**SONOMA CLE 2016**

STUFF YOU NEED TO KNOW TO BE A BETTER ADVOCATE IN

NEGOTIATION, MEDIATION AND ARBITRATION

PRESENTED BY

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**INTRODUCTION**

Negotiation, mediation and arbitration are the subject of today's presentation. They are the three most common dispute resolution processes in use in the legal field today, outside of litigation. The importance of these non-litigation dispute resolution processes has increased greatly in recent years due in large measure to the expense and time required to effectively litigate a case. The effective uses of these processes can be vital to a client's representation.

Lawyers go through much training, emphasizing discovery and trial techniques. Our purpose here is to provide additional tools to promote better advocacy in the non-litigation dispute resolution processes. We will seek to do this with a mix of theory (i.e., conflict theory, communication theory and dispute resolution theory) and practical, tactical advice regarding each of these areas. One basic assumption we make in this presentation is that the parties involved in these disputes operate under the United States legal system with commonly accepted United States/Western values and the assistance of lawyers. It is very important to understand that cultural differences can have a major impact on how dispute resolution works.

To have dispute resolution, there must first be a dispute. The conflict resolution model attached as Slide 1 shows how this occurs. It begins with differing parties having interests or aspirations that conflict. This alone does not make a dispute. The dispute only occurs when a party actually perceives or realizes an injurious event or experience. Recognizing that a particular event or experience has been injurious is called "naming." The next step in the process is "blaming", where the particular named injurious event or experience is attributed to the fault of another. The next transformation takes place when the party who has "named" and "blamed" actually communicates their grievance to the party believed to be at fault. This is called "claiming." Sometimes, these steps can be separate, distinct and drawn out (i.e., a toxic injury, or asbestosis). Sometimes, they can occur almost instantaneously (i.e., an auto accident). Lawyers have had and continue to have a large role in helping people in the "naming", "blaming" and "claiming" process. In many ways, this is the purpose of "access to justice."

Once the grievance is communicated, the dispute resolution continuum comes into play if the claim is rejected in any manner. At the beginning of this process, there is a decision to be made by the person with the grievance. Does that person or party move forward with the grievance or not? Does he/she accept the rejection (lump it) or proceed? If the decision is to proceed, then negotiation begins.

Finally, the three alternate dispute resolution processes are not exclusive. Negotiation can still be occurring during mediation and arbitration. Mediation can still occur as a required precondition of arbitration or as a part of the arbitration process. The first process to come into play is usually negotiation.

# **NEGOTIATION**

## **A. Generally.**

Life is a series of negotiations. Everyone negotiates daily. Lawyers probably do more negotiating than any other distinct function of their practice. They negotiate with clients, employees, partners and opposing parties and counsel. Yet, relatively few lawyers receive any in-depth training in negotiation. Most get some type of on-the-job training throughout the years of practice in the use of certain tactics that sometimes seem to work. As a result, there is a vast disparity in the ability of individual lawyers to negotiate.

To begin understanding negotiation, it is important to realize that there are two basic types of negotiation: distributive negotiation and integrative negotiation. Distributive negotiation is the type with which many litigators are familiar in their practice. The plaintiff starts high, the defendant starts low and the parties try to dance to the middle. Here, the best compromise is one where neither side is happy with their outcome. Integrative negotiation is the second type of negotiation which seeks a win/win result. *Fisher & Ury*, Getting to Yes (1981), is the classic work providing a popular explanation of distributive negotiation. Importantly, these two basic types of negotiation can both play a role in a single negotiation. Even in a basically distributive negotiation, there is room for integrative bargaining and vice versa.

## **B. Distributive Negotiation.**

In the typical personal injury case, the plaintiff starts the negotiation by offering high, and the defendant counters by offering low. In a successful settlement through negotiation, the parties dance closer together through a series of declining/increasing offers/counteroffers until reaching an agreed-upon amount. Often though, the negotiation is unsuccessfully terminated after one or more offers/counteroffers. While there are facts outside of the negotiation itself that can play a role (i.e., too soon, not enough facts; too much exposure due to similar cases/issues, etc.), the failure often results in one or both parties not having a clear, in-depth understanding of this type of negotiation.

Slide 2, the Distributive Negotiation Chart, provides a shorthand explanation of the distributive negotiation process. To begin with, distributive bargaining has certain characteristics. It is a fixed pie, zero sum process. There is a certain amount of something (money, land, goods, etc.) that is set and is to be divided between the parties. Thus, each party's goal is to maximize self-gain. It is a win/lose proposition. With a fixed pie, when Party A gets a larger piece, Party B gets a smaller one; and, vice versa. Also, the focus is on positions or amounts, not the underlying interests or the reasons why a certain position or amount is desired.

The chart sets out the various zones and points that impact the distributive bargaining process. First, zones which are unrealistically high or low value areas based on the facts of the case, are defined as the insult zone. Offers in these zones can cause the other party to get up and walk out, shut down negotiations or refuse to counteroffer. The credible zone is the realistic value area given the facts of the case. Within the credible zone are aspiration points. This is a party's best realistic result -- the homerun. It should be high in the credible zone for plaintiffs and low in the credible zone for defendants. The chart also sets forth reservation price/points. This is the party's walkaway number. Plaintiff A would not accept any less than A's reservation price, and Defendant B would not pay any more than B's reservation price. Within the reservation price/points is the zone of possible agreement -- the sweet spot of distributive negotiation.

The point of all this is for the negotiator to realistically assess the case and make an educated guess or estimate as to the insult zones, the credible zone, the aspiration points, the reservation price/points and the zone of possible agreement to better calculate where offers and counteroffers make sense to reach agreement. Certainly, these numbers can change during the course of the negotiation as more facts are revealed. However, the structure provides a handy guide to avoid mistakes and maximize one's chances of a successful distributive negotiation.

## **C. Integrative Negotiation**

Integrative negotiation differs from distributive negotiation in a number of significant ways. It evaluates interests rather than positions. It is collaborative not competitive. It seeks mutual gain where possible; not a win-lose fixed pie result. It is harder to do. It takes more time. It is not suitable for every case. Its results are most often more satisfying to the parties than results from distributive negotiation.

Slide 3 illustrates the seven elements of integrated negotiation: communication, relationship, interests, options, legitimacy, alternative and commitment. The slide actually assumes that one knows the facts of the case. Each of these elements plays a role and impacts the next element. The approach is as follows:

### Identify and evaluate the facts/variables of the case;

### Prepare an effective communication strategy;

### Develop relationships;

### Determine interests;

### Discuss (and negotiate, if necessary) options;

### Assess alternatives;

### Agree on legitimacy of the option meeting interests; and

### Reach commitment.

These elements are used to separate the people from the problem, focus on interests not positions, develop options leading to mutual gain, base these options on objective criteria and lead to a win‑win result.

The first step in the process is obvious but critical. Know the case. Know not only the strengths of one's case but also the strengths of the opponent's case. Do not let your advocacy role override your counselor role so much that you drink your own Kool-Aid.

Next comes the development of an effective communication strategy in order to build a relationship with the other party. Open‑ended interest‑based questions obtain more information than yes‑no cross‑examination style questions. Tone of questioning is important as well. Aggressive questioning (not to be confused with persistent questioning) increases resistance and usually becomes counter‑productive. Timing is important as well. When asking sensitive or important questions, consider the best time in the context of the conversation to do so. For example, a particularly sensitive question right at the beginning of the conversation is probably not a good idea.

Further, communications theory has identified a number of concepts which can enhance effective communication. They are perception, emotions, core concerns, heuristics/bias, and principles of influence.

Use of perception involves things such as putting oneself in the other's shoes; not guessing the other's intent from one's own fears; not blaming the other for one's problems; giving the other a stake in the outcome through participation; and making proposals that are consistent with that perception. One should also look for opportunities to change negative perceptions by acting in a way contrary to that negative perception.

Use of emotion includes recognizing and understanding one's own emotions as well as those of the other; making explicit acknowledgment of the legitimacy of the other's feelings; allowing venting of emotion; and using symbolic gestures to create positive emotion.

The five core concerns are appreciation, affiliation, autonomy, status and role. These address the following questions:

### Can one understand the other's interests?

### Does one have common interests, background, friends, and relationships as the other?

### Does one respect the other and their freedom of choice in the process?

### Does one treat the other as an equal, a superior or an inferior?

### What parts do the parties play in the process?

The answer to these questions can enhance or detract from the process.

Heuristics/bias is a concept that recognizes the mental shortcuts/assumptions people make on a daily basis in dealing with decision‑making. These are non‑rational (not necessarily irrational) unconscious patterns dealing with complex decision‑making. There are any number of them and they can definitely impact decision‑making. For example, the "availability bias" refers to a known tendency of people to make judgments based on how mentally available possible results are to them. For instance, a plaintiff might overestimate the possibility of winning a large verdict because of news coverage of a separate case in which a large verdict was rendered. Another example is that most people incorrectly believe that homicides and car accidents kill more Americans than diabetes and stomach cancer, presumably because of the media coverage of homicides and car accidents. Another example is the "overconfidence bias". Simply put, most people believe that good things are more likely to happen to them on average and that bad things are less likely to happen to them on average when compared to others. Another known tendency arises out of "framing". People are generally willing to take more risks to prevent a loss than they are to obtain a gain. So, if the problem can be framed as a potential loss for one of the parties, they will generally be more willing to take a risk to prevent that loss.

The next concept is principles of influence which are liking; social proof; commitment/consistency; reciprocity; authority; and scarcity. Liking is the concept that we are more influenced by those who are physically attractive, with whom we share something in common and with whom we are familiar. Social proof is the tendency to more likely behave in a certain way after seeing others do so, particularly in a condition of uncertainty and when the "others" are similar to us. Commitment and consistency means that once one makes a choice, there is personal and interpersonal pressure to behave consistently with that choice. Reciprocity is the concept of the Golden Rule: do unto others as you would have them do unto you. Authority is the tendency to comply with the wishes of those in real or perceived authority. Finally, scarcity is the concept that opportunities are more valuable when they are less available. Utilizing all these concepts as part of the communication strategy really enhances the quality of communication.

The whole point of developing and executing a communication strategy is to build relationships. The initial decision here is how good does one want or need the relationship to be in order to explore interests, develop options and agree on legitimacy of the result. This will differ depending on the complexity of the case, the preexistence of a relationship, the desire for a continued relationship as well as the level of the relationship desired. Developing the relationship is enhanced by separating the people from the problem and negotiating hard on the problem but soft on the people. One should bargain hard for his or her interests but respect the other's right to bargain as well. Utilizing objective elements or standards to support one's interests is one way to bargain hard without making it a personal attack. The goal is for the relationship to have a sufficient amount of trust and respect to allow for the additional elements of integrated negotiation to take place.

The interests phase is designed to explore and discover the underlying interests of the parties to the dispute as well as any third‑party interests which may impact resolution. These interests can be present or future interests which are shared by the parties or which differ. In exploring interests, it is important to differentiate interests from positions. A position is the thing one currently seeks. Interests are the reason why one is currently seeking the particular thing. A helpful illustration is an iceberg floating in the ocean. The 1/5 of the iceberg showing above the waterline is the position while the 4/5 of the iceberg below the waterline represents the interests which support the position.

Once the interests are identified, the next phase is to create, prioritize and choose an option or options that best meets the interests of the parties. One of the best ways to do this is to "brainstorm" the problem. The parties initially develop any number of options. Then they rate the most likely options and prioritize. There is no sacramental form to this practice. This process can be done together or separately. The key is to be open and creative as well as to communicate.

After the options are developed and prioritized, the next step is to agree on one option which best meets interests if at all possible. As part of this process, the parties have to evaluate the best alternatives if no option is selected. This is called the BATNA (Best Alternative to Negotiated Agreement). The stronger or better a party's BATNA is, the harder that party can bargain because there is less downside risk of failure. In the distributive negotiation framework, improving your BATNA will improve your reservation price/point thus shifting the zone of possible agreement favorably to you.

If both parties agree to an option, then the next step is to get commitment in the form of a written settlement document which sets forth the ultimate steps the parties are to take. Without an enforceable mechanism, the negotiation is not complete. Sometimes this is easy. Sometimes it is hard due to contractual, indemnity and other details which can derail any agreement. Obviously, if the parties cannot agree on an option, the negotiation fails.

## **D. Conclusion.**

As set forth at the outset, negotiation is everywhere in our daily lives and particularly in our law practices. This fact makes the relative lack of formal training in negotiation practice for lawyers all the more surprising. This presentation hopefully will help lawyers approach negotiation with a better appreciation of the dynamics. The models of negotiations set forth here are not set in stone. They are models which represent an experienced approach grounded in an organized research‑based methodology. They are designed to help order a lawyer's approach and way of thinking about negotiation. Remember again that rarely is a negotiation all distributive or all integrative. There is often a distributive bargaining role within integrative bargaining models particularly on peripheral issues. There are also often opportunities for integrative bargaining in a basically distributive bargaining setting. The point is to understand both and apply them appropriately.

Finally, slide 4 is a helpful tool to plan for a negotiation using the methodology discussed herein. I find it helpful and hope you do too.

**PART 2 - MEDIATION**

**A. Mediation: The Concept.**

Mediation is a process where a third party, the neutral, assists or aids the parties in reaching a resolution of their dispute. The hallmark of this process is that the mediator has no interest in the outcome and the parties control the outcome. They can agree or not agree. They maintain ultimate control of the process. If resolution is reached it is the parties that make that decision.

**B. Selection of the mediator. What are you looking for?**

One of the most often overlooked considerations in selecting a mediator is the question “Why do I need a mediator?”

The answer is frequently there are obstacles to direct negotiation which prevent the parties from finding a resolution on their own.

These can include emotional elements that prevent the parties from viewing a voluntary resolution as the best course of action. Anger, a sense of being treated unfairly, a breach of a promise, disrespect and unfair behavior all inhibit the parties and their attorneys from viewing the case objectively.

In lawyer represented cases the lawyers themselves may have engaged in acrimonious depositions, motion practice and discovery disputes such that their ability to let go of the desire to defeat the other side is overpowering.

One or more of the parties may have an unrealistic expectation about the outcome of a trial or arbitration.

So in this environment, as an advocate for your client, you need to find a mediator that can help you overcome these obstacles to resolution.

Many of you have heard the term facilitative mediator or evaluative mediator and incorrectly assume that mediators practice one style or the other. This is an inaccurate perception of mediators. Most skilled mediators are capable of and use elements of both facilitative and evaluative styles.

Do you need to get a mediator that has deep substantive expertise in the topic of your dispute? It can help. For example, in a multi-party construction dispute it can be helpful if the mediator knows something about the various parties’ responsibility on construction projects. But it is not a necessity.

What the skilled advocate must decide is what the impediments to resolution are and what skills are needed in the mediator to overcome those impediments.

**C. Who needs to be at the mediation?**

We always hear the notion you have to have someone with ultimate authority to attend the mediation. That sounds good in theory, but the reality is the ultimate authority may be an insurance executive in another state, or even another country. They are not going to attend the mediation. What you need is someone who understands the case and has had the benefit of a clear and accurate analysis of the case from the standpoint of liability and damages provided by counsel to make informed decisions about what a satisfactory resolution of the case would be. If a final decision cannot be made the day of the mediation you should discuss this candidly with the other side and with the mediator prior to the mediation session so everyone understands what to expect from the session. Most lawyers understand these limitations and will cooperate if they have been given a heads up before the session. Your role as the advocate in the mediation is to insure that your clients know what the issues are in the case and how that might play out if resolution is not achieved. That is, they need to know what you think will happen if resolution is not achieved.

**D. Who needs not to be at the mediation?**

Frequently in business disputes the principals that were involved in the original dispute have a very difficult time being objective about resolution. If you represent a business client in this type of situation you should carefully consider the idea of bringing someone other than the person involved in the dispute to the mediation.

As an advocate for a client the person you want there from the client is someone who can make an objective business decision. Failure to consider these factors are going to limit your chances for resolution.

**E. The mediation paper.**

Most mediators request a pre-mediation paper several days before the scheduled mediation. Some mediators ask that it be confidential while other ask that the papers be shared. My personal experience is that confidential papers are the most useful because the attorney advocate can be more candid if she knows that the information is going only to the mediator.

What you as the attorney advocate need to do in your paper is give the mediator a clear presentation of the facts and the legal issues in the case. Then you should tell the mediator what the impediments are to resolution. These can include a view of one side or the other, that the other side has broken a promise or has been dishonest or lied to in a prior dealing.

There can be issues of disrespect or discrimination.

All these issues must be candidly discussed in the paper so the mediator has an understanding of the hurdles he must face.

Will the parties have an ongoing relationship? If so, what are the possible alternative solutions other than money that can address resolution?

A lot of time, if the case has gone on for a while there may have been acrimony between the attorneys. Tell the mediator about that.

Do you have client expectation issues? Tell the mediator what they are and suggest what he can do to help break this barrier down.

If there have been settlement discussions, tell the mediator what happened and why you believe direct negotiations were unsuccessful.

Don’t be afraid to tell the mediator what you believe a successful solution to the case would be. I don’t mean to give the mediator a bottom line number, but give him a framework of what you think might work and why.

The very best mediation papers are those that reflect that the attorney has carefully considered his case and has tried to give a fair and honest assessment of the case.

**F. Prepare the client for mediation.**

Unfortunately, most attorney advocates really begin thinking about a mediation the day before the mediation session. This is a mistake. The attorney advocate should focus on mediation the very first time you meet with the client. You should tell the client that the vast majority of cases resolve before trial and that this case may be in that group. Explain to the client that trials are distant objects which may not offer the best resolution. Explain that mediation is a process where the client still has a say in what happens.

Throughout the case the subject of resolution before trial should be revisited with the client. When the attorney advocate is satisfied the time is right for mediation the client should be advised of the opportunity and encouraged to embrace the chance to resolve her dispute in a manner where she has the ultimate decision.

Once you and your client have agreed to mediate there are a number of things you should do to help you and your client to be effective at the mediation.

First, clearly explain the process of mediation. Explain what the mediator’s role is. Most clients assume that the mediator is there to make a decision about the case. Make sure you explain that is not the mediator’s purpose. Explains confidentiality in mediation and how it works and its purpose. Tell the client that your role as attorney advocate is much different in mediation than in litigation.

Explain that your role is to help the mediator understand as much as possible. Explain that you and the client both need to go into the mediation session with an open mind and a willingness to consider anything which might result in a reasonable resolution. Explain that a reasonable resolution is not the same as what a judge or jury might do.

Remind the client that this is her case and the mediator will likely ask questions directly to her and to be prepared to answer fully and openly.

Take time to advise the client that early discussion during the mediation and numbers are just starting points and not to be insulted or shocked at what appear to be offers outside the zone of reality. Tell the client most mediations last most of the day and she should be prepared to go all day if necessary. It is a process.

If the client is a parent or caregiver advise the client to make arrangements for others to handle after school pick up or other obligations that might occur before the end of the day.

Tell your business client that has flown in from another state to please plan on spending the night and to take the first flight out in the morning. I find many insurance clients will book a late afternoon flight which results in the mediation session ending at 330pm to allow time for the client to get to the airport. That is frequently not enough time to get to resolution. Encourage them to understand that if they have made the commitment to mediate you should do everything you can to give the process the best chance for success.

A promise of a nice dinner at a favorite restaurant helps to get past this issue.

**G. Advocacy at the mediation session.**

Many mediators follow a routine that starts with the mediator explaining how the mediation will be conducted, the rules of confidentiality that apply to the process and how he will use information given to him in caucus. Then he will call upon the parties to give opening comments in joint session. Then the parties are separated and move to private caucus for the rest of the mediation. As an advocate at mediation you should discuss what elements should be modified or eliminated. In cases where all parties are represented by counsel and the case has gone on long enough for all to “know the score” openings are frequently counterproductive. As an advocate in mediation you should tell the mediator your position on opening statements well before the day of mediation. If you are dealing with business, commercial or construction disputes both the lawyers and the clients are repeat players in litigation and little is gained by using an hour of the session for each party to restate their legal position in a joint session. On the other hand certain types of cases, such as employment discrimination, present an opportunity for an employer to tell a former employee directly that the company regrets what happened and offer an apology. This simple act, if sincerely presented, often creates an atmosphere that will allow a resolution to be reached.

As the attorney advocate you need to keep in mind that you own the process, not the mediator. The entire process requires you to negotiate on behalf of your client the entire time. You will be negotiating with the other side through the mediator, with the mediator and with your own client. You need to be aware that the mediator is employing strategies and tactics to achieve his goal…a negotiated resolution. What you need to do is identify these strategies and tactics and deal with them and to use the mediator to help you achieve the best resolution for your client.

The mediator does his job by acquiring information, interpreting what that information means and encouraging movement by the parties. Once he has received an offer from one party he will report that to the other side. In the early going, the mediator will likely not comment on the offer unless it is so out of the range of possibility that it will normally be accompanied by a reminder that first offers are just that, a means to get the process going. The information phase is usually accompanied by the mediator asking clarifying questions to allow him to fully understand the factual and legal positions of the parties. The mediator then will move to making comments about the case by translating what he has heard in an attempt to get trade-offs. He will make comments about the demand if it appears to deviate from the norm of “what could happen.”

You want to get the mediator to help you. Assure him that his goal and yours are the same; to reach a resolution of the case. Tell him right away of what you believe your strong and weak points are and what you believe the strong and weak points are of the other side. If you don’t do this, the mediator will ask questions that will get the same information so you may as well get it out there. By openly pointing out the weak points you eliminate the mediator using them during the process to try to get you to adjust your position. After you tell the mediator the strong and weak points give him your proposal to resolution the case. If it is an offer of money tell the mediator how you got to the figure.

Listen carefully when the mediator comes back to your room after caucusing with the other side. Listen for qualifiers. They are clues about what the other side might be willing to do. For example, if the mediator comes in and says something like “after a lot of effort I was able to get them to move.” He is telegraphing that the other side could have and perhaps should have made a larger movement.

The timing of when you release certain information can help you close the mediation on best terms for your client. For example, in commercial disputes there are always lots of documents. You can give the mediator some early and encourage him to ask the other side how they plan on dealing with them. If the other side can’t explain them you have armed the mediator with a tool to help him settle the case favorably for your client. Always ask the mediator to allow you private time with your client to discuss before you give a response to an offer. Remember, it is their case and their decision on what they are prepared to do.

**H. Barriers to Resolution.**

Advocates are often guilty of unwarranted confidence in their evaluation of what will happen if the case proceeds to trial. As a mediator I frequently ask the attorneys to tell me what they think their chance of winning is at trial and many times both parties will say 60-80%. Clearly, one of them is wrong. There are many reasons for this but a big one is there is information that the attorneys don’t know and they tend to understate the risk associated with that lack of knowledge. The good advocate in mediation will have a realistic view of his case.

Loss aversion and risk aversion are also deal killers. Loss aversion causes defendant attorneys to choose to risk a large loss rather than settle for a smaller but certain loss. Risk aversion is the willingness of people to give up a higher value riskier option to be certain that they at least get something.

Reactive devaluation simply means that the other side will automatically devalue a solution that comes from the other side. Thus if it comes from the mediator it might be acceptable. This is where the mediator can be your ally.

Many advocates see mediation as a strictly zero sum distributive process. If you win, I lose. This thinking is a problem because it inhibits creative thinking to find possible solutions through integrative bargaining. Not every case needs to be resolved by the movement of money from one party to the other.

**I. Pay attention to Non-verbal communications.**

Many of us through experience have learned that people give off information without speaking. If someone is mad their face will flush. If someone is sad their eyes may tear up. But there are many more subtle clues that are available. You just need to train yourself to see them. Studies have shown that somewhere between 60-93% of all communication is non-verbal. So if you are not paying attention to these non-verbal messages you are missing almost everything others are communicating. There are a number of books about playing poker that are a good starting point in understanding the concept. If you have watched any of the poker shows on television you see many of the players with hats, mirrored sunglasses and other items to prevent the other players from getting the non-verbal cues. One of the things you are looking for is signs that a person might be lying or trying to deceive you. The most reliable indicators of lying are the automatic gestures a person makes because they lack the ability to control them. When you see a person touch their nose it may indicate what they have just said is a lie. The reason is that when someone is intentionally lying their blood pressure increases. This causes an itching of the nose which in turn results in the nose rub. Rubbing one’s eyes is also an indicator of lying. It is the brain’s attempt to avoid having to look at the person being lied to. Another indicator is the collar manipulation. Like the itchy nose the rise in blood pressure also causes the neck to sweat and thus the collar pull away.

Most believe that if a person won’t look at you they must be lying. For some this is true, but not some liars. A much more reliable indicator is eye blinking. A person who is lying will increase their blinking substantially. The mirrored sunglasses the poker players wear hides pupil dilation which occurs as they react to a good or bad hand. So the player with 4 kings cannot hide his excitement. His eyes will dilate. If you are paying attention you get the “tell”.

One important thing to remember about non-verbal signs is they must be considered in the entire surroundings and circumstances of each body signal you see. You cannot view body language in a vacuum or in isolation.

Body language and verbal language should match up. This is referred to congruence. If there is no congruence the individual telling you something may not be telling the truth.

**J. Conclusion.**

Since the vast majority of all litigation ends in resolution before trial and more cases are mediated the advocate who has the best skills and tools at mediation enhances his chances for a better resolution.

**PART 3 - ARBITRATION**

**A. What is it and why do it?**

1. What is it?

Arbitration is a private (out of court) process with binding dispute resolution by a third party based upon an agreement. There are some factual situations where arbitration is required by statute.

There are two basic types of arbitration agreements. First is the pre-dispute agreement or arbitration clause which is contained in a contract. Examples of contractual arbitration clauses are as follows:

Franchise agreements: *Bottle Poetry LLC v. Doile Restaurant Group Franchise Company, LLC,* 2013-0406 (La. App. 4 Cir. 1/15/14); 133 So.3d 60.

Oil exploration agreements: *Goodrich Petroleum Company, LLC v. MRC Energy Company*, 2013-1435 (La. App. 4 Circ. 4/16/14); 137 So.3d 200.

Construction contracts: *University of Louisiana Monroe Facilities, Inc. v. JPI Apartment Development, LP, and XYZ Insurance Company*, 49,148 (La. App. 2 Cir. 10/8/14); 151 So.3d 126.

Mobile home purchase agreements: *Mayeaux v. Skyco Homes*, 2013-1053 (La. App. 3 Cir. 7/2/14); 161 So.3d 765

Employment cases: *ConocoPhillips, Inc. v. Local 13-0555 United Steel Workers International Union*, 741 Fd.3 627 (5th Cir. 2014)

Additionally, almost every communication/internet usage agreement contains arbitration clauses, so when the user clicks on "agree", they are additionally agreeing to an arbitration clause.

The second type of arbitration agreement is a post-dispute agreement or submission. These occur when the parties, for possibly some of the reasons listed below, agree that arbitration is a better process than litigation and wish to enter into a post-dispute arbitration agreement. So, just because there is no arbitration clause in a case where lawyers are involved, it doesn’t preclude arbitration as an available remedy.

Any valid arbitration clause must contain certain elements in the agreement. Without each of these elements, the arbitration clause may be limited or non-binding. The first element is defining what is arbitrable. Stated another way, it is defining the scope of the clause. See, for example, *Sanctuary Capital LLC v. Richard D. Cloud*, 49,766 (La. App. 2 Cir. 4/15/15); 163 So.3d 890.

The next element is a commitment of the parties to arbitration. This involves not only determining whether there is a commitment to arbitrate, but also a determination as to who has the primary power to decide whether the parties agree to arbitrate -- the courts or the arbitrator? See, e.g., *ConocoPhillips v. Local 13-0555 United Steelworkers International Union*, *supra*. In the absence of a clear and unmistakable agreement to allow the arbitrator to arbitrate arbitrability, the courts will retain that power. *Id.*

The next element is to pick a set of rules to govern the process, as well decide on case administration. While there are a number of different organizations providing rules and administration of arbitrations, it is not required that a case administrator be chosen. In fact, there are rules specifically designed to govern the process of arbitration without a third party administrator. Additionally, there are, within each differing organization, different rules for different types of disputes, i.e., commercial disputes, construction disputes, patent and trade secret disputes. Some of the organizations that provide these types of rules are the American Arbitration Association (AAA), JAMS (formerly known as Judicial Arbitration & Mediation Services, Inc.), the International Institute for Conflict Prevention & Resolution (CPR), as well as others. In addition to a variety of providers, there are also special rules for expedited procedures, as well as special rules for large, complex disputes contained within the rules set forth by the individual providers. There has been a concerted effort to provide more flexibility to encourage the use of arbitration.

The final element is the provision for Entry of Judgment to enforce the arbitration award. Typically, this allows enforcement of the award in any court of appropriate jurisdiction. This is particularly useful in international disputes where neither of the parties want to try a case in a national court of the other party's origin. The arbitration goes forward and then the Entry of Judgment provides for the enforcement wherever jurisdiction may exist.

Examples of standard arbitration clauses are set forth in the AAA Commercial Rules, amended and effective October 1, 2013, on pg. 8. Both the pre-dispute clause and the post-dispute clause contain the four necessary elements of an arbitration agreement.

In assessing whether or not to arbitrate, it is very important to understand the strong federal policy favoring arbitration. The Federal Arbitration Act (9 U.S.C. §1-16) has been found by the courts to govern any contract that involves interstate commerce as the Commerce Clause of the Constitution has been interpreted. It also preempts any state law or policy to the contrary. See, for example, *Doctors Associate's v. Casaratto*, 517 U.S. 681 (1996). The policy is so strong that the courts have ruled that even if the contract, which includes the arbitration clause, was induced by fraud, the arbitration clause is still valid unless the clause itself was induced by fraud. *Prima Paint Corp. v. Flood & Conklin Manufacturing Company*, 388 U.S. 395 (1967).

2. Why do it?

There are two general bases for deciding to utilize arbitration as the dispute resolution process as opposed to opting for litigation. The first basis is control and choice. The second basis is economy and efficiency. In either case, arbitration compares favorably with litigation, because in litigation there is very little control, choice, economy or efficiency due to the existing laws and the court funding crises which exists throughout this country.

The first area of control and choice involves the selection of decision makers. Typically in litigation, you get the judge you draw. Arbitration provides for panel selection, as well as determining the number of decision makers you choose to have. But arbitration also allows for the parties to require certain types of expertise in the arbitrators. *Williams v. Keller Williams Realty*, 2014-0202 (La. App. 4 Cir. 11/5/14), 154 So.3d 798.

The next area is choice and control of the rules of the process. In litigation, the law is the law. In arbitration, there are many options to choose particular rules and craft a particular process. For example, in *Goodrich Petroleum Company LLC v. MRC Energy Company*, *supra*, the parties agreed that the liability issue would be decided in the same manner as cross-motions for summary judgment based on briefs, documentary evidence and oral argument before the panel, reserving the issue of damages to provide for a more economical process.

Another area of control and choice is that of venue. While contracts do have choice of law provisions, arbitration clauses can provide for venue in a particular place, even though it would not normally have jurisdiction to hear the case. For example, *Bottle Poetry LLC v. Doile Restaurant Group Franchise Company, LLC, supra*, provided for arbitration in New Orleans, even though the plaintiffs had no connection and were not licensed to do business in the State of Louisiana.

Another area of choice and control is a prior mediation and/or negotiation requirement in the arbitration clause itself. This is designed to require the parties to actually attempt settlement before just leaping into arbitration. Experience indicates that this requirement does cut down on arbitrations.

Another area of control and choice is that of remedies. An arbitration clause can limit the types of damage that the parties may seek. One fairly common use of arbitration clauses currently is to prohibit the availability of class actions. Particularly in adhesion-type contracts, the party drafting the arbitration clause is not interested in making it any easier for the consumer, but rather is much more interested in prohibiting the consumer from seeking class action relief.

Confidentiality is another area where there is heightened control and choice compared to litigation. To begin with, the arbitration can be private and without a transcript. Secondly, there are various rules that can be chosen to increase the confidentially protection. For example, Rule 17 of the CRR Rules for Nonadministered Arbitration of Patent & Trade Secret Disputes is a good example of this increased protection. Another related area to the confidentiality desire is the fact that the arbitration ruling would not provide a legal precedent, as would the judgment of a court. In some cases, this could be a very important consideration.

The economy and efficiency basis for seeking arbitration really involves the limitations of time, pleadings and discovery, as compared to litigation. To begin with, the arbitration award is final, unless the parties have specifically agreed to a private appellate arbitration process. So, the appeal delays are not a factor. Additionally, there are limited provisions for discovery that are under the control of the arbitrator and/or nowhere near as open as that involved in litigation. There is no presumption in favor of discovery. Finally, even though a motion for vacatur exists, it is only awarded under 9 U.S.C. §10 if (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or any other misbehavior by which the rights of any party may have been prejudiced; or (4) where the arbitrators exceeded their power or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. These grounds have been narrowly construed by the federal courts due to the strong public policy in favor of arbitration. See, for example, *Hill v. Norfolk & Western Railway Company*, 814 F.2d 1192 (7Cir. 1987); *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5 Cir. 2007); and *David Company v. Jim Miller Construction, Inc.*, 444 N.W.2d 836 (Minn. 1989). The basic policy is to have the dispute resolved as quickly and efficiently as possible.

3. Summary

Arbitration can be a very valuable tool for dispute resolution, but it is often overlooked. Lawyers typically default to litigation unless required to arbitrate due a pre-dispute contractual provision. Given the benefits of arbitration described above, this is a mistake. It is particularly mistaken when the parties to a dispute have an ongoing relationship, because litigation tends to foster more conflict. Even without such a relationship, ignoring arbitration as an option is still misguided given the expense, time and "crap shoot" nature of litigation. A good lawyer should more often effectively seek arbitration when the circumstances warrant.

**B. Effective Strategies for Successful Representation.**

1. Pre-hearing considerations.

Carefully examine the applicable statute of limitations to the claim you are bringing. If there is any doubt that an arbitration filing will not interrupt the running of the time then you should consider whether to file a civil action and move to stay it or work out a tolling agreement with the other party.

Most cases that go to arbitration go by virtue of a selection in the agreement between the parties.

If you are representing a plaintiff and you don’t really want to go to arbitration you need to think about what is likely to happen if you ignore the arbitration provision and file a lawsuit. Almost always the defendant will file an arbitration demand and successfully compel arbitration. This will put you in the defensive position and make the arbitrator wonder why you wanted to avoid arbitration.

If you are representing the defendant consider filing a demand for declaratory relief before the plaintiff files his arbitration demand. This strategy allows you to be the claimant. This is a valuable position because it allows you to present your case first.

One of the most important things you will have to consider is arbitrator selection. Most administrative organizations, such as AAA will send you lists of names of proposed arbitrators and you rank them and the highest ranked that both sides agrees to is appointed. Or you can agree on someone even if they are not on the respective panels. Do all you can to know about the arbitrator before you select her. Generally when making a selection what you are looking for is someone with a record of fairness, experience and subject matter expertise if possible.

The arbitration demand is a critical step in the process yet it is frequently handled in a very routine manner with bare bones information placed in the demand form provided by the administrative entity. I think this may be a mistake for the advocate.

The very first thing the arbitrator is likely to read is the demand for arbitration. As an advocate the demand provides you with your earliest opportunity to persuade the arbitrator. That means that you should consider making the demand more like an opening statement which contains all the key facts, documents and perhaps the law to frame your case for the arbitrator.

If you are the respondent you should consider a similar approach in your answering statement.

The first contact with the arbitrator will be at the first preliminary hearing. The arbitration preliminary hearing is not like a hearing in court, but is more in the nature of a scheduling conference. These are mostly held by telephone conference. Have all possible names of parties and witnesses been identified so the arbitrator can run a complete conflicts check? One of the big issues that the arbitrator will want to discuss is whether the parties have reached agreement about discovery and the scope of it. In large commercial or construction cases the topic of e-discovery will have be addressed.

The arbitrator is trying to balance a party’s desire to obtain information consistent with the expedited nature of arbitration.

In preparation for this discussion you should be able to tell the arbitrator why the information you want will lead to the discovery of admissible and relevant evidence.

Will the grant of the request for discovery avoid surprises at the hearing? Be prepared to explain why the particular information you want will accomplish this.

How will the discovery requested expedite the hearing? A good explanation to this question will help convince the arbitrator to grant the request.

And last, is the information sought necessary to assure that the party will receive a fair hearing? If you can explain that to the arbitrator you will have an excellent chance of getting what you request.

The issue of third party discovery is something which presents particular challenges that needs to be carefully thought out by party representatives. Historically, lower federal courts authorized arbitrators not only to subpoena third parties for the production of documents and testimony at an actual hearing, but prior to the hearing for the purposes of discovery. The question is, does Section 7 of the Federal Arbitration Act authorize arbitrators to compel pre-hearing document discovery from entities not parties to the arbitration proceeding? The Circuits are divided on this topic. The 8th Circuit has held that it does. The 2nd and 3rd Circuits have determined it does not, and the 4th Circuit has concluded that it may where there is a showing of special need.

Section 7 of the FAA provides, in part, that:

“The arbitrators ….may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” 9 U.S.C. Section 7.

The 8th Circuit, it seems to me, has the most logical view on this matter. The 8th Circuit has held that:

“Though this statute does not explicitly authorize the arbitration panel to require the production of documents for inspection by a party, implicit in an arbitration panel’s power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.” *In re Arbitration between Sec. Life Ins. Co. of Am.* 228 F.3d 865, 870-871 (8th Cir. 2000).

The 2nd and 3rd Circuits have both held that arbitrators do not have the power to compel pre-proceeding production. *Hay Group Inc. v. EBS Acquisition Corp.*, 360 F. 3d 404, 407 (3rd Cir. 2004); *Life Receivables Trust v Syndicate 102 at Lloyds of London*, 549 F. 3d 210 (2nd Cir. 2008).

The 4th Circuit has concluded that arbitrators may require production, but only where there is a special need for the documents. *Comsat Corp. v. National Science Foundation*, 190 F. 3d 269, 275 (4th Cir. 1999).

In Louisiana, the topic of third party witnesses is addressed in La. R.S. 9:4206 and 4207. La. R.S. 9:4206 basically tracks the substance of Section 7 of the FAA, whereas La. R.S. 9:4207 allows the arbitrators to authorize the taking of depositions to be used as evidence before the arbitrators.

The Uniform Arbitration Act now provides that an arbitrator may permit the deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or unable to attend the hearing. An arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons, and the desirability of making the proceeding fair, expeditious, and cost effective. Section 17 B. and C.

2. The American Arbitration Association Rules for the

Construction and Commercial Industry.

Construction Rule 24 provides in part:

“At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct the production of the documents and other information in the identification of any witnesses to be called.”

The Rule further provides,

“There will be no other discovery, except as indicated herein, unless so order by the arbitrator in exceptional cases.”

Under the large complex procedure Rules, an arbitrator is authorized to take such steps as he may deem necessary and desirable to avoid delay and to achieve a just, efficient and cost effective resolution.

Additionally, the parties may conduct such discovery as may be agreed to by all of the parties. However, the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate.

The arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, may order depositions or propounding of interrogatories to such persons who may possess information determined by the arbitrator to be necessary to a determination of the matter.

In *Stolt-Nielsen S.A. v. Celanese Ag,* 430 F. 3d 567 (2nd Cir. 2005),the 2nd Circuit affirmed a district court’s order finding that the arbitration panel had authority to compel witnesses to appear before the arbitrators with documents and give testimony prior to the final merit hearing.

This provision has been interpreted to mean that arbitrators are not authorized to compel pre-hearing document discovery from nonparties to the arbitration proceeding. This is a serious limitation especially in complex commercial cases. Of course the best time to deal with this problem is when the arbitration agreement is being drafted. The parties can select procedural rules that allow such discovery. However, if you have not had the opportunity to craft the agreement to accommodate discovery then you may have to fashion a work around which requires a third party to appear before an arbitrator in an “arbitration proceeding.” This is an additional expense and time but absent agreement it may be the only way you can access necessary discovery from third parties.

The AAA commercial rules in complex cases and construction case both allow for discovery from third parties if certain requirements can be meet. You should consult the rules to determine what rights you have in this area.

Be prepared to answer questions about whether the parties contemplate dispositive motions. Can the case be structured in such a way that cross motions for summary judgment can be held first and then a hearing if necessary?

Most arbitrators will want to select hearing dates as the first item of business and then back into the other deadlines. Speak with your client before the preliminary hearing and have dates held by all before the conference so you can tell the arbitrator what works for your side without having to agree pending a confirmation with the client. Once the hearing dates are selected the arbitrator will enter deadlines for sharing exhibits, expert reports, completion of discovery and a final pre-hearing brief. Last if the agreement does not specify a specific type of award you should discuss with opposing counsel before the preliminary hearing what form of award you want. This is often overlooked and left to the decision of the arbitrator. Know what you want and be sure to understand the differences the types of awards.

Most importantly, the arbitrator is likely to start the call with asking each side to give a brief description of their position. Be ready with some bullet points that you want to emphasize. This is a great opportunity which is wasted by lack of preparation. The arbitrator will be taking notes and if you are organized and give her points about your case you will reinforce your view of the case with her.

3. Interim Orders.

One of the issues that often comes up is the need for interim orders.

The primary source of authority for an arbitrator to issue interim orders is the parties’ agreement. The final and binding nature of arbitration requires that arbitrators have the authority to enter such orders as are necessary to render a fair and effective award.

The authority to issue interim orders to preserve the subject matter of the dispute is a necessary ingredient of the arbitrator’s authority to resolve the dispute in the first instance.

Once all the discovery is complete I strongly recommend you sit down face to face with opposing counsel and see if you can agree on undisputed facts that can be handled by a joint stipulation. The arbitrator will greatly appreciate your effort to do this.

Document intensive cases almost always present an opportunity for joint exhibits which both parties can agree on and can be submitted by stipulation. This shortens the hearing time and reduces duplicate exhibits being offered at the hearing with different exhibit numbers.

4. Briefs.

The next step is the pre-hearing brief. The best briefs are those that are concise and present only the important and relevant material in a clear and compelling way. The brief is your last chance to demonstrate to the arbitrator that you are prepared and organized and understand the case. Give her the framework for the hearing and point out the issues expected to be decided.

When deciding on what evidence you want to present at the hearing remember that if you have selected an arbitrator with subject matter expertise you don’t need to do the normal “education” that you would with a judge or a jury. Carefully think about what evidence you need to present to an arbitrator that possess substantial subject matter expertise.

5. The hearing.

The major difference between arbitration and civil litigation is that most arbitration rules provide that strict rules of evidence do not apply. This is because one of the few grounds an arbitration award can be vacated is when an arbitrator refuses to hear evidence which is material to the controversy. As a consequence arbitrators are very liberal in what they allow into evidence. As an advocate, the best practice is to assume everything will come into evidence and be prepared to deal with it. Another consideration is that unlike litigation affidavits of people not present may be submitted. So if the other side intends to offer affidavits rather than live testimony of a witness ask the arbitrator to require that the opposing party be required to reveal who the will offer via affidavit and provide you with a copy long enough for you to prepare evidence to challenge the affidavit.

For the most part witness testimony and evidence is handled much like a civil trial. However, if the arbitrator has subject matter expertise, eliminate cumulative testimony and evidence. Make it clear and concise.

If you are presenting your case to a single arbitrator it is not hard to see if your theme is hitting home. In a three panel case try to determine which of the three is the leader and pitch your case to that arbitrator.

Reevaluate your case each day. Decide if you can eliminate some evidence where you are satisfied the arbitrator has got the point. When your best judgment says enough, stop.

After the close of evidence a brief closing argument is worthwhile since it is last chance to tell the arbitrator how you see the case. Be prepared to do so.

Most arbitrators will want you to submit post hearing briefs. Besides reviewing the evidence to show why you should prevail, you should specifically and separately list the remedies you want in the award and why you are entitled to them.

Your chances of achieving a good arbitration outcome will be greatly improved if you take a proactive role in planning and preparing for the arbitration from the beginning of the process.

6. Post Award Issues.

a. *Attempting to Vacate Awards*

Generally speaking courts will confirm and enforce rather than vacate arbitration awards. The losing party may seek to vacate an arbitration award, but typically the grounds on which awards may be vacated are narrower than the grounds an appeal court may review decisions of trial courts.

Typically appellate courts may reverse trial courts’ legal rulings as they review those rulings *de novo.* Arbitrators’ legal rulings are rarely given *de novo* review by courts considering the motion to vacate. The question which is still somewhat unresolved, is whether arbitration awards must apply the law correctly to avoid vacatur? In *Hallstreet Associations, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) the Supreme Court refused to enforce an agreement, where the parties agreed to allow a reviewing court to vacate a legally erroneous award. The *Hallstreet* court stated that the FAA’s four grounds for vacatur are exclusive so the courts should not enforce contractually created grounds for vacatur.

In *Hallstreet Associations, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), the Court held that Sections 10 and 11 of the FAA are the exclusive regimes for review provided by the statute.

**PART 4 - CONCLUSION**

As clients grow increasingly frustrated with the time and cost of litigation they are insisting that their attorneys provide effective and cost controlled alternatives to dispute resolution. Attorneys need to master the skills of negotiation, mediation and arbitration to be effective. We hope that we have provided a road map for you to get started.