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in Mediation and Arbitration

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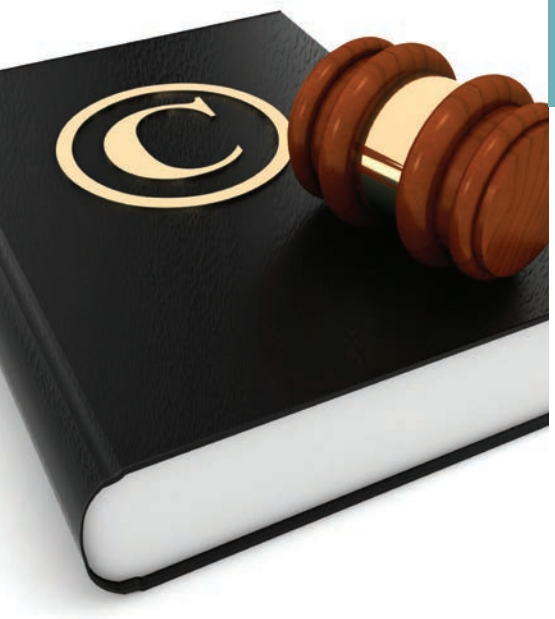

Why ADR Can Help Address the Rising Tide of Copyright Litigation

IN DEPTH

We could be seeing a new trend in the rise of copyright litigation in the United States, particularly when it comes to video and other electronic media. In fact, copyright disputes could soon outnumber patent infringement matters, which have long been the most common.

"Patent litigation has been hot for over a decade and is beginning to show signs of waning," said Darin Klemchuk, founder and managing partner with the IP litigation firm Klemchuk Kubasta in Dallas.

For several reasons, as patent litigation drops off, copyright disputes could rise significantly, said Klemchuk.

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WHAT'S INSIDE

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ADR CONVERSATIONS

How the Failure to Settle Affects the Workplace for Both Employees and Companies

The following interview was conducted with Rowena Crosbie, President of Tero International in Des Moines, Iowa, and Ellen Kandell, President of Alternative Resolutions in Silver Spring, Maryland. This article will explore the use of ADR in the workplace, causes of disputes and how failed mediations or other forms of workplace conflict resolution impact employees, supervisors and companies.

In your experience, do most companies have formal internal conflict resolution programs, or do most rely on ad hoc processes? Do those that have internal programs use company employees in resolution processes, or do they outsource the process to ADR providers?

Rowena Crosbie said, "The clients we serve across the U.S. and internationally generally do not have a formalized process, but rather rely on an ad hoc process to resolve most employment related disputes."

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Why ADR Can Help Continued from Page 1

Darin Klemchuk, Founder and Managing Partner, Klemchuk Kubasta

"Unlike patent and trademark litigation, a prevailing party in a copyright case usually is entitled to recover attorney's fees," said Klemchuk. "Another factor is that copyrights are generally easier and less expensive to register than patents and trademarks."

All the attention currently being paid to patent trolls could also have some unintended consequences.

"If Congress takes further action to rein in patent litigation and damages, copyright litigation could see more activity," said Klemchuk. "While patent trolls have gotten much attention in recent years, there have been some litigants referred to as copyright trolls recently. This suggests the rise of copyright litigation."

"If Congress takes further action to rein in patent litigation and damages, copyright litigation could see more activity."

–Darin Klemchuk

One of these alleged copyright trolls was a company called Righthaven.

"Righthaven was created to be a copyright holding company, and it sought to enforce copyrights in content created by a media publishing company," said Sam Lewis, a copyright attorney with Feldman Gale in Miami.

Lewis said Righthaven's approach was similar to that of patent trolls. The company would send demand letters and/or pursue litigation against bloggers and others who reproduced copyrighted materials on the Web—even when the use constituted fair use.

"Righthaven pursued claims of infringement, typically offering to settle for considerably less than the cost of defending the action—or even the cost of hiring a lawyer to defend the case—but more than would have been paid if the defendant prevailed," said Lewis.

The alleged copyright troll Righthaven was ultimately not successful in its strategy, noted Lewis.

"As far as I understand, Righthaven's enforcement tactics have ceased, and there is a fair amount of news coverage regarding adverse court decisions, sanctions imposed, awards in favor of defendants who successfully defended against Righthaven's claims, etc.," said Lewis.

Disputes involving copyrighted video make up a significant number of total copyright suits. These matters range from fights between industry giants to content owners going after individual infringers.

Klemchuk noted, for example, that there has been a rise in so-called "John Doe" copyright cases involving claims related to copies of movie files by unknown computer users.

"These cases typically involve a lawsuit against several John Does, third-party discovery of ISPs to determine who

Sam Lewis, Attorney, Feldman Gale

owned the IP address of the computer at the time of the alleged illegal file copying and a demand for an early settlement based on the IP address information or face being named in the lawsuit as a defendant," said Klemchuk. "Some of this litigation involves pornographic movies, which adds additional leverage to the settlement negotiations."

Another source of copyright litigation is large corporations that are competing to provide similar products.

"A recent example, and one that has yet to be resolved, are the actions brought by the broadcasting industry against Aero, alleging Aero's Internet streaming of content that was broadcast over-the-air violates copyright protections," said Gary W. Smith, who chairs the Intellectual Property and Technology Practice Group at Posternak Blankstein & Lund LLP in Boston.

With the rise in copyright litigation, it is likely many companies, especially those that use or produce content such as video, will find themselves either bringing or defending against a dispute.

Content owners, in particular, might also have no choice in the matter.

"From an owner's perspective, copyright-protected works have become increasingly important business assets with enhanced economic value and utility," said Smith. "Thus, copyright owners have little choice but to police

Gary Smith, Chair, Posternak Blankstein & Lund, LLP

and protect their copyright interests. The only way to protect publicly distributed content is through enforcement efforts, up to and including litigation."

Smith noted those using copyrighted materials can take steps to reduce liability.

"Looking at the issue from the perspective of users or distributors of copyrighted materials, my advice is to vet copyrighted material very carefully before using or distributing it and to take precautions against infringement, including inadvertent or unintentional infringement," he said. "Diligence is important."

If all signs do seem to be pointing to litigation, there are issues that both sides should consider.

"The parties should ask themselves tough questions early in the case," said Bobby A. Ghajar, an IP litigator and leader of the Worldwide Trademark Practice at Pillsbury Winthrop Shaw Pittman LLP. "For plaintiffs, that may mean conducting interviews, collecting evidence, investigating the alleged infringement, ensuring the validity of the asserted copyright and understanding a defendant's likely exposure and defenses. Defendants should investigate and understand the genesis of the accused work. They should assess the sales and profits of the accused work."

Bobby Ghajar, Litigator, Pillsbury Winthrop Shaw Pittman, LLP

Plaintiffs and defendants alike should also avoid being too sure of their positions.

"In many cases, overzealous litigants do not pause to assess the potential holes in their case," said Ghajar. "And in many copyright cases, plaintiffs name numerous defendants in hopes of being made whole."

Both sides should also keep the idea of settling, and using some form of alternative dispute resolution, top of mind from the very beginning.

"Copyright litigation has become incredibly expensive," said Lewis. "As early as possible, try to reach a reasonable and fair settlement of the claims. When the cost is considered together with the fact that the vast majority of copyright infringement actions filed are settled prior to trial, it makes sense to try to reach a reasonable settlement before each side ends up spending more than may be at issue in the case."

The nature of copyright litigation can also make it a risky choice, said Smith.

"Copyright cases can be dangerous for all concerned due to how attorney's fees are awarded," said Smith. "A sophisticated defendant will frequently make an offer of judgment under Federal Rule of Civil Procedure 68. Depending on the circuit in which the case is pending, this can essentially amount to a poker game on who is the prevailing party and how attorney's fees will be awarded. Because of this risk, alternative dispute resolution can be advantageous to both sides."

The good news for both plaintiffs and defendants is that alternative dispute resolution can be very effective in handling copyright disputes.

"Arbitration can be a less costly alternative to copyright litigation and offers the advantages of streamlined discovery and speedy determinations," said Smith. "Mediation can be especially useful where there is a potential for an outcome that does not designate clear winners and losers. Mediation also offers the advantage of being able to provide creative solutions that would not be available in the context of litigation."

"It makes sense to try to reach a reasonable settlement before each side ends up spending more than may be at issue in the case."

–Sam Lewis

In the end, it is important for parties on both sides of a copyright dispute to fully assess the value and importance of a copyright to their bottom line, the strength of their respective cases and the resources—both time and money—they are willing to commit to litigation. After careful consideration, it might be that ADR is the favored choice of many litigants. ●

Failure to Settle Affects the Workplace Continued from Page 1

Rowena Crosbie, President, Tero International

They use their human resources department to address conflict using a process or protocol that is spelled out in their employee handbook, Crosbie said, adding, "Some organizations have formal grievance processes for employees to follow if their issue cannot be addressed through normal channels. Formal mediation agreements are primarily reserved for vendor and client contracts."

Ellen Kandell, President, Alternative Resolutions

Ellen Kandell said for the most part only "large companies such as Lockheed Martin, Coca-Cola and Black & Decker have formal, multi-tiered dispute resolution processes for employment disputes, while the majority of smaller companies use ad hoc procedures and outside neutrals to assist in resolving workplace disputes." Much of the reason for this is resources, including the ability to train and use in-house employees to conduct dispute resolution and the ability to plan far out in advance of a dispute arising, she suggested.

The workplace includes individuals from all types of backgrounds and with all types of experiences, at both the employee and management levels. What are the most common conflicts or disputes that arise in today's workplace?

Crosbie explained that "the topic at hand in a conflict is rarely the true issue and most conflicts can be traced to other issues and many relate to differences in people. When deeply held values are challenged, which can be related to diversity, conflict frequently ensues. Personality conflicts are another example of a source of conflict that is tied to difference."

Kandell echoed Crosbie's assessment, saying that while an employee may file an age discrimination case or hostile workplace complaint, "a lot of the issues that arise in the workplace relate to respect and communication, and fundamentally, tone of voice ends up being the true underlying reason behind an employee filing a complaint, which happens in both the private and public sector workplaces."

Are there types of disputes or conflicts that are more suitable for informal conflict resolution, while others are more suitable for formal ADR processes, including mediation?

Crosbie suggested that "if employees and leaders are trained in win/win negotiation or influence skills, most conflicts can be handled before they reach the threshold of conflict, that is, the presence of unproductive emotions by one or more parties." However, "if left unchecked, emotions can heighten, and it is at that point that a neutral third party is sometimes required," she said.

Kandell agreed, saying whether a dispute is amenable to mediation or likely to be resolved in mediation is "not a function of the type of case. Rather, the people and facts of the case drive the success or failure of a case, coupled with the expertise of the mediator."

When a dispute or conflict reaches the stage where mediation is necessary, what seems to be the most effective way to get the parties to buy into the process?

Crosbie said, "People, in general, have a need to feel valued and understood. This is especially true in conflict, when unproductive emotions characterize the interaction. Addressing the human or emotional needs as well as the issue is critical. A highly trained mediator will separate the people from the problem, seek to uncover underlying issues and acknowledge common ground before moving to solutions."

According to Kandell, "the convening process is key, and if a mediator conducts this process, he or she can build trust among the parties and increase the likelihood of success for the parties."

This rarely happens in ad hoc systems, so while it may cost more, companies should consider committing the extra resources and increasing the likelihood of a positive outcome, which goes a long way toward reducing the problems that can stem from a failed mediation, Kandell suggested.

What, in your years of experience, seems to cause mediations or other non-binding ADR processes to fail in workplace disputes?

Kandell said, "Mediation may fail because the case is too far along when it is attempted and if a company decides to take a hard line with a particular case." In addition, "if

"If employees and leaders are trained in win/win negotiation or influence skills, most conflicts can be handled before they reach the threshold of conflict."

–Rowena Crosbie

money is not a factor in the mediation process, parties may dig in their heels. However, when money is a big factor, parties have an incentive to settle to reduce transactional costs or if there is outside pressure from the company to settle the case to limit costs down the line related to lost productivity."

When a mediation does fail, what steps do companies take to address the dispute? Do they resort to binding processes or outsource the dispute to ADR providers?

Kandell said when the parties fail to reach a settlement in mediation in an informal process, they generally move to a more formalized ADR process such as arbitration, or if it was a court-ordered mediation, they would return to the litigation track. However, time and time again, parties end up reaching settlement days or weeks later due to the groundwork laid in mediation, she noted. Other times after a failed mediation, "a company will put more money on the table to induce settlement, or outside pressure from higher up the chain of command may lead to a settlement," she suggested.

What impact does a failed mediation have on the employees involved in the dispute and on those employees that are not a party to the dispute?

Crosbie said, "Unresolved baggage is a problem in workplaces and in households, and the impact can be far reaching to anyone who is impacted or touched by either party of the dispute, which can include lost productivity in the workplace."

Kandell said when a mediation fails, it's more unlikely that an employee will be willing to try it again in a future dispute, and that may lead them to discourage others from relying on the process to resolve their workplace disputes.

What impact, from a productivity, monetary or workplace-harmony standpoint, does a failed mediation have on the company?

According to Crosbie, "The monetary impact varies depending on the dispute and includes things like fees for the mediator and time invested in the dispute. The greater cost in most cases is the lost opportunity of not operating in a collaborative environment."

Can a lessons-learned process assist with reducing the number of failed mediations and help increase the success rate of employment mediations?

Kandell said it can. "Smart companies are looking at conflict as an opportunity for growth and learning." When the post-conflict phase is handled proactively and openly, companies can use the opportunity to form conflict management councils that can assist in dealing with future conflicts" in a more constructive manner, which can help reduce future conflicts or mitigate those that do occur.

Crosbie suggested that "people can acquire the skills of working together collaboratively, which are learned behaviors and don't come naturally to any of us."

How can companies organize their workplace to limit the number of conflicts that require intervention on the part of third parties and reduce the overall fiscal impact of employment-related disputes?

Crosbie said, "Teach people how to separate people from the problem and get to underlying issues themselves so that third parties aren't required."

Kandell suggested that companies can "use outside consultants to help them address conflict in a more constructive and clearer manner by identifying where they arise, how much money they are costing the company and what impacts they are having in the company overall." This can lead to the "establishment of a pilot program that trains employees to handle conflict resolution, creation of a peer review process and a process for identifying when it is necessary to seek help from outside neutrals or ADR providers," she said. ●

"Use outside consultants to help them address conflict in a more constructive and clearer manner by identifying where they arise, how much money they are costing the company and what impacts they are having in the company overall."

–Ellen Kandell

FEDERAL CIRCUIT COURTS

Fifteen-to-One Punitive Damages Arbitration Award Upheld By Appellate Court

Mave Enterprises, Inc. v. Travelers Indemnity Company of Connecticut

2013 WL 537608
Cal.App 2 Dist., September 26, 2013

Mave Enterprises alleged that their insurer, Travelers, did not make timely payments to cover the losses resulting from a fire at its manufacturing facility. Mave sued to cover interest and finance charges accrued as a result. During jury selection, the parties agreed to arbitrate under a high-low arrangement. The arbitrator found that Travelers had acted in bad faith and awarded Mave nearly $3.7 million (well below the $7.5 million high), most of which was punitive damages.

Travelers moved for a revised award, arguing that the award was unconstitutionally excessive. The motion was denied. Mave moved in state court to confirm the award and Travelers moved to stay the proceedings and vacate the award. Travelers indicated it would move to vacate in federal court. After a hearing, the superior court confirmed the award.

In federal court, Travelers asserted that the arbitration was governed by the FAA. The court found that the arbitrator had manifestly disregarded the law on damages and reduced the award by about $1 million. Mave filed a motion requesting that the court decline jurisdiction. The court granted that motion, thereby restoring the original arbitral award. Travelers appealed to the Ninth Circuit and also within the state court system.

At the California Court of Appeal, Travelers argued that the superior court erred in denying the motion to stay because the case was governed by the FAA for two reasons – the fact that the insurance contract dealt with interstate commerce and because of a JAMS rule (the arbitrator was a JAMS neutral) that states that "proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et seq. or applicable state law." Travelers argued that the FAA required recalculation of damages, that a federal court would be more likely to apply the manifest disregard standard and that the arbitrator exceeded his powers under the FAA.

The Court held that the trial court did not abuse its discretion by denying the motion for a stay, that it had acquired and retained jurisdiction of the dispute long before the federal court was involved, and also because the California Arbitration Act, not the FAA, governed in this case. The Court found that these were California parties acting in a California court and that the "or" part of the JAMS rules allowed arbitral application of California law. Furthermore, the trial court was correct in using California law at every juncture of the case. The Court quoted the trial court's memo that "Even if this were an error in law, it is not grounds to vacate the arbitration award under California law because the Court may not set aside an arbitration award even if the arbitrator made an error of law.... Further, the 15-1 ratio is not an error in law because the Courts eschew 'rigid numerical limits' to awards of punitive damages." The Court found that the trial court acted properly in confirming a 15-1 ratio award because Travelers conduct was "egregious" and "warrants the punishment and deterrence that a 15-1 ratio imposes." The Court noted that the CAA does not allow review under an argument that the arbitrator made errors of law – and they were also clear that there was no indication that there was an error. The Court wrote "We agree with the analysis of both the superior court and the federal district court in concluding that the arbitrator's use of a 15-1 ratio in calculating punitive damages is not the type of legal error—if it was an error at all—that permits the vacatur of the arbitration award under the CAA."

Failure to Disclose Partner of Law Firm as Reference on Resume Results in Vacatur

Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP

2013 WL 5321158
Cal.App 2 Dist., September 24, 2013

Mt. Holyoke Homes and Darla Jones (hereinafter "Holyoke") brought a legal malpractice claim against their lawyers, Jeffer Mangels Butler & Mitchell. The law firm moved to compel arbitration. The trial court granted the motion to compel despite Holyoke's argument that the clause was not revealed in a timely fashion.

The case went to arbitration with a retired judge of the California superior court. Prior to arbitration, the judge disclosed that he had mediated a matter with one of the defendant law firm's lawyers as an advocate. He also

indicated that he knew one of the lawyers in the defendant firm for many years and that he had conducted an arbitration with Holyoke's lawyers. He also stated that he was not aware of any relationship with any party or lawyer that would impair his ability to arbitrate neutrally and impartially.

The arbitrator ruled in favor of the firm and awarded them $18,132 in unpaid legal fees, $285,000 in fees connected with the arbitration and more than $150,000 in costs.

Subsequently, Holyoke searched the internet and found one of the defendant law firm's partners named as a reference on the judge/arbitrator's resume. Holyoke then moved to vacate the award on this basis. The defense submitted declarations from both the judge and the law firm partner that indicated that the reference was more than 10 years old, that the relationship between them was purely professional and that the reference was used without the partner's knowledge or consent. The trial judge confirmed the award and added another $43,762 in fees.

On appeal, the California Court of Appeal found the lack of disclosure of the partner's name to be a significant omission in violation of ethics codes and California law. The Court noted that the question was not whether the arbitrator was biased, but instead whether a reasonable person aware of the facts could entertain a doubt that he could be impartial in this case. The Court stated that "We conclude that the answer is yes." They went on to write that "the fact that the arbitrator had listed a partner in JMBM as a reference on his resume reasonably could cause an objective observer to doubt his impartiality as an arbitrator, and his failure to timely disclose that fact compels the conclusion that the arbitration award must be vacated." The Court made it clear that "We do not suggest in any manner that [the judge] actually was biased in favor or against any party to this litigation" but they vacated the award nonetheless. The Court rejected the argument that because the judge's resume was easily found that the lack of disclosure was not problematic. They put the burden of disclosure fully on the arbitrator and stated that "the connection between the undisclosed fact of the arbitrator's naming an attorney as a reference on his resume and the subject matter of the arbitration, a legal malpractice action against the law firm in which the same attorney is a partner, is sufficiently close that a person reasonably could entertain a doubt that the arbitrator could be impartial...His failure to timely disclose this ground for disqualification of which he was then aware compels the vacation of the arbitrator's award."

FAA Requires Appointment of Substitute Arbitrator Where Designated Arbitrator Unavailable

Green v. U.S. Cash Advance Illinois, LLC

2013 WL 3880219
C.A.7 (Ill.), July 30, 2013

Joyce Green alleged that U.S. Cash Advance (USCA) misstated the loan's annual percentage rate in violation of the Truth in Lending Act. USCA moved to compel arbitration. The National Arbitration Forum was the arbitrator named in the contract, but when the agreement was signed and even later when this dispute arose, the NAF had effectively gone out of business. USCA asked the judge to name a substitute arbitrator, but the judge declined, holding that NAF was "an integral part of the agreement." USCA appealed.

The U.S. Court of Appeal for the Seventh Circuit found the refusal to name a substitute arbitrator to be a reversible error. The Court found it significant that the agreement containing the language of the contract stated that any dispute "shall be resolved by binding arbitration by one arbitrator *by and under the Code of Procedure* of the National Arbitration Forum" [emphasis added by the Court]. The Court concluded that so long as the NAF's rules were used, a substitute arbitrator was required.

The Court concluded, "These parties selected private dispute resolution. Courts should not use uncertainty in just how that would be accomplished to defeat the evident choice. Section 5 [of the Federal Arbitration Act] allows judges to supply details in order to make arbitration work. The district judge must appoint an arbitrator, who will resolve this dispute using the procedures in the National Arbitration Forum's Code of Procedure." ●

Social Media Playing an Increasingly Complex Role in E-discovery

The increasing use of social media platforms by individuals and companies to share both personal and corporate information with friends and the general public is leading to greater use of the postings in e-discovery by attorneys and corporate counsel.

David R. Cohen, Practice Group Leader for the Records & E-Discovery Practice Group at Reed Smith LLP in Pittsburg, said, "Social media is still not as much of a target of e-discovery as more traditional information sources, like email, Word documents or records specific to particular types of disputes, but social media records have made it onto the radar screen of lawyers in particular kinds of disputes. For example, where plaintiffs may be claiming personal injuries or impairments, defendants may seek access to their Facebook accounts and/or other social media postings for useful ammunition," he explained, adding, "It does not look good for the person who claims a serious disability from an injury to be seen in recent skiing pictures."

"Parties may object to such discovery as a violation of their personal privacy, and judges or neutrals may require a threshold showing by requesting parties that the discovery is reasonably likely to uncover relevant evidence, but the threshold is usually not very high with regard to information parties have voluntarily chosen to share with all of their Facebook 'friends' or with other groups through social media postings," he noted.

However, "where the information is publicly available, such as Twitter feeds or Facebook posts where users have failed to implement privacy settings, adverse parties can even find that information directly, without needing to resort to formal discovery," Cohen explained. "It has been held to be an ethical violation, however, to have someone seek to 'friend' an adverse party or witness, without revealing the true motive for the request, as a way of getting access to their posts."

Tom Kelly, a partner with K&L Gates LLP in Seattle, said that the inclusion of information gleaned from social media platforms, including Facebook and Twitter, is a complex because "social media is constantly evolving, the law around it is complex and still developing and the tools to use the information in discovery are also developing."

facebook

LinkedIn

twitter

Kelly went on to explain that there are technical issues surrounding retrieving posts from social media platforms for e-discovery because even once you have the data, getting at the specific information relevant to a case is more difficult than getting information from emails. Using search terms for information from emails is relatively straightforward, while it is "much harder to search for and locate specific data from postings on social media platforms," he said, adding, however, that there are companies currently shopping services that can begin to address these difficulties.

While retrieving the data may be more difficult, it can still be done. With this in mind, Cohen cautioned that "companies need to be concerned because posts by individual employees can have a real impact on the company—at least reputationally and sometimes even in ways that create legal liability, such as inadvertently revealing private or proprietary information, or even information that could impact stock values." He said that many "forward-looking companies are now adopting social media policies that provide guidance and restrictions on what employees should say or do with regard to social media postings—e.g. prohibiting employees from mentioning their company affiliation when making statements that have not been approved by the company, due to concern that the employees' personal views could mistakenly be taken as views of the company."

"Many individuals remain unaware that what they post may be used against them in litigation or other contexts—e.g., many employers, and even universities, now routinely check social media postings of applicants before making employment or admission offers," he said. In addition, "many individuals may be unaware that material they post may reveal information that they do not intend, including hidden metadata attached to pictures, which may reveal not only when the picture was taken, but also precisely where."

As awareness of how information from social media postings can be used grows, some companies are beginning to institute policies to address postings. "Most have implemented controls about who can post, and have content check processes to avoid mistakes because whatever is said publicly can and will be used against the company," Cohen said.

He noted, for example, that "offers, even those with mistakes, can give rise to contract claims, representations about products, or services can give rise to misrepresentation claims, and using or attaching other works or images can give rise to intellectual property or breach of privacy claims. Having lawyers review content in advance of company postings is a prudent way to help reduce mistakes and/or liability risks."

Social media platforms, like much

See "Social Media" on Page 12

Muslim Imams to Get Mediation Training

In the Muslim community, marriage is viewed as a religious covenant, and when family disputes arise, people turn to their religious leaders, known as imams. Unfortunately, imams are trained only in the religious sciences and therefore are not equipped to handle domestic violence or other troubling family law problems. And many Muslims, including imams, are unaware of Islamic traditions of dispute resolution.

To address this need, Karamah: Muslim Women Lawyers for Human Rights has launched the Muslim Mediation Initiative, a program funded by the JAMS Foundation that will train Muslim leaders about family law conflict resolution from an Islamic perspective.

"Muslim religious leaders have only a cursory knowledge of the legal process," explains Karamah executive director Aisha Rahman. "They're not trained in family law, and they often give bad advice," including counseling women to return to their abusers because of the moral significance placed on marriage and family. To combat this, the Muslim Mediation Initiative will train imams in appropriate ways of guiding families through the common issues affecting Muslim communities, such as divorce, custody disputes, domestic violence and other family law conflicts. The program should result in "more competent religious leaders, a more comfortable Muslim community and sensitive and thoughtful service providers working together to serve the Muslim-American population."

The ideal organization to spearhead this initiative, Karamah—which means "dignity" in Arabic—is a U.S.-based nonprofit organization founded in 1993 by a law professor and Islamic scholar to advance the view that Islam does not require a choice between human rights and faith. Its primary focus is gender justice, civil rights and religious freedom. Through jurisprudential scholarship, the development of a network of Muslim jurists and leaders, and education programs in the U.S., Europe, North America, the Middle East and North Africa, Karamah teaches the gender-equitable principles of Islamic law and helps Muslim-Americans develop leadership, advocacy and conflict-resolution skills. Based in Washington, D.C., the group already trains the Department of Justice and other service providers about cultural sensitivity in domestic violence cases occurring in the Muslim community. It also regularly offers continuing education programs for attorneys, court advocates, social workers and therapists representing victims of domestic violence. Karamah partners with many organizations, including the University of Pennsylvania's Wharton School, Meridian International Center and the Arab Women's Legal Network.

Aisha Rahman, Executive Director, Karamah

Karamah recognizes the value of secular training for service providers but also understands that Muslim clients are seeking religious-based solutions, particularly related to family issues. "Through the Muslim Mediation Initiative, we will teach imams to be non-partisan so they can really look at the facts of a case and also understand cultural and religious sensitivities," Rahman explains. According to Rahman, the Islamic tradition is filled with stories, scriptural references and examples of conflict resolution and mediation, but they've been forgotten or are simply not employed in the Muslim-American context.

For the launch of the Muslim Mediation Initiative, Karamah has already partnered with influential imams, including Mohamed Ahmed of the Islamic Center of Nashville. "Imams are overwrought with cases, so they're open to the idea," according to Rahman, who is also head of Karamah's Family Law Division. "They're actually asking for training."

One of the first goals of the Muslim Mediation Initiative is clarifying the role and definition of an imam, something that differs among Islamic countries. In Pakistan, for example, an imam is an elder who leads prayer, with dispute resolution handled primarily by the courts or by families. But in many other countries, an imam serves as the spiritual guide for any issue related to family, parenting and domestic violence.

> **"Through the Muslim Mediation Initiative, we will teach imams to be non-partisan so they can really look at the facts of a case and also understand cultural and religious sensitivities."**
>
> —Aisha Rahman

For the next several months, Karamah leaders will develop the mediation initiative's curriculum. It can draw on the Karamah's summer program, which teaches conflict resolution and peace studies using role-playing exercises, lectures, debate simulations and leadership and teamwork exercises. While Karamah perfects the imam education process and establishes the initiative's legitimacy, the program will remain on a smaller scale. But then Karamah hopes to "take it to the next level and expand to other states, each of which has its own family and mediation laws," according to Rahman.

The Changing Legal Landscape in Brazil

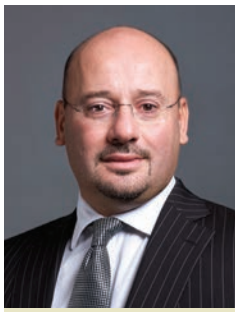
ADR has been gaining momentum in Brazil for many years, sparked in part by a swell in foreign investment, the country's exportation of capital abroad and distinct public policy shifts. In 2001, for example, the Brazilian Supreme Court affirmed the constitutionality of the Arbitration Act, and the New York Convention was adopted in 2002. In 2004, the Brazilian Constitution was amended to shift recognition of foreign arbitral awards from the Brazilian Supreme Court to the Superior Court of Justice, which has been more willing to recognize and enforce arbitration awards. Similarly, the Brazilian National Council of Justice, the agency that controls and manages the quality of civil services rendered by the Brazilian Judiciary Power, issued Resolution 125 in 2010, which introduced Brazilian courts centers devoted to administering and incentivizing consensual conflict resolution. Today, many Brazilian law schools offer programs in ADR, and the first National Mediation Competition took place in August, with more than 32 law school teams. In 2006, National Settlement Week was launched.

Gabriela Asmar, Former Weinstein JAMS International Fellow

As a result, arbitration in particular is increasingly used as a substitute for Brazil's historically slow and disorganized legal process. Because ADR is "the only salvation to the Brazilian Judicial System," it will continue to play a role in the country's evolving legal transition, according to Gabriela Asmar, a former Weinstein JAMS International Fellow. "The special characteristic of Brazil right now is that its economic and political circumstances are similar to those of the U.S. in the 1950s. We need to solve our bottlenecks in order to grow into a sustainable leading position. In terms of conflict resolution, this means entrusting methodologies that do not depend on the state mechanisms to build foreseeability in business solutions. In other words, the state can only play its fundamental role of enforcing the basis of a democratic market if the market plays its role of solving its own disputes through ADR and using the judiciary only when it is indeed necessary."

In contrast to arbitration, mediation so far is primarily employed in small claims areas, such as family and criminal cases, and has not yet gained momentum in commercial cases. While Brazil has had specific legislation about arbitration for several years, a federal act on mediation is still forthcoming, according to Humberto Dalla, a Brazilian prosecutor with a Ph.D. in civil procedure and the editor of General Theory of Mediation. "This is probably the reason why arbitration is more common than mediation in commercial and civil matters," he explained. "Some issues relating to mediation and arbitration processes are still under discussion in Brazilian courts; other than that, the most important barriers are cultural, not legal."

According to Andre Chateaubriand, a partner at Sergio Bermudes Advogados law firm and one of the lawyers charged with drafting the private mediation part within the revision of the country's arbitration statute, for mediation to catch up to arbitration as a tool in Brazil, "it's necessary to increase corporate mediation awareness between lawyers, in-house counsels and the business sector as a whole."



Giuseppe de Palo, Partner, JAMS International

To help with that campaign, the new Civil Code of Procedure, which will probably apply from 2014 onward, requires that parties first adopt mediation in an attempt to resolve conflicts. In addition, the Brazilian senate appointed a commission of specialists to present a bill of mediation before the congress, which will be another crucial step in mediation's acceptance in commercial cases. "The main problem is the lack of information about mediation, although it has been changing as the justice crisis in Brazil has reached great dissatisfaction levels from citizens, companies and magistrates," Chateaubriand said. "It makes alternative judicial proceedings like mediation more evident and important."

Giuseppe de Palo, a mediator and a partner at JAMS International, notes that the first video on Brazilian judicial mediation was produced in 2004 and was the only one available for nearly eight years. "Many people were talking, teaching and writing about mediation, but without practical experience," said de Palo, who was invited by the Brazilian National Council of Justice to join a speaking tour about mediation developments.

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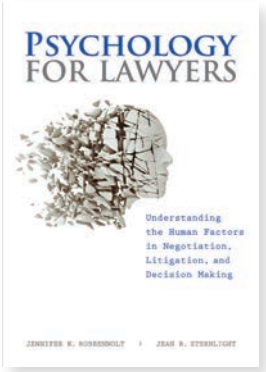
Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making

Written by Jennifer Robbennolt and Jean Sternlight



REVIEWED BY RICHARD BIRKE

Here's a little secret. For lawyers with a little bit of experience, the law is easy. They may pretend the law is hard so people will think they are smart. But it isn't the law that's hard; it's people that are hard. And that's why negotiation and mediation are more challenging than litigation.

My 100th trial was much less nerve-wracking than my first, but the negotiated resolution of a claim is always fraught with tension. Whether a deal or dispute involves a merger, an employment issue, a contract dispute or the licensing of intellectual property, the law becomes routine—but dealing with people never does. People, specifically the way people think and behave, are a seemingly endless mystery.

Law professors Jean Sternlight (University of Nevada, Las Vegas) and Jennifer Robbennolt (University of Illinois at Urbana-Champaign) have made it much easier to understand the people. In 2008, they penned *Good Lawyers Should Be Good Psychologists* in the Ohio State Journal on Dispute Resolution. They described how deeply human psychology penetrates the daily work of the lawyer. That article was great, but it wasn't enough. So the pair of talented authors has produced the fruition of their vision. Their book, *Psychology for Lawyers*, is far-and-away the best volume I've ever read on how insights from cognitive and behavioral psychology impact all aspects of lawyering—from client interviews to negotiation of deals and disputes to how to have a happy and sustaining career.

The book is really two books in one. The first, consisting of seven chapters, is a primer in those aspects of psychology that undergird the lawyering process. These seven chapters cover such gems as Prospect Theory (losses hurt more than commensurate gains feel good; we are risk-seeking in the face of losses and risk-averse in the domain of gains—mostly; and whether something is a gain or a loss can be a cognitive illusion) and Reactive Devaluation (people rate deals based on who made the offer instead of whether it's the best available solution). The authors cover a huge amount of material concisely in about 150 pages.

The next seven chapters (the second book within a book) consist of the following topics: justice, interviewing clients and witnesses, counseling clients, negotiating and mediating, discovery and due diligence, writing and ethics. These chapters take the insights from psychology and apply them to practice. Here are a few tidbits:

- Offer clients and negotiation opponents a warm beverage when you meet. They will be primed to like you when their brains signal warmth.

- Ask questions to break bad news instead of making declaratory statements. When presented with negative declarations, people tend to defend, but when responding to questions, people play devil's advocate with their own cases.

- Don't ask whether someone understands a direction or question (say, in a deposition), but instead make them repeat the question before answering. People tend to be overconfident that they have understood instructions or questions until the time comes to act on them.

The final chapter is a little bit of positive psychology for the lawyer who may be a little burnt out. The practice of law can wear on a person, and Robbennolt and Sternlight offer some rays of hope that a person can be a good lawyer and a happy, fulfilled person.

The only negative thing about the book is that it's a bit too thorough for the average practitioner. With literally hundreds of psychological insights presented, a reader might become oversaturated and fail to retain enough knowledge to pull the right principle out at the right time. I guess multiple readings are in order!

This book has become one of my standard recommendations to lawyers and negotiators who wish to understand more about how the people in the room shape the outcomes of cases and deals. It is a terrific, well-written work and well WORTH READING.

JAMS DISPUTE RESOLUTION
ALERT
An Update on Developments in Mediation and Arbitration

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of the technology surrounding the Internet, evolve rapidly, and courts are taking on issues as they arise, both Kelly and Cohen commented.

"Our courts tend to be more reactive than proactive, partially because it is useful for judges or neutrals to make decisions in the context of specific facts, rather than trying to pre-judge issues or apply one-size-fits-all rules," said Cohen. "What discovery is appropriate in a particular case can depend on many factors, including the burden and cost of the requested discovery, the likelihood of uncovering relevant and material evidence and the interests or amounts at stake in the matter. That can change substantially from one case to the next."

Law firms and attorneys are also being forced to catch up with the ever-evolving technology, with some doing this more quickly than others, according to Cohen.

"The whole field of e-discovery continues to evolve and can give rise to complex issues," he said, adding, "Accordingly, we have seen an increase in law firms developing separate records and e-discovery practice groups and/or individual lawyers who concentrate their practices in these areas. As with other practice areas, clients can benefit from the advice of lawyers who focus in these particular practice areas."

Joseph Gratz, an attorney with Durie Tangri in San Francisco and Vice-Chair of the American Bar Association IP Section's Committee on Copyright and New Technologies, said that the use of postings from social media platforms is also forcing attorneys to have a more complex and nuanced understanding of the meaning of original posts and thread that follows from them. The discovery process will have to be used to understand what each part of the thread meant to different people participating in it and what evidentiary weight to assign to the various parts of a thread. This may require that attorneys with more familiarity with the social media platform be utilized to parse out the meaning or import of various portions of a thread, Gratz added.

"The winners in business tend to be those who can most rapidly take advantage of, or at least adapt to, new technology and communication modes while implementing controls—like Electronic Communication and Social Media policies, Bring Your Own Device policies and well-designed employee training programs—to minimize any resulting risk exposure," Cohen said. ●

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Amidst these major strides in acceptance, the primary barrier to complete adoption of ADR remains inside the courts, according to de Palo. "Not all judges understand the benefits and how to use it," he said. The second barrier is the lawyers, he adds, because they're unsure how to monetize ADR, though the bar associations are starting to change that. Labor cases were some of the first to head to arbitration in Brazil, and family law and other civil cases followed. "We're about to see this working in large scale and observe the effects on the economy," de Palo said. "We will need more than 10 years to clearly see the effects of the public politics on the economy." ●

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