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Mandatory Arbitration: Vigilance Is Required

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The **Real Cost** Of Mandatory **Arbitration**

BY KIMBERLY KALMANSON AND RANDI M. COHEN

As a result of the #MeToo movement and the significant effort to give voice to victims of sexual harassment who have long suffered without public recourse, the New York State (NYS) legislature amended the NYS Human Rights Law earlier this year to strengthen protections for employees who allege claims of sexual harassment and attendant discrimination. The amendment aims to prohibit employers from forcing victims to proceed with their claims only through arbitration, which is often shrouded in secrecy. This legislation (which is similar to statutes recently enacted in other states, as well) is seemingly a giant step forward for employees who wish to speak publicly through litigation. Nevertheless, while the new NYS law invalidates mandatory arbitration provisions in employment agreements that include discrimination claims and also provides that non-disclosure agreements in discrimination settlements are invalid unless they are requested by the employee, it is not without controversy.

It is almost certain that these laws will be challenged as pre-empted by federal laws, including in large part, the Federal Arbitration Act (FAA). The FAA heavily favors a party's right to contract for arbitration. Given the current make-up of the Supreme Court, and the recent spate of cases holding the FAA as sacrosanct, those challenges are likely to be successful. Of course, Congress could act to amend the FAA to exclude matters of sexual harassment from its reach, but that hardly seems plausible in today's political climate. All of this spells good news for employers and terrible news for employees. While we are huge proponents of alternative dispute resolution (ADR) as a means to resolve disputes more quickly and cheaply than going the traditional litigation route, the use of what effectively constitutes *forced* arbitration undercuts the entire spirit and policy underlying ADR.

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Certainly, laws like the one passed in New York are a step in the right direction. Absent a protective law, or certain extenuating circumstances, mandatory arbitration provisions are presumptively enforceable. The underlying reasoning is that contracting parties should be free to waive the due process available to them and agree to submit their disputes to an arbitrator, or other ADR procedure. Of course, arbitration *does* constitute a waiver of due process—arbitrators are not strictly required to follow the law or the rules of evidence. And, absent extraordinarily rare and narrow circumstances, the decision of the arbitrator is final and binding. It is almost impossible to overturn or win an appeal of an arbitrator's decision. Without a doubt, there can be benefits to ADR; ADR offers much more privacy around a dispute, an expedited and less burdensome procedure, and a finality to the decision of the arbitrator, in contrast to a litigation that can drag on for years through an appeal process.

The flip side to those benefits, however, is that there is a leverage associated with a public litigation that, in the employment context, provides an employee some power against an employer who will almost always seek to cure a ding to their reputation, and who will be held to much higher standards of conduct than if allowed to proceed through arbitration. It is not uncommon for parties to an arbitration to engage in malfeasance or miss deadlines without consequence, and for the other side to be left with little avenue for relief. It is easy to find oneself between the proverbial rock and a hard place; anger the arbitrator by asking » *Page S11*

KIMBERLY KALMANSON *is the principal attorney of Kalmanson Law Office.* RANDI (MELNICK) COHEN *is a solo practitioner specializing in labor and employment law.*

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Susan DeSantis, Deputy Editor-In-Chief
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Compelling Third-Party Discovery In New York Arbitration

BY CLAUDIA SALOMON AND ABHINAYA SWAMINATHAN

In arbitration, as in other methods of dispute resolution, third parties often possess valuable information crucial to the dispute. Third parties, however, are not bound by the parties' arbitration agreement, and so compelling documents or testimony from third parties is a matter of law in the arbitral seat.

Section 7 of the Federal Arbitration Act (FAA) provides that "arbitrators … may summon in writing any person to attend before 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." Ostensibly, this provision authorizes arbitrators to compel document production from "any person" during a hearing. However, parties and practitioners seeking third-party discovery must consider three key questions.

First, U.S. courts are split on whether third-party discovery can be obtained *before* a hearing. If the relevant law requires arbitrators to call third parties to a hearing in order to obtain documents from them, an additional question arises about whether third parties should be called to the evidentiary hearing or a special hearing. Depending on these requirements, practitioners may need to consider the most efficient way to organize the required hearing(s).

Second, given the procedural rules governing the service of arbitral summons in the United States, practitioners need to consider the appropriate place of compliance with the summons to third parties.

Third, and finally, practitioners should be conscious of jurisdictional limitations on whether a given court can actually enforce an arbitral summons.

This article addresses New York law with respect to these three considerations and provides practitioners with some strategic tips for obtaining third-party discovery in arbitrations seated in New York.

Compelling Third-Party Discovery Before the (Evidentiary) Hearing

The Second Circuit has held that §7 of the FAA does *not* authorize arbitrators to compel "pre-hearing" discovery from a third party. *Life Receivables Trust v. Syndicate 102 at Lloyd's of London* (2005). That is, if parties wish to obtain documents or testimony from a third party in New York, they cannot do so unless that party is called to testify at a hearing.

However, the Second Circuit has suggested a way that parties can still obtain third-party discovery in advance of the evidentiary hearing—arbitrators can hold a special hearing for purposes of obtaining documents or testimony from a third party. *Stolt-Nielsen Transp. Group v. Celanese AG* (2005).

Holding a separate hearing for the sake of collecting third-party discovery, or adding third parties as witnesses to the evidentiary hearing solely for the purpose of obtaining documents from them, can lead to considerable additional costs and raise several logistical concerns. If the arbitration is seated in New York, and substantial third-party discovery is required, the best approach may be for the parties to confer among themselves, the relevant third parties, and the tribunal to identify an efficient way forward. This approach will minimize the costs and other headaches associated with arranging the necessary hearings.

For example, the parties may wish to consolidate all third-party discovery to one preliminary hearing, as opposed to scheduling different hearings for different third parties. In addition, depending on the needs of the case, the parties may agree to schedule the preliminary and evidentiary hearings close together (thereby minimizing travel costs). Alternatively, the parties may agree to schedule the hearings far enough apart to allow the parties and the tribunal to properly consider information obtained from third parties in advance of the evidentiary hearing.

The parties may also agree to prepare a concise, joint list of questions for the witness at the hearing in order to avoid dila-

CLAUDIA SALOMON *is a partner in the New York office of Latham & Watkins and global co-chair of the firm's international arbitration practice.* ABHINAYA SWAMINATHAN *is a law clerk in the practice.*

tory and redundant examinations from either party. To the extent that the parties have any control over the relevant third parties, they could also agree to produce certain documents from third parties without the need for arbitral summons. Lastly, third parties themselves may wish to avoid travel and other burdens and voluntarily produce certain documents.

The parties therefore have great flexibility in organizing their arbitration in a manner that mitigates the challenges of the hearing requirement under New York law.

Drafting Arbitral Summons

Practitioners representing parties in arbitrations seated in New York should be aware that the tribunal's power to compel discovery is subject to a geographical limitation. Section 7 of the FAA provides that summons should be served "in the same manner as subpoenas to appear and testify before the court." In the United States, Rule 45 of the Federal Rules of Civil Procedure governs the process by which subpoenas are served.

Rule 45 provides that "a subpoena may be served at any place within the United States." Rule 45(b)(2). Third parties can therefore be served with summons anywhere in the United States, regardless of where the arbitration is seated.

However, Rule 45 places a territorial limitation on the *place of compliance* with the summons. Under the rule, the tribunal may only summon a third party to appear for testimony within either (1) a 100 miles of where the person resides, is employed, or regularly transacts business in person; or (2) the state in which the person resides, is employed, or regularly transacts business in person if the third party would not incur substantial expense. Rule 45(c)(1). Similarly, the summons may only require a third party to produce documents, electronically stored information, or tangible items that constitute or contain evidence at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person. Rule 45(c)(2).

Properly drafted arbitral summons, therefore, will identify a place of compliance that is consistent with the above requirements. In reality, depending on the location of the hearing, the "home base" of counsel, parties, and the arbitrators, the location and number of the relevant third parties that need to be served with summons, this requirement can exponentially increase parties' logistical and cost considerations.

Enforcing the Summons

Finally, practitioners seeking to enforce arbitral summons must consider three things:

- Whether courts in New York will have personal jurisdiction over the third party
- If seeking to enforce in federal court, whether there is an independent basis for the court's subject matter jurisdiction over the dispute
- Whether it would be safer to enforce in state court given the state courts' more expansive view of §7

First, the court compelling the third party to produce documents must have personal jurisdiction over that party. *Ping-Kuo Lin v. Horan Capital Mgt.* (2014). Practitioners should carefully consider the third party's circumstances in light of the requirements to establish personal jurisdiction before seeking to enforce arbitral summons in a New York court.

Second, the court must have subject matter jurisdiction over the dispute. The U.S. Supreme Court has conclusively held that the FAA does not, by itself, create federal-question jurisdiction. *Vaden v. Discover Bank* (2009); *Moses H. Cone Memorial Hospital v. Mercury Construction* (1983). Before seeking to enforce a summons in federal court in New York, the enforcing party must first identify the *independent* basis for federal jurisdiction over the dispute.

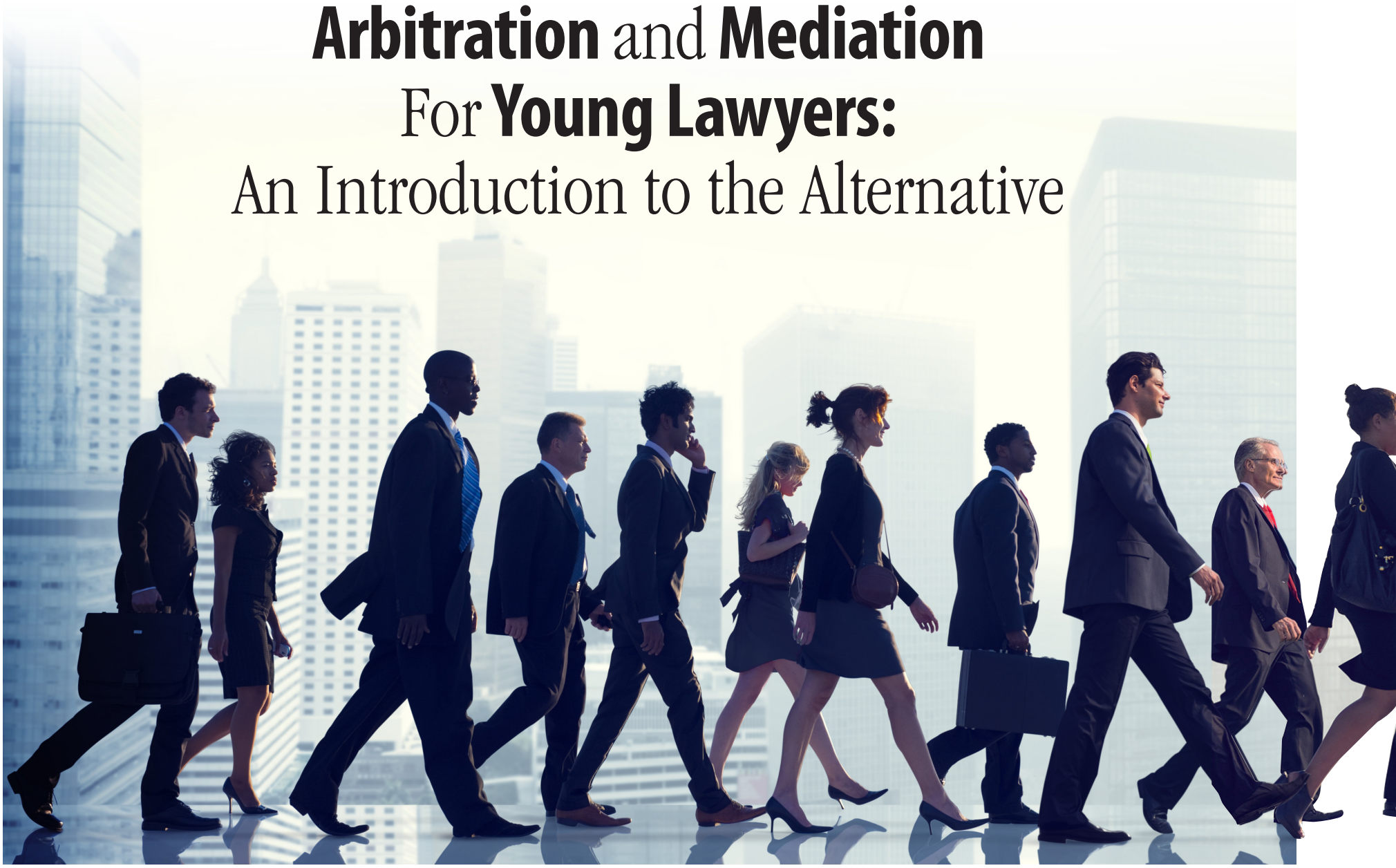
However, because U.S. state courts are courts of general jurisdiction, parties are saved from the additional step of identifying an independent basis for the court's jurisdiction over the dispute if they seek to enforce in state court.

Third, New York state courts allow the "deposition of nonparties … in FAA arbitration where there is a showing of 'special need or hardship,' such as where the information sought is otherwise unavailable." *ImClone Sys. v. Waksal* (2005); *Matter of Roche Molecular Sys.* (2018). That is, state courts will authorize discovery *before* a hearing as long as the enforcing party can show a special need or hardship. This is in contrast to the Second Circuit, which only authorizes discovery if the third party is called to a hearing.

Depending on the needs of the arbitration, this difference between New York state and federal courts may mean that state courts are a more attractive venue for enforcing summons, provided that they have personal jurisdiction over the third party.

Productive conversations with opposing counsel, the tribunal, and the relevant third parties can help parties obtain third-party discovery in an efficient manner. When that is not possible, parties should balance the value of obtaining the relevant third-party discovery against the challenges of meeting the above requirements.

Arbitration and **Mediation** For **Young Lawyers:** An Introduction to the Alternative



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BY LARRY S. SCHACHNER

As a fresh out of law school attorney starting out as a litigator with a municipal agency, I was eager to try every case I could get my hands on to gain valuable trial experience—a goal I'm sure many attorneys have during the early stages of their careers. I also realized early on, that not *all* cases could go out to trial, otherwise the court system would be paralyzed. Instead, when a case reached a settlement it usually did so at one of the numerous pre-trial conferences in court. Back in the 1990s, when I was a Principal Law Clerk in the Bronx Supreme Court, alternative dispute resolution (ADR) as we know it today, was rarely used as an alternative to trial. Cases being settled in a private forum using mediation or arbitration were novelties. However, in recent years, ADR has exploded onto the scene and has become essential to the resolution of numerous types of civil legal disputes. Prior to my leaving the bench in 2017, it became apparent that due to increases in court calendars and decreases in judicial resources, fewer cases were being sent out for trial. Instead, more and more disputes were being settled using ADR. One side effect of this, is that young lawyers are now faced with fewer opportunities to hone their trial experience. However, with ADR on the rise, one could argue that attorneys should be encouraged to gain exposure to mediation and arbitration as early in their careers as possible.

As a mediator and arbitrator at NAM (National Arbitration and Mediation), I see many different types of cases which rely on ADR, from the basic motor vehicle negligence, slip and fall, and premises liability cases to more complicated labor law, product liability, medical malpractice, commercial/business litigation, and employment disputes.

Today, private mediation and arbitration are essential tools for all civil litigators, not just to those entering the practice of law, but to more seasoned attorneys as well. ADR offers young lawyers the opportunity to gain necessary trial experience when they take on commercial arbitrations or negligence actions that go to arbitration. Mediations provide budding litigators valuable experience in the art of negotiation, which will be useful throughout their legal career. In addition, if the mediation does not reach a resolution, one can still learn from the experience and gain a fuller understanding of the strengths and weaknesses of the case as well as his/her adversary's—going through this process can prove to be very useful at trial.

Young advocates would be remiss in not familiarizing themselves with the ever-expanding world of ADR, and it is my hope this article will provide valuable insights into the forum so that they are prepared to utilize mediations and arbitrations to help resolve cases and gain valuable litigation experience.

Tips for a Successful Mediation

Over the years, I have found that the best settlement is one where neither side is completely happy.

First and foremost, preparation is key—know the file, the liability issues, and the damages. Are there any legal issues that will have an affect on the case? As a young lawyer, I was once told by a mentor that even if I was not the most experienced lawyer in the room, I should still be the best prepared. As a judge and as a mediator I always appreciate a well prepared attorney. Make sure you do all the necessary legwork prior to the mediation. What's the insurance coverage? Verify the existence of any liens, workers compensation, Medicaid, Medicare, private medical, and funding liens. Go through the case file to check the history of demands and offers. Talk to the decision makers on your side. Your client must be spoken to, and their expectations must be managed.

It's a good idea to have a conversation with your adversary prior to the mediation to gauge their position. I have seen mediations get bogged down over any one or all of the above issues. Don't let it happen to you!

I recommend preparing a confidential mediation statement for the mediator. In

LARRY S. SCHACHNER *is a retired Justice of the Supreme Court, Bronx County. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States.*

doing so it will help you focus on the key issues in the case. Drafting a clear, concise mediation statement allows you to get to the heart of the case. If you are submitting an examination before trial (EBT) transcript, do not submit the entire transcript, just the relevant highlighted portions. Make sure the statement is organized and provides all the necessary essentials to the mediator.

At most mediations all sides will initially meet with the mediator jointly to outline their claims in an opening. Each side should

take advantage of conducting an opening. If you anticipate emotional circumstances, notify the mediator beforehand – they will be able to anticipate and further diffuse some of the emotion if made aware. The opening allows you to speak to the other side and the mediator directly. Clients should attend the mediation, especially plaintiffs. After the openings, each side should meet with the mediator separately. Put your trust in the mediator, be open with them and acknowledge any weakness in the case. This will help your credibility. Let the mediator know what you want kept confidential. Hopefully, after some back and forth negotiations, all sides will move towards a settlement. One note about settlements: If your client is present at the mediation they should sign off on the agreement.

Occasionally, there will be cases that are contentious, where anxiety levels and emotions will run higher than normal. The parties or the lawyers may need to vent their frustrations. If this is the case, the mediator knows it's important for all parties to get things off their chest in a private session. This often will help diffuse the situation and allow the mediator to move the negotiations forward toward a fair and equitable resolution.

Success at Arbitration

With the number of commercial and international arbitrations on the rise, young attorneys will become more and more involved, offering them a chance to gain valuable litigation experience.

The purpose of an arbitration proceeding is to streamline the resolution of any dispute under an arbitration agreement. Offering a more expedient, cost efficient and private process, arbitration as opposed to litigation presents numerous benefits to all parties involved. Counsel will have more control over a private arbitration, and the results will remain confidential.

The arbitration proceeding will be based upon the arbitration agreement between the parties. Although subject to modification on consent, the rights of the parties and the responsibilities of the arbitrator are governed by the arbitration clause. If you are the attorney drafting the arbitration clause you must insure that the terms are clear, comprehensive, and concise. The last thing your client wants to do is end up litigating the enforceability of the arbitration clause in court or before the arbitrator. If this happens, any benefit of having a shorter, more cost-effective process will be lost.

The arbitration of a commercial dispute can have many of the characteristics of civil litigation in court including discovery, motion practice, and interim relief. However, with the assistance of the arbitrator, it will have an expedited pace, with the parties exercising greater control over the process.

Commercial arbitration is trending upward. The legal community is experiencing an exponential increase in the use of arbitration to resolve many business and employment disputes. With the number of commercial and international arbitrations on the rise, young attorneys will become more and more involved, offering them a chance to gain valuable litigation experience.

Additionally, in personal injury litigation, arbitrations are frequently used to resolve numerous motor vehicle and other negligence claims. Parties will usually have the protection of a "high-low" agreement, and in general the decision of the arbitrator will be final. In addition to serving as a mechanism by which to resolve cases, arbitrations are a unique opportunity for young lawyers to gain trial experience. Through arbitration, attorneys can sharpen their skills in a variety of areas of trial practice, from opening statements, direct and cross examination, to summations. As previously noted, preparation is key, and the legal practitioner must carefully go over their document submissions with the arbitrator.

Conclusion

Young lawyers take note: While caseloads increasingly create a backlog in our court system, ADR will remain vital to the resolution of civil legal disputes. Unquestionably, we will continue to see the growth of both private mediation and arbitration in the coming years.

Meaningful Diversity: The Next Chapter of The ADR Story

BY CHRIS M. KWOK

Given the historical exclusion of minorities from the legal profession, the lack of diversity in alternative dispute resolution (ADR) is not surprising. The diversity and inclusion issue is magnified by the unique features of the ADR field. Neutrals with diverse backgrounds can help administer justice in today's increasingly diverse society, as they are a reflection of the people they serve. Of course, mere diversity is not enough; the meaningful inclusion of those diverse candidates in the industry is the next chapter of the ADR story.

I had the opportunity to conduct a study on this issue with leading ADR professors and practitioners, and we published a paper exactly a decade ago. Maria R. Volpe, Robert A.

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Baruch Bush, Gene A. Johnson Jr., and Christopher M. Kwok, "Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field," 35 Fordham Urb. L.J. 119 (2008). In that study, we identified professional, institutional and economic barriers that everyone faced, but we also recognized that each of those barriers were encountered more frequently by minorities, given their long-time exclusion from the legal field. Since the publication of the paper, new pathways have appeared and a new generation of practitioners has emerged, bringing energy to the field. Using the paper as a starting point, I will comment on what has transpired in the past decade and offer my thoughts on what the next decade may bring.

In our paper, we found professional barriers, in that the entry point for the mediation field was elusive, with a very hazy career path that often demanded a strong appetite for risk and an entrepreneurial streak. In the ensuing decade, we have seen a proliferation of graduate programs in dispute resolution. In New York City, there is an LL.M. program at Cardozo School of Law and a master's program in negotiation and conflict resolution at Columbia University. Since 2009, the American Arbitration Association's (AAA) Higginbotham Fellows Program has given lawyers the opportunity to transition into neutral work. The program's offerings have served critical functions, including providing access to mentors and formal training programs, which minority lawyers often cite as resources that traditionally have been unavailable to them. Goodwin Liu, et al. "A Portrait of Asian Americans in the Law," Slide 32. In New York City, the ADR Inclusion Network allows ADR leaders to keep diversity and inclusion issues at the forefront of the discussion.

Institutionally, we found that minority attorneys had difficulty being included on rosters. And then even once they appeared on rosters, they experienced limited opportunities for repeated selection. They also encountered economic barriers, in which compensated neutral work was hard to find, and a predominance of pro bono work. This is the heart of the issue for those in ADR: first being selected as a neutral and then, critically, maintaining recurring selections in order to make a living. To that end, ADR providers have focused on adding minority neutrals to their ranks in the last decade. The question of whether those minority neutrals are being selected is a far more difficult to answer. ADR users develop working relationships with neutrals, as well as trust and a comfort level that leads to continuing selection.

For neutrals who are former judges, their credentials, in the absence of any other information, are especially effective in spurring a first-time selection. That selection then allows them the chance to build trust and a comfort level, leading their recurring selection, probably the most important component of a sustainable and successful career. To that end, a continuing dialogue regarding diversity as it relates to neutral selection is paramount.

In 2018, two important developments took place. In May, JAMS introduced a model inclusion rider clause that urges users to consider diversity as one of the factors in neutral selection. In August, the American Bar Association (ABA) adopted Resolution 105, which encourages users to select and use diverse neutrals.

How can users participate meaningfully in this dialogue about diversity? I suggest that they contact national and local minority bar associations like the Asian American Bar Association of New York (AABANY) and the National Asian Pacific American Bar Association (NAPABA) to engage new neutrals. They can also sponsor programs and conferences to widen the potential pool from which neutral selections can occur. Through Resolution 105, the Dispute Resolution Section of the ABA is highlighting the importance of diversity in ADR. The JAMS inclusion rider clause serves the same function but is placed within the contract, reminding users of the importance of diversity during the neutral selection process.

Users and providers should consider keeping diversity statistics on neutral selection, as data points on neutral selection are invaluable in accurately assessing the diversity issue we are facing. If you can't measure a problem, you can't measure progress. Statistics on diversity among law school student bodies, summer associate classes and partnership ranks have been scrutinized, and institutions are now being held accountable. Having similar data points for the ADR field would be similarly useful.

The effectiveness of mediations is predicated on seeing problems in a new light and offering solutions from a fresh perspective. Diversity of experience, such as the immigrant experience, should be recognized as a hallmark of strength in a neutral. "Outsiders" trained in ADR often bring those fresh perspectives and thus particular strength to their work as neutrals.

The first generation of neutrals primarily included retired judges and a small cohort of pioneers who blazed an early path as full-time neutrals. There was a narrow path that lead to being a full-time neutral. Because of the historical exclusion of minorities from the legal profession, the first generation of ADR professionals reflected the composition of the legal industry at the time. In the ensuing decades, we have seen tremendous progress, but a great deal more must be done. Multiple entry points of change have emerged, and individuals can now move into the ADR profession much earlier in their careers. We have begun a paradigm shift through the increasing professionalization of the field. Each initiative advances the field a bit. Soon we will have created a new world, one that accurately reflects our society.

CHRIS M. KWOK *is a mediator and arbitrator with ADR provider JAMS in New York, focusing on employment disputes. He joined JAMS after 15 years with the New York District Office of the U.S. Equal Employment Opportunity Commission, where he convened and mediated more than 1,000 employment law disputes involving Title VII of the Civil Rights Act of 1964, Title I of the Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967.*

Five Employment Issues Boards Should Be Thinking About

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BY LYNNE HERMLE, JESSICA PERRY AND ANDREA JOHNSON

Now into the second half of 2018, corporate boards of directors should be focused on some key employment law developments that have transpired so far this year. While there are many recent developments in the employment law sphere, the five issues discussed below are some of the most notable and important for boards to focus on as they consider company policies and procedures. These issues touch on areas like compensable time for hourly employees, employee classifications, arbitrations, #MeToo, and religion in the workplace—areas all directors should be familiar with in order to manage the day to day affairs of the company and mitigate potential risk. Below are the employment law developments sophisticated corporate boards need to consider before the year ends.

(1) Review 'De Minimis' Off-the-Clock Work

In *Troester v. Starbucks Corp.*, the California Supreme Court held that employers must compensate California workers for the time they spend on certain routine tasks after clocking out, and rejected application of the federal de minimis doctrine. The Supreme Court noted that California employers bear the burden of instituting

LYNNE HERMLE *and* JESSICA PERRY *are partners, and* ANDREA JOHNSON *is employment law career associate, at Orrick.*

appropriate practices to prevent off-the-clock work. The Court concluded that, under California law, an "employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine." This is because, as the Court noted, "a few extra minutes of work each day can add up."

ACTION TO CONSIDER: Companies with operations in California should review their timekeeping practices to determine whether any off-the-clock work occurs—especially on a regular basis. For example, work that's performed by employees before and after scheduled shifts. If necessary, these companies should consider new timekeeping tools or other means to ensure that employees are paid for all time worked. In some instances, it may be wise for companies to restructure jobs so that it is no longer necessary for employees to complete any job tasks before or after clocking out. In determining the best course of action, companies should consult with experienced counsel regarding practical steps to ensure compliance and to discuss any unintended consequences of proposed changes.

(2) Revisit Employee/ Non-Employee Classifications

In *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, the California Supreme Court established a new, three factor "ABC" test to determine who is an employee for purposes of wage and hour laws. This test puts the burden of showing that a worker in California is not an employee squarely on the company. The ABC test examines whether: (a) the worker is free from the direction and control of the hirer in connection with the performance of the work; (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

ACTION TO CONSIDER: Companies with operations in California should review their current classification of contractors under this new test and consult with experienced counsel regarding any potential reclassifications. In the event that such reclassifications are necessary, companies should consider all tax obligations.

(3) Update Arbitration Agreements To Include Class Action Waivers

In *Epic Systems Corp. v. Lewis,* the U.S. Supreme Court ruled that employment arbitration agreements with class action waivers do not violate federal labor law. Employers may require that, as a condition of employment, employees agree to individually arbitrate their disputes rather than proceed by class action in court.

ACTION TO CONSIDER: Companies should engage counsel to evaluate their current arbitration agreements and discuss whether to include class action waivers. The inclusion of such waivers may protect companies from resource-draining litigation in the years ahead. However, as part of this evaluation, companies should also consider what class action waivers may not cover, *i.e.*, PAGA representative actions, state and federal charges of discrimination, government audits, unemployment, and workers' compensation. And they should be drafted carefully given the evolving and ever changing law at a state level.

(4) Update Sexual Harassment Policies in the Wake of #MeToo

In the wake of #MeToo, state and local laws across the country are changing. The California legislature has responded to the #MeToo movement with several proposed bills—one of which has been signed into law to protect sexual harassment victims from defamation suits. Other bills, if passed, would change employers' obligations to prevent harassment and respond to harassment allegations. Additionally, the EEOC is supporting the #MeToo movement with a Select Task Force on Harassment and a public meeting titled "Transforming #MeToo Into Harassment-Free Workplaces," and by aggressively pursuing cases in federal courts throughout the U.S.

ACTION TO CONSIDER: In such a rapidly changing legislative environment, companies should engage counsel to examine their sexual harassment policies and procedures to make sure they are effective, updated, and comply with newly enacted legislation. In addition, companies should consider working with experienced counsel to create sex harassment training specifically geared to addressing questions and concerns raised by the #MeToo movement at all levels of the company. Periodically reviewing these policies and procedures on an ongoing basis is advisable given the latest developments at a federal, state and local level.

(5) Revisit Religious Accommodation In the Workplace

In *Masterpiece Cakeshop Ltd., et al. v. Colorado Civil Rights Commission, et al.,* the U.S. Supreme Court ruled in favor of a cake shop owner who refused to make a wedding cake for a same-sex couple because of the shop owner's religious beliefs. Although the case dealt with a store owner and customer, it reminds us that similar situations may arise between employers and employees. Employers must balance accommodating employees' religious beliefs, on the one hand, and preventing discrimination and harassment, on the other.

ACTION TO CONSIDER: Companies should review religious accommodation policies in the context of recent case law regarding sexual orientation and gender expression discrimination by considering the following questions: (a) Do the policies consider both the employee's religious accommodation request and the company's own business needs, thereby allowing the company to evaluate whether the requested accommodation creates an undue hardship, including with respect to customers or other employees? (b) Will accommodating an employee's religious belief or expression interfere with other employees' rights? (c) Would allowing the accommodation allow discrimination against other employees on the basis of sexual orientation? Balancing these factors can be challenging, and the legal landscape is continuing to develop. Companies would be wise to engage experienced counsel to review these policies and consider any unique characteristics of the company, workforce, and customers in drafting compliant and forward looking policies.

As employment law continues to shift during 2018, boards of directors that review these recent employment law developments and take appropriate action may mitigate against lawsuits in 2019 and beyond. Taking a proactive approach may not only help to ward off lawsuits, but may put board members in a better position to make clear headed, tough decisions before any employment conflicts or reputational harm arise. In addition to lowering risk to shareholders and potential liability, early intervention could allow boards to be more transparent and strategic in adopting new policies and procedures—moves that may not only reduce liability and risk, but improve the long term success of the company.

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for penalties he or she may not be wont to impose, or go to court for relief and risk being countersued for violating the confidentiality or non-disparagement provisions of the underlying contract. By mandating arbitration (and tying the bow of silence with a broad non-disparagement agreement), the bad-actor employer may face exposure for the specific matter, but aside from the individual confidential case, gets to conceal its bad acts under the cloak of confidentiality, with little incentive to correct its actions either by the so-called court of public opinion, or by fear of a litigant with access to his full rights and an appeal process.

Those in favor of mandatory arbitration provisions will no doubt argue that no party is *forced* to arbitrate, but rather, that it is a function of contract. Technically, that is true, but that argument assumes that employees are able to engage in arms'-length transactions with their prospective employers. For C-Suite employees and executives, this is often true—the parties do negotiate the terms of their employment agreements, many of which come with a guaranteed term of employment, guaranteed bonuses, mandatory severance, incentive payments and other perks (like gym memberships, travel, etc.). These executives often have multiple offers or opportunities, are wealthy enough to afford counsel, and have the leverage to enter into an agreement that provides a trade—mandatory arbitration and perhaps other restrictive covenants in exchange for a handsome salary and perks. But, to be sure, that is not the case for the average employee.

In the past year, we have represented a multitude of employees, all of whom were bound to mandatory arbitration provisions, and none of whom made more than $60,000 per annum. They simply did not have bargaining power with their prospective employers. Rather, they were young adults, early in their careers, who did not have the means to engage counsel to review their employment agreements. And, even if they had had that means, it wouldn't have mattered. The contracts are effectively contracts of adhesion. Don't want the contract—don't take the job. But often, the only way to progress in a field is to accept a job with these restrictive covenants. This is particularly true where it is standard in the particular industry to necessitate these types of agreements. This is not an arms'-length relationship.

Consider this real life nightmare: A low wage earning woman is sexually-harassed and retaliated against, and files for arbitration to contest her termination as the contractually proscribed method of dispute resolution, only to be countersued on the basis of an innocuous statement that purportedly violates her overbroad non-disparagement provision. Her case progresses, ever-so-quietly, while the employer has no incentive to cease sexually harassing its employees, and, actually retaliates against those employees who assist in the arbitration. And whatever happens in that arbitration happens. The arbitrator's word is final. She loses her day in court; she loses her potential appeal. This, friends, is what happens in the dark under the cover of mandatory arbitration and non-disparagement provisions. Contrast that hamstrung claimant from that of another who is able to fight her case in court. That litigant, while perhaps also bound by a non-disparagement provision, is able to have her case proceed with a public docket, with a judge overseeing the case that does not have to concern him/herself with who will select him/her again in the future, and without the fear that no one will ever know of the accusations—whether they prove to be substantiated or not.

To us, the message is fairly simple: ADR is an excellent avenue to elect when *both parties truly elect it.* Arbitrators handling matters as a function of unequal bargaining power ought to be vigilant in policing employers who may not take the matter as seriously as they would had the case proceeded in traditional litigation. Congress should consider the will of the States and carve out an exception in the FAA to ensure that victims are not further victimized without access to their day in court with the full light of day.