podcast, Michael McIlwrath, who works in the Florence, Italy, office of a General Electric Co. energy unit, Infrastructure-Oil & Gas. He was joined by meeting keynoter Richard Susskind, who is author of "The End of Law? Rethinking the Nature of Legal Services," published last year by Oxford University Press USA. (Susskind's keynote address was examined at CPR News, 28 *Alternatives* 90 (April 2010).)

McIlwrath introduced the session by going backward in time, describing a conversation he had with an anthropologist who had

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CPR News

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examined a culture of "dispute avoiders" who live near the Amazon River. (That discussion became *IDN* Podcast 84: "Plants, Beer, and Shamans to Avoid and Resolve Conflict," which was posted Feb. 12 at www.cpradr.org, and is available at the site's *IDN* archives as well as iTunes.)

The tribes historically lived in groups of 30-50 people, without formal legal procedures or courts. They resolved their disputes without arguing or even displaying anger, or any negative emotion—when they are sober.

Instead, McIlwrath said, the members of surrounding villages periodically convened for ceremonial drinking binges where grievances are decided by a court of public opinion. Any parties not satisfied with this form of justice simply may leave the village to stake out a home in nearby available land.

This method worked well for centuries, McIlwrath told the CPR audience, until modern times when the tribes were driven into towns of 200-300 people, and without the benefit of empty surrounding lands for dissenting villagers to inhabit. With the traditional method insufficient in an era when people live in close quarters, an informal judiciary is emerging in response to this pressure, in the form of the community shaman/witch doctor.

Suggesting that changes in the environment and economy will provide pressures that will fundamentally change methods of resolving conflict, McIlwrath introduced Mathew J. Burrows, of Washington's National Intelligence Council, the federal agency that provides long-term strategic thinking for U.S. intelligence services. Burrows provided the council's view of the changes and challenges the world faces for the next 25 years, which he described as a "transitional" period.

China and India, he said, will surpass most Western nations in gross domestic product over the next two decades, including the U.S. around 2025-2027.

He also discussed the rule of law and governmental operations, noting that organized crime now has a "joint identity" with some governments, including states around Russia.

Burrows suggested the political environment and economy will provide pressures that will fundamentally change conflict resolution.

The panel reviewed delivery of dispute resolution practices and legal services. It discussed what would survive, and how different the areas will look in a quarter century.

Moderator McIlwrath emphasized the in-house counsel need for dispute prevention to meet management goals in a big company, and discussed outsourcing versus "insourcing." He said General Electric had found keeping some legal work in the company more cost effective than giving it to its outside law firms.

Consultant-author Richard Susskind, who agreed to participate as a last-minute fill-in after his keynote address, said that it would not be possible for general counsel to respond to existing or future economic pressures by continuing with the current law-firm practices.

He explained that there are three "pressures" acting on general counsels, based on his discussions with them. They are (1) the pressure to reduce head count, (2) the pressure to reduce external costs, especially the costs of law firms, and (3) the increasing demand for legal and compliance support. In other words, said Susskind, the pressure is to do much more with much less.

Still, despite new models and sources for getting legal work done, panelist Susan Hackett, general counsel of the Washington-based Association of Corporate Counsel, said, "I don't believe the billable hour will ever die." She added that the culture changes will mean, simply, that law firm's billable hours won't be "the default mechanism" for purchasing and selling legal work.

McIlwrath noted that ADR will become standardized, "like Holiday Inn did for hotels." McIlwrath—who is a board member and former chairman of the International Mediation Institute, a Netherlands-based nonprofit mediation advocacy group that provides credentials for neutrals—urged audience members to "heavily invest in mediation." He said that in assessing disputes and legal problems, attendees should "challenge every single assumption about every single thing you do."

The panel generally agreed that the future would see a much greater degree of information available about the performance and reputation of lawyers, mediators, and arbitrators, with Internet sites providing user feedback and even rankings about performance.

Panelist Paul Lippe, of Moffett Field, Calif., who is chief executive officer of Legal OnRamp, picked up on that subject, briefing the audience on the trends that led to the establishment of his company, and how it operates. The company runs http://legalonramp.com, a website where in-house counsel collaborate with "invited outside lawyers and third-party service providers."

Richard Susskind said that the changes and innovations for legal services delivery won't be temporary. Susan Hackett and Paul Lippe both noted that many of the innovations the panel projected already are taking place.

McIlwrath concluded the session predicting that within 25 years, mediation will emerge as a global profession, with parties and practitioners treating it as a familiar practice regardless of where their dispute arises. He said that much of the groundwork is being done today with international and domestic standards and ethical rules. "A party in New York will get on a plane to attend a mediation with its counterparty in Kuala Lumpur," he said, "and they will take their New York lawyer with them rather than hiring local counsel."

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For more information on past CPR meetings, including the sponsors, please visit the Training/Events tab at www.cpradr.org.

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- **Workshop on a controversial mass claims issue** led by Deborah Greenspan, former Deputy Special Master for the September 11 Victims' Compensation Fund Program
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