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ADR Techniques/Part 3

Why Do Mediators Mediate the Way They Do?

BY JOHN LANDE

This is Part 3 of a four-part series. This month, the author discusses mediators' insights from participating in an educational program to help them understand their own unique mediation practice systems. It is adapted for Alternatives *from a longer version of this article, which includes more details and is available at https://bit.ly/3JJGqnR. See Part 1 at John Lande, "The Real Practice Systems Project: A Menu of Mediation Checklists," 42* Alternatives *53 (April 2024), and Part 2 at John Lande, "Practitioners Tell Why Real Practice System Checklists Are So Useful," 42* Alternatives *80 (May 2024).*

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Rutgers University psychologist Kenneth Kressel argued that mediators' mental models of mediation are largely unconscious mixtures of formal models and "personal 'mini-theories' of conflict [and] the role of the mediator."

He defined "mental schemas or models" as "ideas the mediator holds about the role of the mediator; the goals to be attained (and avoided), and the interventions that are permissible (and are impermissible) in striving to reach those goals." Kenneth Kressel, "How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking," 28(3) *Ohio State J. on Disp. Res.* 709 (2013). They are "mediator coping responses to the complex and demanding task of intervention decisionmaking and the limitations of formal models of practice and conscious human deliberation."

The author is Isidor Loeb Professor Emeritus at the University of Missouri School of Law's Center for the Study of Dispute Resolution in Columbia, Mo. This year, he received the American Bar Association Section on Dispute Resolution's Award for Outstanding Scholarly Work. See https://bit.ly/3Tq5YuK. He is a frequent contributor to Alternatives. His biography page can be found at https://lande.missouri.edu.

Another article—James A. Wall and Kenneth Kressel, Mediator Thinking in Civil Cases, 34(3) *Conflict Res. Q* 331 (Spring 2017) (available at https://bit.ly/3xsD06l)—described mediators' thinking in 20 real-life civil mediations. Wall and Kressel shadowed mediators during the cases and, as they went from one caucus to another, the researchers asked the mediators to describe what they were thinking. Adapting the late Daniel Kahneman's framework from his book, *Thinking, Fast and Slow*, Wall and Kressel

> found evidence that [mediators'] thinking unfolds along two planes: one intuitive (system 1) and the other rational (system 2). On the former, mediators frame the mediation as a distributive process, instinctively evaluate the situation as well as the parties, and engage in habitual interventions. On the rational plane, the mediators develop goals, rationally evaluate the situation, mentally map what is going on, and choose among a variety of rational steps, such as pressing, delaying the mediation, and extracting offers, in order to accomplish their goals.

These studies suggest that mediators' perceptions about why they mediate the way they do often are a disorganized hodgepodge of

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CPR News

London Educator/Arbitrator Emilia Onyema Receives CPR's ADR Diversity Award

Emilia Onyema, a professor at School of Oriental and African Studies-University of London and an independent arbitrator, was presented with CPR's 2023 Outstanding Contribution to Diversity in ADR award.

The presentation was made at CPR's Annual Meeting in March in Philadelphia.

Onyema is a professor of international commercial law and an international arbitrator. She is also the director of the SOAS Arbitration and Dispute Resolution Centre. She is qualified to practice law in Nigeria and as a solicitor in England & Wales.

Onyema is the convenor of the SOAS Arbitration in Africa conference series, which began in 2015 and has been held in seven cities throughout the continent—Addis Ababa, Lagos, Cairo, Kigali, Arusha, Douala, Ghana and Cape Town—to date. She is the Lead Investigator for the biennial Arbitration in Africa Survey. She is the co-author of the African Promise, a pledge that aims to improve the profile and representation of African arbitrators and to appoint Africans as arbitrators, with a special emphasis on arbitrations with Africa connections.

Onyema founded the Arbitration Fund for African Students, which was launched at the 2019 SOAS Arbitration in Africa conference in Arusha, Tanzania. The fund advances education in the knowledge, skills, techniques, use and methods of arbitration by providing funding for African students to attend arbitration-related conferences and events. The fund also established the website linked above to provide information on Africa arbitration to the general public.

Emilia Onyema

Onyema was honored "for her contributions to diversifying the field and especially focusing on the importance of promoting and selecting and recognizing the talents of African arbitrators," said CPR Vice President for Education and Advocacy Ellen Waldman at the awards dinner, held March 6 at the Westin Hotel in Philadelphia during CPR's 2023 Annual Meeting.

Alternatives is highlighting the awards throughout the year in CPR News, and will announce the opening of the 2024 awards, to be presented at the 2025 CPR Annual Meeting. The full awards list is available here: www.cpradr.org/news/press-releases. See CPR News last month for three items devoted to the presentation of the James F. Henry Award, named in honor of CPR's founder, to former chair William H. Webster, at 42 *Alternatives* 72 (May 2024).

Emilia Onyema was unable to travel from London, but thanked the awards dinner audience in a video message, and cited past winners. In a separate statement, she said, "I thank the CPR for this recognition of my research and knowledge exchange work which focuses on the

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Alternatives

CPR

Editor:
Russ Bleemer

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Mediation Processes

Exploring Grounds on which Mediation Should Be Discontinued

BY UNYIME MORGAN

Mediation has been hailed for its potential to restore relationships, and cost and time-savings. But despite its benefits, there are circumstances that arise where postponing or ultimately terminating mediation is professional.

The 2021 United Nations Commission on International Trade Law Mediation Rules, which regulates mediation, stipulate prerequisites for international mediation. There are universally recognized requirements for a valid mediation, including the voluntariness of the mediation process, confidentiality, and neutrality of the mediator. Articles 1, 3, 4, 5, and 6 of the 2021 Uncitral Mediation Rules (available at https://bit.ly/3RsbhKT).

Depending on the situation or incurability of a deviation from the established requirements, the mediation qualifies for postponement or termination. Nevertheless, some factors justify both postponement and termination. They can be obvious, and they can be subtle and potentially complicated. They include:

Death of a Party or Mediator: Obviously, the prospect of mediating a dispute may fizzle out with the death of a party. This would likely be the case where the dispute revolves around the deceased party, particularly if the facts of the dispute are solely within the dead party's knowledge.

The mediator's death may also lead to the termination of mediation, especially where either or both parties had opted for mediation because of the mediator's peculiar attributes like integrity, expertise, success, etc.

But the death of a party or mediator may not always terminate a mediation. In peculiar cases like property sharing, community and land disputes where other family or community members are involved in the dispute, mediation may be postponed until a reliable representative is appointed to continue with the mediation.

Incapacity of Mediator or Party: Incapacity may be transient, recurring or consistent. Causes range from emotional instability—perhaps from disclosures at mediation, mental disability, sickness, old age, or simple exhaustion from a long day.

The incapacity of a party or parties is not a trivial concern. It deserves special attention, at least for two reasons. First, the documented outcome of mediation falls into the category of written agreements regulated and meticulously protected by law. It is a legal contract.

In the United States, mediation contracts entered into by persons who have not yet attained the age of majority, persons who are intoxicated, mentally ill or defective are voidable and stand a chance of being declared void, while persons under guardianship for mental illness or defect do not have the capacity to enter a contract (Restatement (Second) of Contracts Sections 12-16 (1981) (available at https://bit.ly/4500R8z)). Evidently, a party's incapacity can render the settlement agreement void or voidable—that is, subject to be declared valid or invalid, depending on the evidence before the court.

Second, Standard I (A) of the 2005 Model Standards of Conduct for Mediators (available at https://bit.ly/3rl9htb) mandates mediators to conduct mediation based on the principle of self-determination. In other words, parties' participation and choice of settlement options should be intentional, not coerced. Where a party to mediation is incapacitated or disabled, the principle of self-determination places an additional burden on mediators to protect the interests of the incapacitated or disabled persons by exploring "the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate in mediation and exercise self-determination." Model Standards of Conduct for Mediators Standard VI(A)(10) (2005).

This is because incapability/disability potentially erodes a fundamental precondition for mediation, the voluntariness of parties' decision-making and participation in the mediation process. The absence of voluntariness in turn threatens the validity of the mediation and the associated settlement agreement. See Russ Bleemer, "ADA Mediation, Updated: The Law Is Enforced by ADR Processes. They Work." 41 *Alternatives* 19 (February 2023) (available at https://bit.ly/3RvCyvV), for a discussion of the nuances of mediating disputes involving persons with disabilities.

The person(s) affected by incapacity may be any party, both parties or even the mediator. A mediator's incapacity may stem from inexperience in the mediation of certain types of disputes. Mediators should be candid about their incapacity to perform optimally and notify parties whether a postponement, termination or recasting of the mediation would ensue from such incapacity.

Where a party or parties disclose mental incapacity, the mediator, in conjunction with the parties, may decide to postpone, terminate or recast a mediation. Mediators should also observe whether parties to a mediation are sound enough to mediate, probe to ascertain appropriate next steps and, where applicable, consult with parties to postpone or terminate the mediation—all while affirming the right to self-determination. The purpose and key to the mediators' efforts is to provide the path for the accommodations required under the Americans with Disabilities Act. See the Model Standards above, and the federal government's website at www.ada.gov/law-and-regs/ada.

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The author is enlisted as a mediator with the Maryland Program for Mediator Excellence, a program of the Maryland Judiciary's Mediation and Conflict Resolution Office in Annapolis, Md. Her website is www.unyimemorgan-mediation.com.

Mediation Processes

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Non-Payment of Mediation Deposit: Uncitral Mediation Rules Article 11(5), at the first link above, provides that incomplete payment of deposits by all the parties within a reasonable period may culminate in a suspension or termination of the mediation at the mediator's instance. To ensure payment of mediation fees, a mediator may designate an amount of deposit to be paid by each party. Non-payment, even by one party, could affect the continuance of the mediation. The mediator may either postpone to allow the non-compliant party or parties pay to up, or terminate the mediation and refund payments made already–if any.

Termination by a Declaration of a Party or Parties to the Mediator: Where one or both parties declare to the mediator (and the other party, where applicable) that the mediation is terminated, then the mediation is automatically terminated on the date of such declaration. Uncitral Mediation Rules (Article 9(b)-(c). The Uncitral Rule does not require any reason to be presented for such a declaration.

This gives credence to the voluntariness of the mediation process. Mediation is party-driven. From practical experience, however, parties usually give reasons for requesting the postponement or termination of mediation. Giving reasons for the postponement of mediation communicates good faith and determination to resolve a dispute via mediation.

Termination by a Declaration of the Mediator after Consultation with Parties: Mediation shall be terminated by a declaration of the mediator, after consultation with the parties, to the effect that further mediation efforts are no longer justified. Uncitral Mediation Rules, Article 9(d). Mediation would be deemed to have been terminated on that day. Many reasons can justify such a declaration by a mediator—ill health, unresolved deadlock, mental incapacity, etc. The mediator may also postpone mediation for the same reasons. But see Model Standards and ADA above.

Absence of Appropriate Party: Who qualifies as a party to mediation? An appropriate mediation party is not merely one who is interested in the mediation.

The answers to several questions can provide guidance on whether the parties before the mediator are the appropriate parties. Does the party have the power to make crucial decisions toward the resolution of the dispute? Can the party decide on the continuation or termination of a mediation? Is the party conversant with the facts of the dispute?

A negative response to any of these questions may be an indication that the appropriate party is absent from the mediation. Upon realization that the appropriate party is not present at a mediation session, the mediator may consult with the other party to postpone the mediation. If the appropriate party's absence cannot be remedied, this would be a good reason to terminate the mediation.

Calling It Off

The question: When should mediation be postponed or terminated?

The nuances: While, for example, an earthquake requiring rescheduling is obvious, most issues require the mediator to balance practicality, ethics standards, and the law. There can be liability. It's tough.

The basics, refined: Professionalism, tact, and integrity must guide the formation of an enforceable settlement agreement.

Source of Agitation

Lengthy Mediation Sessions: Mediation sessions should not be excessively lengthy. Mediators risk losing parties' optimal attention and participation when mediation sessions run beyond two hours at a stretch. Attention should be paid to planning and scheduling mediation sessions involving children, nursing mothers, sick persons, disabled persons, and the elderly. Accommodating is key.

If the mediator is aware that a party or parties have to travel across long distances to participate in mediation and that returning home on time depends on the early closure of the mediation session, such concern should be taken into consideration in planning mediation schedules. Generally, the interests of the vulnerable should be accommodated when scheduling. While lengthy mediation sessions are good reasons to postpone a mediation, mediations that stretch on for more than six months risk termination to prevent further time-wasting, unless there are good reasons to prolong such mediations.

Supervening Event: Supervening events include war, fires, and natural disasters like earthquakes, floods, etc. These events can result in the postponement or termination of a mediation. The destruction of the subject matter of a property-sharing mediation by a natural disaster is an example of a supervening event. Depending on the extent of destruction, a postponement or termination would be justified.

Likelihood of Bias: Where a mediator discloses the likelihood of bias, mediation may be terminated or postponed. Likelihood of bias may arise from previous commercial dealings, conflict or acquittance with any of the parties. Likelihood of bias may also spring from a traumatic subject matter or situation which the mediator is unable to relate with. Despite the disclosure of bias, parties may decide to continue with the mediation. But if even one party decides not to proceed with the mediation, then the mediation stands terminated.

Grounds for Terminating

Uncitral Mediation Rule Article 12 provides guidance on when mediation may be terminated. Such grounds include signing the settlement agreement and the expiration of a time period and/or a deadline. Declaration by parties and declaration by the mediator, discussed above, could be reasons for postponement or termination.

Signing the Settlement Agreement: Signing the settlement agreement naturally brings the mediation to an end. If new facts emerge after a mediation terminates, a re-mediation of the affected settlement terms should not be ruled out, subject, of course, to the parties' mutual consent.

Where agreements reached at a re-mediation session alter the terms of the original settlement agreement, another agreement should be drawn up. A good example of a case where settlement terms may be re-mediated is a mediation aimed at sharing the properties of a deceased person. A

discovery of additional properties owned by the deceased may require re-mediation for allocation. Parties and mediators should be mindful, however, that a settlement agreement adopted by the court possesses the same status as a court judgment: It can only be set aside by the court.

Expiration of Time: Upon the expiration of a mandatory period in an applicable law, court order or mandatory statutory provision, or as agreed upon by the parties, the mediation should be terminated. Application for an extension of time should be sought and obtained from the appropriate authority or person(s) before the expiration of time.

Illegality: Only legal causes should be mediated. Disputes arising from an agreement to commit a crime or unlawful act should not be mediated. The mediator who mediates a crime is in danger of prosecution as an accomplice.

An example of mediation tainted with illegality is one where a settlement is obtained based on fraudulent information. Furthermore, mediators should be mindful to report child abuse and any other legally required maltreatment to the government. This is because mediators are mandatory reporters in many jurisdictions like Australia and the United States.

* * *

Finally, there is closure.

Postponement and termination may occur at any phase of mediation due to the voluntariness of mediation. Mediators should strive to ensure that discontinuance is not occasioned by their incompetence because many discontinued mediations do not resume.

The mediation process requires professionalism, tact, and integrity. The mediator's ideal goal is timely resolution of the dispute and parties' commitment to a settlement agreement. Mediators, however, should not be so emotionally committed to the outcome that parties are shoved into unreasonable settlements.

The mediator who mediates a crime is in danger of prosecution as an accomplice.

On the other hand, the mediator should not be so indifferent as to neglect his/her commitment to self-improvement and discipline. According to Mark F. LaMoure, self-improvement and practice remain the golden tools for excellence (see LaMoure's quotes on the subject at https://tinyurl.com/3nv6s94a).

Arbitration Practice/Part 2

More on Independent Actions and the 'Jurisdictional Anchor': Where the Law on Award Enforcement May Be Going

BY PHILIP J. LOREE JR.

*In Part 1 last month, author Philip J. Loree Jr. discussed the dilemma of federal court jurisdiction over requests to confirm or vacate arbitration awards where the case has been subject to Federal Arbitration Act Section 3 motions on staying the case. See the author's article, "The Fourth Circuit Weighs the Post-*Badgerow *Jurisdictional Anchor—and Finds It Won't Set,"42* Alternatives *73 (May 2024). This month, he continues a discussion of the power under FAA Section 3 to provide jurisdiction for the same federal court in a case to rule on Section 9 and 10 questions of confirming or vacating an arbitration award. Part 2 focuses on what a recent federal circuit case on the subject got right, where correction is needed, and what could happen soon on the point in the U.S. Supreme Court.*

* * *

Despite the existence of Federal Arbitration Act Section 3 on jurisdiction for stays in arbitration as discussed in Part 1 last month (cited above), the case of *SmartSky Networks LLC v. DAG Wireless Ltd.*, ___ F.4th ___, No. 22-1253, slip op. (4th Cir. Feb. 13, 2024) (available at https://bit.ly/4aviBLS), incorrectly concluded that FAA Sections 9 and 10 motions are always independent actions. (All FAA sections referred to in this article can be viewed at https://bit.ly/43h4buX).)

It determined that the very different procedural postures of *SmartSky,* an embedded proceeding, and *Badgerow v. Walters*, 596 U.S. 1, 142 S. Ct. 1310 (2022) (available at https://bit.ly/47CVvRG), an independent proceeding, were therefore irrelevant. (In *Badgerow,* the U.S. Supreme Court held that a basis for subject-matter jurisdiction—independent from the Federal Arbitration Act itself—must appear on the face of a standalone or independent petition to confirm or vacate an arbitration award and that independent basis cannot be established by "looking through" to the underlying arbitration proceeding.)

The reasoning *SmartSky* employed to justify this conclusion can be legitimately questioned. The court, for example, suggested that Section 9 and 10 applications are invariably independent actions because the Supreme Court in *Badgerow* "directed its subject matter jurisdiction at the matter that was before the district court–a contract enforcement action, not the employment-related lawsuit that was before the arbitrator. …" *SmartSky,* slip op. at 12.

But that question is relevant only to applications that constitute standalone, independent

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proceedings in which the merits are not before the court, and where the court has not stayed pursuant to Section 3 a plenary action that purports to address the merits.

The related assertions the *SmartSky* court made concerning the independent nature of Section 9 and 10 proceedings are likewise not applicable in the context of an embedded proceeding that has been stayed pursuant to Section 3. It is certainly true that once the award was made, the parties "were no longer litigating over their fraught business relationship[,]" that "those issues and claims had been resolved by the [Panel][,]" and that their "dispute [at the award enforcement stage] focused on the enforceability of the arbitral award." *SmartSky*, slip op. at 12.

But the stay authorized by Section 3 is supposed to remain in effect until the court determines that the arbitration has been finally resolved "in accordance with" the parties' agreement. The results of post-award litigation determine whether and when that is the case.

Were it not for the arbitration agreement, the district court would have ultimately adjudicated the matter—whether by trial or summary judgment—and issued an order or judgment finally resolving it. Because there was a stay pending arbitration, that stay is supposed to remain in effect until the matter, which was submitted to arbitration, is finally concluded.

The court's Section 3 jurisdiction must continue to allow the court to adjudicate post-award motions. It is the result of the post-award confirmation and vacatur litigation that finally resolves the dispute and finally determines when arbitration has been had according to the parties' agreement. And if the court ultimately grants a judgment confirming a final award, that judgment will reflect the final determination on the dispute's merits and will be entered in the stayed action.

The court also said that Section 9 and 10 proceedings are independent actions even in an embedded proceeding because "[t]o find it had jurisdiction over what was in essence a contract dispute among the parties, the district court had to 'look through' to the civil lawsuit and determine that a federal claim existed." *SmartSky,* slip op. at 12-13.

This assertion misapprehends what "look through" means. As previously discussed, the phrase means to look through to an underlying arbitration proceeding not before the Court. It does not mean to somehow "look through" to a proceeding that is already before the Court. That is not a "look through"—it's a "look at."

In an embedded proceeding, there is a suit on the merits of a federal question-governed matter before the court. The only question is whether, considering the Section 3 stay, the court has the continuing federal subject-matter jurisdiction to resolve motions that relate integrally to the stay because their outcomes will define how long the stay remains in place. Nothing in *Badgerow* forecloses—or could legitimately foreclose—filing in a Section 3-stayed proceeding Section 9 and 10 motions concerning the awards made in the arbitration that precipitated (and authorized) the Section 3 stay. There is no "look through" here.

Ready to Rule

The question: The Supreme Court is wrestling with the scope of the federal court system's power to adjudicate post-award petitions and motions involving the Federal Arbitration Act.

The implications: The focus is on jurisdiction. Advocates need to know where—state or federal?—and how to bring their arbitration-related cases.

The setting: The issue at press time awaits a U.S. Supreme Court decision. This article (and Part 1 last month) analyzes the most recent U.S. Circuit Court law that the nation's top Court will confirm, overturn, or modify.

Requiring a Basis

While the Court also points to *Badgerow* requiring a basis for subject-matter jurisdiction to "appear on the face of the petition" that requirement is not relevant in an embedded proceeding. An independent basis for jurisdiction need not appear on the face of a motion filed in a pending, stayed action over which the court already has subject-matter jurisdiction.

In an embedded proceeding, the independent basis for subject-matter jurisdiction appears on the "face" of the complaint, which has been stayed pending arbitration under Section 3. An application for Section 9 or 10 relief made in an independent proceeding must, of course, state an independent basis for subject-matter jurisdiction in the petition because there is nothing else before the Court to establish such jurisdiction.

The assertion that in an embedded proceeding the district court litigation is no longer pending is inaccurate. As noted in Part 1, the *SmartSky* court's assertion that in an embedded proceeding Section 9 or 10 applications "are not motions in a pending action; rather, they are separate actions independent of the related civil lawsuit," is not true.

Similarly, as the Court said, the complaint itself in the Section 3-stayed action could not serve as a "jurisdictional anchor" because it was "no longer pending before the district court district court[,]" and "all the issues contained therein were consolidated in the arbitration." That is also not accurate: if true, then there would be no need for a stay pending arbitration, the stay should have been dissolved, and the action dismissed on the merits.

None of that happened and there was—and remains—a live controversy over how the stayed litigation was supposed to have been finally resolved. And, as previously discussed, based on anchor jurisdiction, the resolution of the federal-question merits litigation will be a judgment entered in that litigation confirming the arbitrators' award that resolved the claims brought in that federal question-stayed suit.

Authority Rejected?

SmartSky rejected U.S Supreme Court authority on the court's FAA Section 3 powers.

The Court distinguished two U.S. Supreme Court cases that SmartSky cited in support of its anchor jurisdiction argument, *Marine Transit Co. v. Dreyfus*, 284 U.S. 263 (1932), and *Cortez Byrd Chips Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000). In *Marine Transit*, a case

that arose under the Court's admiralty jurisdiction, the U.S. Supreme Court wrote:

> And it is contended that, aside from § 8, the Act does not provide for the granting of an order for arbitration 'in a pending suit.' With respect to the last contention, it may be observed that § 3 provides for a stay in a pending suit until arbitration has been had in accordance with the terms of the agreement, and it would be an anomaly if the court could grant such a stay and could not direct the arbitration to proceed although the court, admittedly, could have made an order for the arbitration if no suit had been brought.

284 U.S. at 274-75.

Although the quote from *Marine Transit* would, for all intents and purposes, and if applied, control the outcome of this case, the *SmartSky* Fourth Circuit decision did not follow it because it concluded that it was dicta, not binding precedent, and because it believed that any precedential value it might have had was superseded by *Badgerow*.

The reason that the Fourth Circuit concluded it was dicta was because the *Marine Transit* Court's subject-matter jurisdiction was based on admiralty jurisdiction. In these circumstances, FAA Section 8 authorized parties in admiralty jurisdiction cases involving an alleged failure or refusal to arbitrate to commence by libel or seizure a proceeding to compel arbitration, and to authorize courts to direct arbitration and retain jurisdiction to enter judgment on a resulting arbitration award:

> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 8.

Because jurisdiction over the arbitration litigation was based on admiralty jurisdiction, and on Section 8, the Fourth Circuit dismissed the Section 3 discussion as dictum, i.e., discussion not essential to the holding of the case. Dictum does not constitute binding precedent, even though it may be persuasive authority.

SmartSky's determination that the Section 3 discussion in *Marine Transit* was dictum might arguably be correct—a matter for Scotus to decide—but, in any event, whether the Fourth Circuit should have followed *Marine Transit*'s clear, longstanding guidance as at least persuasive authority is a different question.

Furthermore, the U.S. Supreme Court in *Cortez* characterized that guidance as "precedent" and "holding[,]" strongly suggesting that, unlike the Fourth Circuit, *Cortez* did not consider the Section 3 discussion to be dictum.

Cortez, which was decided in 2000, relied on *Marine Transit*'s Section 3 discussion to explain one of the reasons that the venue provisions of FAA Sections 9 through 11 should be construed to be permissive, not mandatory:

> A restrictive interpretation would also place § 3 and §§ 9-11 of the FAA in needless tension, which could be resolved only by disrupting existing precedent of this Court. Section 3 provides that any court in which an action 'referable to arbitration under an agreement in writing" is pending "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. If an arbitration were then held outside the district of that litigation, under a restrictive reading of §§ 9-11 a subsequent proceeding to confirm, modify or set aside the arbitration award could not be brought in the district of the original litigation (unless that also happened to be the chosen venue in a forum selection agreement). We have, however, previously held that the court with the power to stay the action under § 3 has the further power to confirm any ensuing arbitration award. *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 275-76 (1932) ("We do not conceive it to be open to question that, where the court has authority under the statute… to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, ultra vires or other defect"). Habert in effect concedes this point, acknowledging that 'the court entering a stay order under § 3 retains jurisdiction over the proceeding and does not 'lose venue.'" [Citation omitted.] But that concession saving our precedent still fails to explain why Congress would have wanted to allow venue liberally where motions to confirm, vacate, or modify were brought as subsequent stages of actions antedating the arbitration, but would have wanted a different rule when arbitration was not preceded by a suit between the parties.

529 U.S. at 201-202 (emphasis added).

While *Cortez*'s reliance on *Marine Transit* was for purposes of demonstrating why interpreting Section 9's venue provision is permissive, the Court considered *Marine Transit* to be "existing precedent" and its Section 3 discussion to be a holding, not dictum.

> The Supreme Court may provide guidance on Federal Arbitration Act Section 3 stays and continuing jurisdiction under FAA Sections 9, 10, and 11.

The *SmartSky* appeals court, however, focused instead on how *Cortez* "does not hold or find that a court that has subject matter jurisdiction to enter a stay retains jurisdiction to later enforce an arbitration award." *SmartSky*, slip op. at 19.

The Court "therefore [did] not interpret the *Cortez* Court's discussion of the impact of a restrictive interpretation of the venue provisions in Sections 9-11 to set forth a blanket rule that a court that stays a case pursuant to Section 3 retains subject matter jurisdiction to enforce or vacate an award under Sections 9 and 10." Slip op. at 19.

Calling Scotus

Will the current Supreme Court's pending decision shed further light on whether

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Arbitration Practice

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SmartSky got it wrong (or right) on FAA Section 3? It could.

The U.S. Supreme Court is now poised in *Smith v. Spizzirri*, No. 22-1218 (docket page available at https://bit.ly/48wt09w), to decide, according to the question presented, "[w]hether Section 3 of the FAA requires district courts to stay a lawsuit pending arbitration, or whether district courts have discretion to dismiss when all claims are subject to arbitration." In the course of answering this question, it seems possible the Court may provide some guidance bearing on the relationship between Section 3 stays and continuing jurisdiction to hear post-award motions under FAA Sections 9, 10, and 11.

The case was argued on April 22. The respondents and an amicus brief supporting them addressed and backed the *SmartSky* decision in papers filed with the Court; the petitioners' attorney argued for continuing jurisdiction after an FAA Section 3 ruling, contra to *SmartSky*. A decision is expected before the Court's current term concludes at the end of this month. For details on the Supreme Court *Smith v. Spizzirri* argument, see Lee Williams & Russ Bleemer, "Today's Scotus: Does Federal Arbitration Act Sec. 3 on Litigation Stays Allow Dismissal?" *CPR Speaks* (April 22) (available here).

What Are *SmartSky*'s Strengths?

Having critiqued *SmartSky*'s reasoning, it is fair to ask what the decision's strengths are, if any. The answer to that question may depend on who is asking it.

From the standpoint of the federal courts, who are or should be concerned about docket strain, one of the decision's strengths is that, in the absence of an independent basis for diversity or federal question jurisdiction over the post-award application (for example, under FAA Chapter 2—Convention on the Recognition and Enforcement of Foreign Arbitral Awards (§§ 201 – 208), or FAA Chapter 3—Inter-American Convention on International Commercial Arbitration (§§ 301 – 307)), it directs post-award challenges to the state courts—even in situations where there is already pending a Section 3-stayed litigation on the merits of the arbitrable controversy over which the court has federal question, but not diversity, jurisdiction.

In a jurisdiction that permits an action stayed pending arbitration to serve as a jurisdictional anchor for post-award litigation, post-award challenges will frequently be heard by the federal court in which the suit was originally brought. But in a jurisdiction that follows the *SmartSky* approach, a greater number of post-award challenges will be heard by the state courts.

The net result under *SmartSky* is less work for the federal courts and more for their state counterparts. One can hardly blame federal judges if they see this as a positive development. How a busy state court judge might look at it is a different question.

That is especially so since, as *Badgerow* and *SmartSky* pointed out, those post-award challenges concern principally contract enforcement matters, which are governed by state law, not the merits of the underlying claim that resulted in the stayed lawsuit, which are governed by federal law. *SmartSky*, slip op. at 12 (quoting *Badgerow*, 142 S. Ct. at 1316-17 (citations omitted)).

As friend and colleague Richard D. Faulkner, a Dallas arbitrator, arbitration attorney, mediator and former state court trial judge, told the author,

> Payment of–compliance with—almost all arbitration awards irrespective of the basis of the underlying, now fully adjudicated claims, is only required as part of the "agreement for arbitration." Therefore, failure or refusal to pay or comply with the award is arguably merely a "local" breach of contract. Consequently, it is logical that there is no federal jurisdiction and motions to confirm, modify or vacate and such actions properly and exclusively belong in the state courts.

[*Editor's note*: Richard D. Faulkner and author Philip J. Loree Jr. have served together on numerous CPR Institute *YouTube* panels analyzing arbitration jurisprudence. They can be found on the CPR Institute's *YouTube* channel at https://www.youtube.com/@CPRInstituteOnline. CPR publishes *Alternatives*.]

Individuals or small-business parties in disputes with larger, more economically powerful ones, might welcome *SmartSky* because it should increase the number of award challenge matters decided in state, rather than federal court. While state arbitration law, and judicial views about award enforcement, differ from state to state, there is, in this author's experience, at least a perception that certain state courts may, all else equal, be more likely than their federal counterparts to vacate a questionable award.

That perception may hold true even where a state court is required to apply substantive FAA provisions. State courts, unlike their federal counterparts, are not bound to follow federal circuit courts' decisions interpreting the FAA, only those of the U.S. Supreme Court. But a state Supreme Court's interpretation of what the FAA means on a point not definitively resolved by Scotus may well differ from circuit court interpretations that are binding on federal courts sitting in the same state but not on the state courts.

As Faulkner, speaking of *SmartSky*, explained,

> In reality, this [*SmartSky* decision is] going to generate a morass. It also generates huge opportunities for creative mischief! Almost all states follow the specific procedures in their domestic arbitration versions of the Uniform Arbitration Act–Revised Uniform Arbitration Act. These can differ significantly from the provisions of the FAA. Texas "urban county" courts … are often very hostile to arbitration. I also am reminded of [California's] "increased ethical standards" which are arguably designed to further, not hinder arbitration. What fun!!

While individuals and small businesses might generally prefer a state forum for post-award challenges, there are nevertheless potential drawbacks that may favor their more economically powerful counterparts.

For example, certain states have 30-day deadlines for moving for vacatur of an award that may apply in state court proceedings, even proceedings concerning FAA-governed arbitration. See, e.g., Conn. Gen. Stat. §

52-420(b); 42 Pa. C.S. § 7314(b); & 42 Pa. C.S. § 7321.24(b). These may be traps for unwary, would-be award challengers who might believe their applications are governed by the longer, service-within-three-months deadline, see 9 U.S.C. § 12, only to find their motions to vacate time-barred.

What Are *SmartSky*'s Weaknesses?

One thing that certain practitioners may conclude about *SmartSky* is that it might tend to increase the time and monetary cost of FAA litigation, and thus its inefficiency. If a federal court has already compelled arbitration, the judge presiding over the stayed federal action may, for what it is worth, be familiar with the arbitration agreement, the underlying dispute, the parties, and counsel. (To be sure, the value added by prior involvement in the matter may be insignificant or nonexistent given the exceedingly narrow scope and summary nature of Section 9, 10, and 11 proceedings.)

It also may be quicker, easier, and less expensive to simply move for confirmation in a stayed action, than to commence a new summary proceeding in state court, pay a new filing fee, and serve process again.

Another *SmartSky* weakness is that it exposes parties to potentially complex and expensive state-court litigation over complex preemption issues. In addition to the shorter limitation periods already mentioned, state statutes may impose procedural and other requirements that are different from the FAA and would not likely be applied in an FAA-governed court proceeding, but which state courts might conclude are not (or might not be) preempted by the FAA's substantive provisions. Not satisfying these requirements could, for example, result in the forfeiture of defenses to arbitration, including defenses concerning arbitrability. *See, e.g.*, N.Y. CPLR 7503(b) & (c).

State arbitration law may not permit certain vacatur grounds that some federal courts might recognize under the FAA (e.g., manifest disregard of the law), but permit other vacatur grounds that a court under the FAA would likely not. These state-law differences, and the difficulties often inherent in determining which are substantive and which procedural, provides fertile ground for complex preemption disputes that might not even arise if the application could have been made in federal court.

For example, New York recognizes various public policy defenses to arbitrability and award enforcement, at least some of which would probably be deemed preempted in federal court. See, e.g., *Merrill Lynch v. Benjamin*, 1 A.D.3d 39, 43-46 (1st Dep't 2003) (listing certain public policy defenses to arbitration).

But whether a state court might deem them preempted by the FAA is not entirely clear. While, for example, New York state courts may look to the Second Circuit for guidance on FAA-related issues, the only federal court that can ever review a state court preemption dispute, and the only one whose FAA precedent is binding on state courts, is the U.S. Supreme Court.

> *SmartSky* should increase the number of award challenge matters decided in state, rather than federal court.

While no doubt many state courts (and certainly many New York state courts) do a good job of policing the scope of FAA preemption, the more these issues are addressed by state courts, the greater the risk that federal and state court decisions applying the FAA will diverge, creating more problems for Scotus, and for practitioners.

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ideas. They develop their ideas from courses or trainings, continuing education programs, articles, and their experiences mediating. Over time, they develop routines that they may perform on "automatic pilot."

I have been developing "real practice system" theory (see "Real Practice Systems Project," *Indisputably* (Dec. 20, 2022) (available at https://bit.ly/3V2LudS) and Parts 1 and 2 of this series linked at the top), which argues that each mediator has a unique practice system, albeit one that often is based on vague, somewhat unconscious, and unsystematic understandings.

Mediators' systems grow out of their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and subjects in their cases. From their mediation experiences, they develop categories of cases, parties, and behavior patterns, and they design routine procedures and strategies for dealing with recurring challenges before, during, and after their mediation sessions.

Educational Programs

I recently conducted educational programs with two groups of mediators to learn why they developed their particular practice systems and encourage them to refine their work consciously and systematically. On Sept. 22, 2023, I led a session at the annual conference of the Association of Missouri Mediators. On Oct. 11, 2023, I presented the same program to mediation panelists of New York's U.S. District Court for the Southern District.

The Missouri and New York programs each lasted 90 minutes and used a hybrid format including people attending in person and by video. The PowerPoint I used in both programs can be found at https://bit.ly/3vGDCVo.

The programs consisted of (1) a brief summary of real practice system theory, (2) an exercise in which attendees wrote answers to a series of self-assessment questions about their individual practice systems, (3) small group discussions about their insights from the exercise, and (4) a plenary discussion about their insights.

The questions in the exercise asked attendees to individually reflect on: (1) their contributions to their mediations (e.g., history, education, training, experiences, values, goals, and benefits sought from mediation practice), (2) descriptions of the attendees and types of cases they mediate, (3) their practice system design of activities before and during mediation sessions, and (4) their reflections on their practices to improve their systems.

In the Missouri presentation, I asked people to write their answers on a blank sheet of

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paper or their computers. In the New York presentation, I gave people a worksheet to answer the questions, which is available at https://bit.ly/3J9wPXe.

The directions for the group discussions asked people to discuss: (1) the most important factors affecting how they mediate, (2) what they learned from the exercise, (3) how they could improve their mediation techniques, and (4) if it would be worthwhile to work more on their reflection exercises.

Survey Methodology

I conducted a survey at the end of these programs to find out what the mediators learned from the discussions and how they might improve their practices. The survey can be found at https://bit.ly/3U3Gu81.

This article presents the results of those surveys, comparing the responses of the two groups. Based on the survey results, next month's concluding Part 4, "Helping You Do The Best Mediation You Can," suggests a practical program for mediators to understand and improve their practice systems, individually and in groups.

In the Missouri program, I received 17 responses from 26 attendees, a 65% response rate. In the New York program, I received 46 responses from 65 attendees, a 71% response rate. The frequencies of responses can be found here: https://bit.ly/4aqflSD.

All but one of the survey questions were open-ended, and I coded the responses into categories. Using this qualitative methodology enabled me to learn attendees' thinking in their own words. As a result, the findings have high *internal* validity.

In other words, the data pretty accurately reflect the attendees' views. If they could choose only from a few pre-determined response options, their responses would not necessarily fit their perspectives.

The findings have limited *external* validity. In other words, the findings are not necessarily generalizable to other mediators. This study is based on a small, non-random sample of mediators who were interested in attending a program on self-assessment of their mediation systems. Thus, the results should be less applicable to mediators who don't share these interests.

The sample consisted of mediators with certain backgrounds described below and the results might be different for mediators with different backgrounds. The mediators in this study reacted to a particular educational program. Mediators might respond differently to a different educational experience. Their feedback could lead to improvements in the educational program, which hopefully would produce even more favorable reactions than the mediators in these programs.

Considering the premises of real practice system theory, the limitations in external validity are not serious problems. The theory argues that mediators' systems are influenced by so many possible variables that practitioners can benefit more by understanding and designing their own unique systems than by relying on empirical generalizations.

Empirical findings can helpfully suggest potential factors that might affect mediators' thoughts and actions. Ultimately, however, mediators should do the best they can to design their particular systems consciously and intentionally by incorporating a range of inputs, including analyses of their own experiences.

Models and (Mini-) Theories

The inquiry: Mediators' operational goals, methods, and objectives—their real practice systems.

The purpose: Implementing the checklist approach described in the past two issues, the author discusses two programs he conducted to help mediators develop "their particular practice systems and encourage them" to refine their work consciously and systematically.

Next month: These developments come together to encourage the best mediation practice possible.

Backgrounds And Identities

The backgrounds of attendees in the two programs reflect the membership of the two organizations. The Missouri mediators handle a wide variety of cases including business, community, construction, consumer, education, elder, family, personal injury, and workplace disputes. They are not required to be attorneys.

New York program attendees are members of a panel of volunteer mediators maintained by the U.S. District Court for New York's Southern District. Generally, these mediators are members in good standing of a U.S. district court, have been trained in mediation, have had substantial exposure to mediation, and participate in continuing education.

The survey asked, "Please summarize your background and experience (e.g., professional role(s), amount of experience, types of cases handled)" and produced 15 responses from Missouri attendees and 46 responses from New York attendees. Because it is an open-ended question, attendees could choose to mention any aspects of their backgrounds or experience.

This question was designed to produce short responses, and attendees mentioned factors that seemed most relevant to them. As a result, the responses provided more valid descriptions of attendees' *subjective identifications* than their *objective characteristics*.

Predictably, more New York attendees identified as attorneys than the Missouri attendees. Fifty-seven percent of the New York attendees identified as current attorneys and 22% identified as retired attorneys. By contrast, only 47% of the Missouri attendees identified as (current) attorneys and none identified as retired attorneys. Forty percent identified as non-attorneys.

The types of cases that attendees handled were the most relevant identifier for both groups. Seventy-three percent of the Missouri attendees and 83% of the New York attendees identified themselves in this way. But they reported handling different types of cases. Forty-seven percent of the Missouri attendees mentioned handling family cases, 27% mentioned employment cases, and 13% mentioned

commercial cases. By contrast, 57% of the New York attendees mentioned commercial cases, 41% mentioned employment cases, and only 4% mentioned family cases.

Many attendees identified by the length of their professional experience, including 53% of Missouri attendees and 83% of New York attendees. Forty percent of the Missouri attendees and 59% of the New York attendees identified as having practiced for at least 20 years.

Factors Affecting Attendees' Actions

The survey asked, "What are the most important factors affecting the way you mediate?" and produced 16 responses from Missouri attendees and 44 responses from New York attendees.

This question prompted a wide range of responses with generally similar patterns by both sets of educational program attendees. The responses reflect the attendees' perceptions and intentions about their mediation approaches, which presumably are imperfectly related to their actual behavior in mediation. We all have biases, especially about ourselves. So these results should be interpreted cautiously.

About half of both groups (Missouri, 56%; New York, 48%) referred to various aspects of the mediation participants' mindsets and behaviors. (Participants include parties and/or attorneys.) Attendees most often referred to participants' expectations and interests in reaching agreement.

One attendee mentioned "parties' realism about the cost benefits of litigating." Another referred to the "expressed and hidden agenda of the parties." Two attendees identified the participants' "sophistication."

As a related matter, about one-fifth of attendees (Missouri, 19%; New York, 20%) discussed how the parties' representation by attorneys or by themselves affected the dynamics. Some noted that attorneys' cooperation (or lack thereof) could make a difference.

One identified the "nature of lawyer-client relationship and who controls the decision-making." Some referred to whether the parties were pro se—representing themselves—with one attendee saying that these parties were the "most difficult."

A substantial proportion of the attendees indicated that the type of case affects their mediation approach (Missouri, 38%; New York, 27%). Most simply wrote "type of case" or some variation. That might be because it seems obvious that the parties, issues, and dynamics differ in family, employment, and commercial cases, for example.

Many attendees, especially in the Missouri group, cited their own mediation goals as among the most important factors affecting their approach (Missouri, 38%; New York, 18%). Seven attendees cited their desires to help parties in various ways. These included "wanting to make sure the parties feel heard," helping give parties "what they want," solving problems, promoting self-determination, reaching decisions, avoiding "long, drawn-out litigation," and "obtain[ing] closure and control over the conflict." Various attendees referred to their personal values, including collaboration, promoting fairness, seeking consensus, solving problems, "being a person of peace," and supporting the attendee's diversity and inclusion work.

One quarter of the attendees described certain techniques as being among the most important factors affecting their mediations (Missouri, 25%; New York, 25%). By far, attendees most often mentioned preparation before mediation sessions. One attendee said that it is "important for me to do as many pre-mediation sessions as possible for me to adjust and adapt the way I mediate to the specific matter, counsel and clients."

Another identified "preparation, meeting with the attorneys ahead of time. Finding out what their experiences have been with mediation, experience with each other, asking how I can be helpful." Several mentioned the importance of listening.

Attendees also identified other techniques including "setting the context of the mediation in an opening statement," using caucuses to "find middle ground," and "conveying to the parties the important opportunity mediation presents to obtain closure and control over the conflict."

Perhaps not surprisingly, a substantial proportion of the New York attendees alluded to their evaluation of the cases but none of the Missouri attendees did so (Missouri, 0%; New York, 20%). Several attendees referred to the facts and merits of the parties' respective positions. Others listed "parties' realism about the cost[s and] benefits of litigating" and "how far the parties are from a reasonable risk assessment."

What Attendees Learned

The survey asked, "What did you learn that you wouldn't have learned without this exercise to write a description of your mediation approach?" It produced 15 responses from Missouri attendees and 37 responses from New York attendees.

Many of the attendees simply appreciated talking with other attendees (Missouri, 47%; New York, 16%). Most of the comments indicated that they liked learning about others' mediation techniques, noting similarities and differences with their own approaches.

As intended, the programs prompted many of the attendees to better understand their own techniques, often specifically mentioning them as parts of their practice system (Missouri, 40%; New York, 27%).

Some said they learned the "importance of having a specific mediation practice system," "all the different factors that affect how I mediate" and "look[ing] at [my] system in a methodical way." Others said, "I learned that I have a system and that I can be reflective about what that system is" and "I actually have great flexibility in dealing with a variety of matters and use a variety of systems depending on the situation."

Another reported "thinking about 'how' I mediate instead of being more on autopilot." For some attendees, the exercise prompted them to recognize specific aspects of their practice systems such as their focus on parties' readiness to mediate, opening statements, and their facilitative approach.

The exercise also sparked some attendees to recognize a need for and improvement of their mediation techniques and reflection about them (Missouri, 13%, New York, 22%). One attendee identified a need to think more about preparation and another recognized a "need to focus more on asking questions of the parties about their risk assessment [rather] than going straight to offering mine."

Many focused particularly on a need for more self-reflection. One highlighted "the

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importance not only of self-reflection subsequent to mediation, but also to contemplate how my background personally [and] professionally has impacted why and how I mediate." Another said, "I found I need to be more thoughtful about my system and to do more 'after-action' analysis." One recognized "the need for rigorous analysis in my introspection and the need to commit my observations/reflections in writing."

Fortunately, most of the attendees felt that they learned something important from the program. Only a small proportion said that they learned little or nothing (Missouri, 0%; New York, 11%).

Changing Techniques

The survey asked, "What changes, if any, do you plan to make in your mediation techniques?" It produced 16 responses from Missouri attendees and 40 responses from New York attendees.

Some attendees indicated that the program prompted them to become more conscious and intentional in their techniques (Missouri, 25%; New York, 15%). Responses included that attendees would "revisit my customary practices. Think outside my normal ways," "work less on instinct; think out [my] approach more carefully," "formally write out my techniques," and "develop some kind of action plan."

Several attendees said that they plan to reflect on their mediations after the cases end (Missouri, 25%; New York, 15%). One mentioned writing these reflections, not simply relying on their memories. And some plan to talk with attorneys after mediations to get their feedback.

The exercise prompted some attendees to increase their preparation of the participants before mediation sessions (Missouri, 6%; New York, 28%). One wrote, "I intend to place greater emphasis on pre-mediation discussions with counsel (and, since I can't speak to the parties directly, exploring with counsel the expectations and understandings of their clients)."

Another said, "Especially with the Court assignments–do more upfront work with the attorneys to make sure they and their clients are ready for the mediation session." A third attendee said, "I plan to have separate telephone calls with counsel in addition to the joint pre-mediation telephone call."

Attendees mentioned a variety of other changes they planned to make in their practices (Missouri, 25%; New York, 33%). These included listening more (especially to individual parties), probing to learn participants' expectations, emphasizing that parties retain control in mediation unlike at trial, incorporating apologies more, being "less judgmental," refraining from or delaying expressing opinions unless requested, observing other mediators, and co-mediating.

The vast majority of the attendees planned to make some changes in their practice following this program. Only 13% of attendees in each group said that they did not plan to make any changes.

What Worked Well

The survey asked, "What worked well with the exercise?" and produced 17 responses from Missouri attendees and 42 responses from New York attendees. Both groups had similar reactions.

The attendees said they loved the small group discussions (Missouri, 88%; New York, 74%). One attendee noted, "loved my group. I never met them before and could have spent another 30 minutes or more." Another said, "It was nice to explore the whys and the hows as to how they impact the work" and one said that the discussion "will influence my approach going forward." One attendee said that there was an "intimate sharing of experiences" and the five people in the group are "contemplating starting our own peer mediation group."

Part of the benefit of the program was hearing others' views and getting new ideas (Missouri, 24%; New York, 29%). One attendee said that the program prompted them to "reflect upon how and why I mediate the way I do." Similarly, another said, "Answering the questions highlighted the things I had not thought about."

The program stimulated thinking about how attendees might improve their practices. One said that it "got me to thinking about what I do as a mediator and why in order to become a better mediator." Another said that it was helpful to "break[] down the steps" in mediation and identify "questions to address in devising a formal program design."

Some attendees credited the questions in the worksheets for prompting useful reflection (Missouri, 12%; New York, 21%). Some also mentioned reading John Lande, "Ten Real Mediation Systems," University of Missouri School of Law Legal Studies Research Paper No. 2022-11 (Nov. 7, 2022) (available at https://bit.ly/4aK43IB) in advance; and some cited the PowerPoint linked above, and the presentation, as helpful.

The final open-ended question was "What other reactions did you have to this exercise?" It produced 12 responses from Missouri attendees and 25 responses from New York attendees. The reactions were overwhelmingly positive (Missouri, 83%; New York, 52%). Attendees described it as "worthwhile," "very positive," "thought provoking," "very practical and helpful," "valuable," "relevant to the work we do," "stimulating and challenging," "great," and "excellent."

One said that it "shows the need for constant self-improvement." Another said that it provided a "critical look at my pre-mediation activities." Another said that it "recharged" their approach to mediation.

Many of the positive responses were about attendees learning about their approaches in mediation (Missouri, 17%; New York, 24%). One attendee said that it "highlighted how much I did not know." Another said that it was helpful to "think[] about what I do and what factors might lead me to do it."

Along the same lines, another said that it is "valuable to pay attention to [how] one's values and goals affect what we do." One said that it is "such a treat to have time to pause and reflect. Usually [I'm] in too much of a hurry to ask myself these kinds of questions."

Only a few attendees responded that the exercise was not helpful (Missouri, 0%; New York, 8%).

The final question was a multiple-choice question, "After the program, do you plan to work on this exercise some more?" It produced 17 responses from Missouri attendees and 44 responses from New York attendees. The options were "yes," "maybe," and "no."

The program stimulated most attendees to plan to continue working on these issues (Missouri, 65%; New York, 50%). About a third of

the attendees weren't sure (Missouri, 29%; New York 32%). A small proportion said that they don't plan to continue working on this (Missouri, 6%; New York, 18%).

The Upshot

This study supports the fundamental premises of real practice systems theory.

Mediators have unique practice systems based on numerous variables including their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and subjects in their cases. While mediators consciously use some techniques, much of their behavior is based on unconscious routines. Through reflection, individually and in groups, mediators can become more aware of their systems and consciously decide to refine and improve them.

The responses by Missouri and New York attendees highlight some similarities and differences in attendees' systems. Both groups identify themselves primarily based on the types of cases they handle. The Missouri group seems to handle a wider range of cases and not specialize as much as the New York group. Both groups also identify based on the length of their experience.

As a group, the Missouri attendees reflect a wide range of experiences. As discussed above, about half of the Missouri attendees identified as attorneys and 40% are not, whereas the New York attendees all are attorneys and about a quarter are retired attorneys.

This study could not tell if the attendees' experiences affect their behaviors, though it seems quite likely that they do.

The participants' mindsets and behaviors were the most important factors affecting the attendees' mediation techniques as identified by both groups. They also mentioned the type of case, which may be related to the participants' mindsets and behaviors.

For example, the profiles of participants in commercial, employment, and family cases–the three types they mentioned most often–clearly differ from each other quite a bit.

About one fifth of attendees referred to whether the parties were represented by attorneys or were self-represented. The attendees also frequently cited their professional goals and preferred techniques as factors affecting the way they mediate.

One of the few striking differences between the Missouri and New York attendees was that none of the former group alluded to their evaluation of cases while 20% of the latter did so. Only a small proportion of attendees mentioned their training as a factor and only a small number of those attendees mentioned traditional mediation theories.

When asked what they learned from the program, the largest proportion of attendees said that they recognize techniques or practice systems they used. This suggests that they generally are not conscious of significant elements of their practice or think of what they do as a system. The program prompted some attendees to perceive a need to be more conscious and intentional in their work and to reflect more about what they do.

A large majority of both groups said that the small group in discussions in the program were helpful.

Overall, the attendees found the educational programs to be very valuable, with a substantial proportion saying that it helped them learn about their own mediation approaches. Two-thirds of the Missouri attendees and half of the New York attendees plan to continue working on these issues after the program, and about one-third of each group said that they might do so.

The main suggestions for improvements of the educational program were to have attendees prepare more before the program and provide more time for discussion.

Action Research for Continued Learning

This study is action research designed to help analyze and develop the Real Practice Systems Project.

As the term suggests, action research involves research intended to promote social action. Ideally, it is part of a cycle of research and action, where research findings promote desired goals and actions, which then are studied to analyze the effects of the actions.

This study was designed to test two premises. First, it analyzes the theory that each mediator uses a unique practice system based on a complex combination of factors including their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and subjects in their cases.

While mediators consciously use some techniques, much of their behavior is based on unconscious routines. Through reflection, individually and in groups, mediators can become more aware of their systems and consciously decide to improve them.

Second, it tests the effects of an educational program to help mediators become more aware of their individual practice systems and to motivate them to develop more conscious and intentional techniques in their systems.

This study supports both premises.

Attendees described varied combinations of multiple factors that they consciously use in their work. These factors go far beyond the ideas in traditional mediation theories. Attendees recognized elements of their system that they use unconsciously—on "autopilot," as one attendee described.

> Each mediator has a unique practice system growing out of their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and subjects in their cases.

Many of the attendees learned that their mediation practice actually is a system, and about the systems that they use. Mediators often focus solely or primarily on actions during mediation sessions. Real practice system theory includes actions before and after mediation sessions. This includes careful preparation for mediation sessions and reflection afterward.

Attendees were enthusiastic about discussing these issues during the program and many were interested in continuing to analyze their systems after the program. Some expressed interest in participating in ongoing educational practice groups.

* * *

In next month's concluding Part 4, "Helping You Do The Best Mediation You Can," John Lande suggests a practical program for mediators to improve their practice systems, individually and in groups.

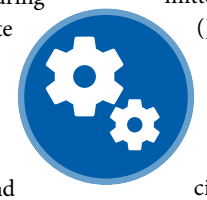
ADR Technology

Online Dispute Resolution's Roots Grow As It Moves to Permanent from Pilot Programs

BY CLAUDIA DIAZ DEL RIO

The Covid-19 pandemic had a profound impact on numerous aspects of professional life, including the operation of courts and alternative dispute resolution mechanisms.

Online dispute resolution, best known as ODR, although not a novel concept during the pandemic was adopted by courts during that time as a way to continue to operate as stay-at-home orders were enacted. Although those stay-at-home orders have since been retracted, ODR court programs continue across the country … and continue to have positive and widespread effects.



In hand with this shift, many courts decided to track and report ODR use and the outcomes this integration had. Courts found that by initiating pilot ODR programs, they saw benefits that would outlast the Covid-19 pandemic.

Michigan, for example, was one of the first districts to have a court-sponsored ODR platform launched in 2014. But since 2014, an estimated 17 states implemented ODR services with nearly two-thirds of these ODR sites being added between 2018 and 2019. See Online Dispute Resolution Pilot Program Report, Florida Courts (January 2021) (available at https://bit.ly/3JXzDal), citing "Online Dispute Resolution in the United States: Data Visualizations," American Bar Association Center for Innovation (2020).

Ohio, notably the Franklin County Municipal Court's small claims division, launched one of the earlier court-sponsored ODR platforms around October 2016. Focusing primarily on debt small claims cases, this ODR pilot program was seen as a great additional resource for debtors. Most debtors simply do not show up to their hearings, but ODR offers more accessibility and flexibility and has proven more effective in increasing engagement in these types of cases. See "Case Studies in ODR for Courts," Joint Technology Committee, National Center for State Courts (January 2020) (available at https://rb.gy/qceqfx).

Specifically, the integration of technology into court systems through ODR offered improved efficiency and accessibility for litigants, especially those navigating high-volume, low-complexity cases like traffic infractions and small claims.

The experiences of courts nationwide, including Florida, illustrate the transformative potential of ODR in modernizing our current court landscape and providing a more equitable judicial system.

In Florida specifically, the Florida Supreme Court initiated an ODR pilot program in 2019, with a report initially due by September 2020. Due to delays with ODR vendors and other technical difficulties, the pilot was extended to February 2020, with the report deadline pushed to January 2021. The Florida ODR pilot program and its report, and the implications for practice in 2024 and beyond, are discussed in more detail below.

Understanding Practices And Challenges

ODR uses technology to resolve disputes and encompasses diverse methods such as mediation.

While first used in commercial settings, ODR increasingly has been piloted and integrated into court systems, mainly as a way for courts to remain in operation during the Covid-19 pandemic. Proponents advocate its wider and continued use, as ODR is seen as a way to enhance access to justice, amongst other positives. See more on the Online Dispute Resolution Project of the National Center for State Courts webpage at https://www.ncsc.org/odr.

ODR helps mitigate barriers involved with traditional in-court dispute resolution by alleviating factors such as time costs of physical court attendance, and the intimidation factor of in-person court appearances in front of a judge or other legal professionals.

And it can be especially beneficial for self-represented litigants ealing with the complexity of civil and evidence procedure. Note that pilot ODR programs often prioritize small claims cases, where most parties are self-represented, as an initial step. See "Online Dispute Resolution in the United States, Date Visualizations," above.

Significantly, while ODR addresses some access to justice issues, it does not mitigate all barriers. It can exacerbate accessibility for those lacking the reliable technology needed to participate in ODR. Despite the nuances, courts offer some relief in this aspect by allowing participants to access their sessions through teleconferencing and video conferencing.

Court Integration

The transition to ODR in court programs from simple commercial settings has gained momentum and been documented by various sources throughout the years. Notably, in 2020, the ABA Center for Innovation surveyed the extent of ODR implementation in courts nationwide, presenting its findings visually in the report cited and linked above, "Online Dispute Resolution in the United States, Date Visualizations. "

The ABA report illustrates that even though some state courts introduced ODR sites as early as 2014, the majority of courts began setting up ODR sites between 2018 and 2019. Early ODR technology adopter Michigan (see above) has been progressively expanding its ODR sites over time.

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The ABA report highlights that court ODR sites do not cover every case type that may appear before the court. Most often the cases offered for ODR include traffic, civil debt, and small claims. See "Online Dispute Resolution in the United States, Date Visualizations," above.

Additionally, the ABA report examined computer access, revealing that more than 90% of the population has access to at least one type of computer, as per U.S. Census Bureau data. The remaining 10% of individuals rely solely on smartphones or tablets, which may not provide an optimal experience for ODR users. See "Online Dispute Resolution in the United States, Date Visualizations," above.

This information is relevant in terms of access to justice because if ODR is to be considered as a solution to accessibility problems within the justice system, reliable technology is a prerequisite for participants.

That data presaged major changes, though the source and timing couldn't have been predicted. A surge in ODR can certainly be attributed to the Covid-19 pandemic. The pandemic affected all elements of society, commerce and government, and for the judicial system, it forced courts to be innovative in real time as it worsened. As courts increasingly relied on ODR during the pandemic, they also began collecting data to understand its impact.

Notably, in Utah, Judge Brendan McCullagh played a key role in redesigning small claims processes, through the use of a streamlined, accessible, and user-friendly ODR system. resulting in the development of Utah's system. See "Judicial Perspectives on ODR and Other Virtual Court Processes," Joint Technology Committee, National Center for State Courts (May 2020) (available at https://bit.ly/3wlkzAo). (The JTC is an effort of the Williamsburg, Va.-based nonprofit NCSC, with the Conference of State Court Administrators and the National Association for Court Management.) The report notes:

> With more than 20 months of ODR case data to evaluate, Utah can now confidently report that ODR does lower the default rate, one of the objectives of their initiative. There is also evidence that some defendants are now making informed decisions not to respond to a collection action. "With respect to default rates, evaluators have to keep in mind that not all defaults are the same. In most cases [prior to ODR], respondents default without ever touching the court system; today, some respondents still default, but only after getting into the system and obtaining a sense of their defenses, if any. With respect to the latter, we can say that these respondents made an informed choice that it would be more convenient and perhaps cheaper for them to default rather than contest the matter."

Id., quoting personal email correspondence that is cited in the report.

In January 2023, the New York Courts Pandemic Practices Working Group released a report offering recommendations based on data collected over the preceding years. Ultimately, New York, like other states, came to this conclusion: the continued and permanent use of technology and ODR to solve disputes within the court system is a net positive, and current operations and programs should be improved upon to provide better access, reliability, and support for ODR participants. See "New York Courts' Response to the Pandemic: Observations, Perspectives, and Recommendations," New York State Unified Court System (January 2023) (available at https://bit.ly/4dChso7).

Furthermore, in January 2021, the New York Courts launched an ODR program for small claims cases, as detailed in a New York State Unified Court System Office for Justice Initiatives report. The pilot program offered digital support for unrepresented users. It operated on an opt-out model and comprised two phases: an educational component consolidating resources and multimedia content, and a negotiation space offering automated bidding, direct negotiation, and text-based mediation for eligible participants. See more at "Law Day Report," New York State Unified Court System, Office for Justice Initiatives (May 2021) (available at https://bit.ly/3JW4GDF).

Computer Update

The stage: Online dispute resolution has been around. Post-pandemic, it is solidifying its status in courts nationwide.

The results: Debates over whether ODR is justice have given way to court programs improving processes and expanding areas in which it is used.

The takeaway: Watch your local jurisdiction. Comment on pilot programs and work with officials on how to make them better. Be part of the evolution, because ODR is permanent.

Examining Florida

The state courts discussed above highlight the diverse landscape of ODR implementation across the nation. It serves as an illustration of the continued growth of ODR court systems even after the peak of the Covid-19 pandemic. Florida further exemplifies this trend, experiencing its own surge of ODR pilot programs and initiatives.

The Executive Council of the Alternative Dispute Resolution Section of the Florida Bar supported ODR's permanent inclusion in the state's courts as far back as 2020. See Gary Blankenship, "ADR Section Supports Permanent Online Mediations," *Florida Bar News* (June 12, 2020) (available at https://bit.ly/3yhcxZI) (advocating for the recognized positive impact ODR integration can have for courts and ODR participants).

In part, thanks to the feedback received from groups like the Executive Council, Florida courts were prompted to launch a statewide ODR pilot program. See Gary Blankenship, "Online Dispute Resolution Pilot Goes Statewide," *Florida Bar News* (May 17, 2021) (available at https://bit.ly/44Ai8Xj); see also Administrative Order No. AOSC21-10, Florida Supreme Court (March 15, 2021) (available at https://bit.ly/4dEYkGq).

The order stated that the Florida Supreme Court initiated ODR assessments as early as 2018. The Supreme Court directed a pilot program to be established to further study the application of ODR in Florida courts. Overseen by the Online Dispute Resolution Workgroup, a

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ADR Technology

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collaboration between the Commission on Trial Court Performance and Accountability and the Committee on Alternative Dispute Resolution Rules and Policy, select Florida judicial circuits began implementing ODR in 2020, particularly in small claims and civil traffic infraction cases.

In 2021, the Online Dispute Resolution Pilot Program Report was published (see first cite and link at the top), offering initial findings and suggestions for the continuing improvement of ODR in Florida courts, as identified by the Workgroup of the Commission on Trial Court Performance and Accountability and the Committee on Alternative Dispute Resolution Rules and Policy (referred to below as the Workgroup).

For the most part, the Workgroup suggested that strategically implemented ODR can be a valuable tool for courts, offering round-the-clock access to address cases remotely, particularly benefiting those with time constraints.

ODR allows asynchronous communication, potentially reducing power imbalances and increasing comfort levels for users engaging with the justice system. In addition, the Workgroup recommended in the report that while ODR is not for all case types, it seems to work best for high-volume, low-complexity cases, at least to start with. See Online Dispute Resolution Pilot Program Report," above. This encompasses small claims cases, traffic cases, and some family dispute cases. The Workgroup also advocates for an opt-out participation model similar to other state's models like New York.

Florida's efforts to integrate ODR into the court system culminated in a July 18, 2023, Florida Supreme Court order which expands the scope of ODR implementation beyond just pilot programs. The order permits judicial circuits statewide to incorporate ODR in small claims cases, civil traffic infractions, and dissolution of marriage cases not involving children.

The order further authorizes judicial circuits to incorporate ODR in the three case types, plus, along with prior authorizations, incorporate ODR in other high-volume, low-complexity cases—potentially consumer debt and certain civil infractions.

> This administrative order ends the "pilot" status for the use of ODR and authorizes judicial circuits to employ ODR on an ongoing basis in any high-volume and low-complexity case type that the chief judge deems appropriate.

See Administrative Order No. AOSC23-41, Florida Supreme Court (July 18, 2023) (available at https://bit.ly/3UBD4IU); see also Jim Ash, "Supreme Court Authorizes Circuits to Pilot the Concept of 'Online Court' for Small Claims Cases," *Florida Bar News* (July 20, 2023) (available at https://bit.ly/4bjO8kT).

Embracing Technology

In the aggregate, the Covid-19 pandemic seems to have forced courts to reconcile with a long-ago truth, the future of legal practice is the integration of technology as a viable tool to allow courts to serve a variety of needs to a greater amount of people. In that sense, Florida is par for the course compared to other states integrating ODR into the court system.

The integration of technology into courts, exemplified by ODR pilot programs across the country, signifies a mostly positive shift in how we access justice now. Pilot programs, like the ones in Florida, offer valuable data collection opportunities before full ODR integration. These pilot programs demonstrate how best ODR can be used by courts—for example, in high-volume, low-complexity cases like traffic infractions and small claims.

In addition to courts, public institutions are spearheading the advancement of ODR through their own initiatives and research. One such prominent organization is the National Center for Technology and Dispute Resolution at the University of Massachusetts-Amherst. The NCTDR is a pioneer in the ODR world. The scope of its work goes beyond traditional boundaries, studying and advancing diverse sectors where ODR is increasingly prevalent, and expanding beyond the more established areas of judiciary and commerce.

The NCTDR has helped to establish ethical considerations and frameworks for ODR, curated and documented various ODR resources, and is constantly exploring new ODR developments within diverse fields as pointed out above, but also user behavioral research and insights, etc. For the latest developments in online dispute resolution, see the National Center for Technology and Dispute Resolution at the University of Massachusetts-Amherst, at https://odr.info.

Ultimately, technology, instrumental during the Covid-19 pandemic, had become a permanent fixture in the judicial system, offering potential improvements in access and efficiency. By studying its impact, incorporating user feedback, and learning from the research and studies conducted by public organizations, courts can refine digital tools to enhance dispute resolution, ensuring a more equitable and efficient civil legal system for all parties involved.

CPR News

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engagement of Africans in international arbitration and the continued development of the skills of arbitration practitioners and acceptance of arbitration within the continent."

In 2007, CPR's National Task Force on Diversity in ADR created an Award for Outstanding Contribution to Diversity in ADR to recognize a person or organization who has contributed significantly to diversity in the alternative dispute resolution field. Submissions for the award are reviewed by a 15-member panel consisting of past winners and CPR officials.

"We are excited to be able to give CPR's Diversity Award to someone recognized across the continents for her exemplary work in increasing diversity in ADR," said CPR Senior Vice President Helena Tavares Erickson in a statement, adding, "Dr. Onyema has spent the better part of her professional career championing the visibility of African neutrals in the ADR world. Her initiatives have had a direct, positive impact in the greater ADR community."