Alternative Dispute Resolution: Leaving the courtroom, is the grass really greener on the other side?

Presented by the Young Advocates Committee

P. Jean Baker, Vice President
American Arbitration Association
Washington D.C.

Raphael Lee
Marsh & McLennan Companies
New York, NY

William K. Whitner
Paul Hastings LLP
Atlanta, GA

Moderator: Terry Moritz, Goldberg Kohn, Chicago, IL
Mediate, Arbitrate, or Litigate Disputes?

By P. Jean Baker – Alternative Dispute Resolution Committee Newsletter, Fall 2012, Vol. 17, No. 1

Deciding whether mediation, arbitration, or litigation should be the preferred way to resolve a potential or pending dispute is not as straightforward as many attorneys believe. Pros and cons are associated with use of each of the three major methods of resolving disputes. The key is to select the best dispute resolution option or combination of options following an in-depth discussion with the client.

To Mediate?
Mediation works best when it is voluntary and the participants—both parties and attorneys—are cooperating with each other. The potential for settlement is greatly enhanced when the parties seek to resolve the current dispute with a minimum of acrimony so that they can maintain a long-term business or personal relationship. Parties who will have zero contact following mediation, are not willing to make concessions, or are going through the motions of mediation because it is required are more inclined to reach an impasse. Mediation may be the preferred alternative dispute resolution (ADR) option if parties are seeking a confidential forum; it may also be the only form of ADR that a public entity is legally authorized to use. Rarely will parties agree to voluntarily submit to arbitration after a dispute has arisen, but many times they will agree to mediate to avoid litigation. Mediation can also be used prior to trial to narrow legal issues or resolve discovery disputes.

Provided mediation results in a settlement, it is less expensive in terms of legal fees and costs than the alternatives. Commentators disagree as to how much discovery, if any, needs to take place before mediation. From my experience, parties and legal counsel need to have engaged in sufficient investigation and discovery to fully understand what would constitute a reasonable settlement offer. Attorneys who fail to conduct this assessment run the risk of leaving client money on the mediation table—prompting buyer’s remorse and a refusal by the client to voluntarily comply with the terms of the mediated settlement. Or the mediation ends in an impasse because of inflated and unrealistic client and/or attorney expectations. Telling a client that a case isn’t worth as much as she had expected can be a difficult discussion for an attorney to initiate. Hiring an expert to deliver the bad news adds to the costs, but it can greatly enhance the potential for a negotiated settlement.

Or Not to Mediate?
Engaging in an unsuccessful mediation prior to either arbitration or litigation not only adds to the costs, but also a party may have revealed, to its detriment, important information concerning case strategy. Because mediation is rarely conducted via either telephone or videoconference, international parties or parties residing on different coasts may incur substantial travel expenses. Mediators are not licensed or regulated. There is no universal requirement that all mediators adhere to a code of ethics. And because mediation is viewed as a consensual process, legislatures and courts have not been concerned about the potential lack of due process—for example, a mediator failing to reveal a potential conflict of interest. Confidentiality cloaks the vast majority of mediations. So who really knows what a mediator did or did not say behind closed doors with only one party present? For this reason, careful selection of a mediator is crucial.

Because much of what is said occurs during private caucus with just the mediator and one side, nothing prevents a party from lying, and nothing prevents the mediator from relying upon the lie when discussing settlement options with the other side. To avoid this, experienced mediators bring the parties together in joint session to confirm the basis for reaching agreement on settlement terms. Material representations by both parties upon which the other side relied should be documented in the settlement agreement.

To Arbitrate?
A law firm compared the estimated time and costs of arbitrating versus litigating a complex civil dispute. Total time for litigation was 4.3 years, and total costs ranged from $727,000 to $1,357,500. In sharp contrast, the total time for arbitration was 11 months, and total costs ranged from $323,200 to $610,000. Savings derived from arbitrating consisted of 3.4 years in time and from $408,800 to $747,500 in anticipated costs. Most of the cost savings came from: (1) reduced legal fees, (2) simplified pleadings, (3) restricted motions practice, (4) limited discovery, and (5) no right to an appeal. However, the more arbitration begins to mirror litigation, the smaller the cost savings.
Parties can further reduce costs by customizing the arbitration process at two points in time: pre-dispute during contract negotiations or post-dispute during settlement discussions. Cost-saving provisions include the following: (1) to reduce unnecessary expenses associated with the filing of prehearing motions (such as motions in limine or motions for summary judgment), require that permission be obtained from an arbitrator before such motions can be filed; (2) if the technology or science underlying a dispute is cutting edge, require the filing of Daubert-type motions prior to the introduction of expert testimony or reports; (3) specify the qualifications for prospective arbitrators and, if appropriate, limit the number to one; (4) because neither the rules of evidence nor the rules of civil procedure apply, agree to the preparation of joint-exhibits books and demonstratives; (5) in lieu of in-person hearings, agree to submission of documents only or desk arbitration consisting of submission of documents and telephonic hearings; (6) impose strict time limits that can only be waived by the arbitrator for substantial good cause; (7) tailor discovery to fit the needs of the parties and require arbitrator approval based upon substantial good cause for additional discovery; and (8) specify that the award shall not be reasoned unless agreed to by both parties.

Arbitration may be the best approach to resolution if the parties have no interest in preserving an ongoing relationship and neither side is willing or able to make concessions. Arbitration awards do not create legal precedent, so the award typically only binds the parties to a specific dispute. As a result of ratification of the New York Convention for the Enforcement of Foreign Arbitral Awards by more than 150 countries, arbitration awards are readily enforceable worldwide. Neither enforcement of national court judgments nor mediated settlements are similarly enhanced by any international treaties of comparable scope.

Or Not to Arbitrate?
As with mediators, arbitrators are not licensed or regulated, and there is no universal requirement that all arbitrators adhere to a code of ethics. Yet, arbitrators have more decision-making authority than a sitting judge, and it is virtually impossible under federal and state law to overturn an award. Adequate due process protections are not guaranteed by either the Federal Arbitration Act (FAA) or the Uniform Arbitration Act (UAA). Additional protections are available in the 13 states that passed the Revised Uniform Arbitration Act (RUAA). The RUAA provides for adequate notice, right to legal representation that cannot be waived, disclosure of potential conflicts, and an independent mechanism for challenging an arbitrator for bias. Rules of various ADR providers vary as to the due process protections provided to parties—for example, AAA’s rules for consumers, employees, and healthcare recipients contain more protections than are contained in the domestic rules governing business-to-business commercial disputes.

A large number of arbitrations are administered by the arbitrator and not by a neutral third party, such as the AAA. This can create legal issues when the ad hoc arbitrator fails to follow the procedures agreed upon by the parties, or when she introduces less than unbiased behavior into the process. For these reasons, courts favor enforcement of foreign arbitral awards rendered during an arbitration administered by a neutral third party, such as the ICDR or the ICC. Some foreign countries, such as China, have strict requirements concerning administration of arbitration for purposes of enforcement. For example, courts in China will not enforce an arbitration agreement that does not reference an ADR administrator.

Unfortunately, with increased usage worldwide, arbitration is beginning to mirror litigation. Users and legal counsel must take proactive steps to prevent arbitration from becoming the functional equivalent of a “trip to court.” Failing to identify and implement best practices can result in arbitrations that are as costly, time consuming, and as unpredictable as going to court without the benefit of an appeal.

To Litigate?
Only a court can render a decision regarding legal rights that is binding on third parties. If the majority of documents and/or witnesses are controlled by the other party, you may need access only provided by the Rules of Civil Procedure. You may want to retain your right to an appeal for “bet the company” business transactions or disputes. China is a signatory to the NY Convention, but it mandates arbitration of what Chinese law classifies as “non-foreign” disputes in China by using Chinese laws, rules, and nationals as the arbitrators. Joinder of parties or consolidation of disputes arising out of different contracts is not automatically available if arbitration is governed by either the FAA or a majority of state arbitration statutes. Many times, larger companies routinely use the threat of unbridled litigation against smaller or economically weaker business partners to obtain more favorable settlement terms should a dispute arise.

Or Not to Litigate?
Trying to navigate the court system in the United States with its strict rules and legal precedents is almost impossible
without legal representation—unless the dispute falls within the jurisdiction of a small claims court. Criminal cases take precedence on court dockets, so it can take years before a civil lawsuit comes to trial. The outcome of the trial varies greatly depending upon who hears the cases—a full-time judge trained in the law or a jury comprised of unpaid and untrained individuals. Trial decisions are routinely appealed, crowding the dockets of the appellate courts and further delaying final resolution by years.

Litigation in the United States is characterized by time consuming and costly rules and procedures: endless depositions, open-ended requests for the production of electronically stored documents, lengthy and repetitive interrogatories. Dispositive motions in litigation are especially expensive because they must be accompanied by a well-written and well-reasoned memorandum of law supplemented by affidavits. Each side is given a chance to respond, followed by a hearing on the motion. Then the court issues a decision, only to have it appealed.

No one should really want to litigate in a foreign country if the parties are from countries that are signatories of the NY Convention or a similar treaty that provides for enforcement of foreign arbitral awards.

**Conclusion**

There is no right answer about the appropriate forum for resolution of every type of business transaction or pending dispute. Matching the forum to fit the fuss requires a thorough analysis of a number of variables—an analysis that should be conducted jointly by the attorney and the client. By focusing efforts upon rightsizing the resolution process, attorneys will provide an invaluable service to their clients.

P. Jean Baker is vice president of the American Arbitration Association in Washington, D.C., and is editor of the ABA Section of Litigation’s ADR Committee newsletter.
Top 10 Things You Need To Know About ADR

P. Jean Baker, Esq., American Arbitration Association

The practice of law is permeated by the use of alternative dispute resolution (“ADR”). Increasingly young lawyers are retained to handle commercial and business matters that demand knowledge of a broad spectrum of ADR practices and procedures. Competent representation requires that the young attorney fully understand the range of ADR options available, the interplay between the different ADR processes, and how to achieve the desired result for the client.¹ Yet few lawyers receive specialized ADR instruction or skills training during law school. This leaves them ill prepared to deal with the increasingly complex legal nuances associated with the use of mediation and arbitration. This article will attempt to identify the top ten things that every young lawyer needs to know about the current practice and use of ADR.

1. Don’t Expect the Clients to Know What They Signed

Don’t expect clients, even sophisticated business clients, to know whether their dispute is governed by an ADR provision. Unfortunately, some agreements to mediate or arbitrate include procedural terms and conditions that can impose substantial loss to the client for the unwary attorney. For example, there are clauses that provide for forfeiture of attorney’s fees if mediation is not commenced prior to initiation of either arbitration or litigation.² Other clauses require the filing of the demand for arbitration within a specified time period to prevent the forfeiture of legal rights and claims. To prevent unwelcome surprises, always request in writing copies of applicable ADR agreements, calendar for follow up, and tag the file for review the moment the documents arrive. Thoroughly review and fully understand the nature of any ADR agreements signed by your client. If you are unsure concerning the impact of a procedural term or condition, seek immediate assistance from someone knowledgeable in the area.

2. There Isn’t a Universal Set of Arbitration Procedures

The rules of the major ADR sponsoring-organizations (American Arbitration Association (“AAA”), JAMS, CPR) do not include the same administrative procedures.³ For example, AAA’s rules provide for administration by a neutral third party (AAA). In marked contrast, CPR’s rules specify that the arbitrators shall administer the proceeding. In addition, ADR sponsoring-organizations do not utilize a single set of administrative rules for every type of dispute. For example, AAA has specialized sets of rules that govern the administration of different types of disputes, such as commercial, consumer, construction or employment. These sets of rules differ markedly concerning such matters as permissible discovery and the remedies or relief available.

Adding to the complexity within a single set of rules, such as AAA’s Commercial Arbitration rules, administrative procedures may vary greatly depending upon the amount of the claim(s) or counterclaim(s). For instance, the large complex case (“LCC”) procedures apply when the claim(s) or counterclaim(s) exceed $500,000. In sharp contrast to the expedited or regular procedures, the LCC procedures provide for depositions, interrogatories and requests for production of documents and the use of three arbitrators when the claim(s) or counterclaim(s) exceed $1,000,000. To minimize surprise and ensure suitability, prior to either agreeing to the use of a specific set of rules or initiating an arbitration proceeding, practitioners should obtain a copy of and carefully review the referenced administrative procedures.

3. Arbitration Rules Are Not Static

The ADR-sponsoring organizations, such as AAA, change their rules. Most of the time the changes are minor in scope, but not always. For instance, on July 1, 2003, the AAA adopted major revisions to their commercial arbitration rules. These changes: (1) provide for the mandatory use of the LCC procedures when claim(s) or counterclaim(s) exceed $500,000; (2) authorize arbitrators under the LCC procedures to order depositions, interrogatories and production of documents; (3) provide that party-appointed arbitrators shall be neutral unless by written agreement of the parties; (4) require disclosure of potential conflicts by both neutral and non-neutral arbitrators.
arbitrators; (5) authorize the AAA to remove an arbitrator based upon the content of a disclosure. Prior to either inserting a reference to or initiating an arbitration under a specific set of rules, practitioners should routinely ascertain whether the rules have recently been revised and if so the extent of the revisions.

4. International Arbitrations Differ Markedly From Domestic Arbitrations

Different laws, regulations and customs govern international arbitral proceedings. Thus, the procedures used to administer international arbitrations differ markedly from the procedures used to administer domestic arbitrations. Just as the domestic rules of the different ADR sponsoring-organizations differ markedly, there are major differences in the way that international arbitrations are administered using either the AAA’s ICDR rules, the ICC’s rules or the UNCITRAL rules. For example, AAA’s international rules provide for administration by a neutral third party, AAA. In contrast, UNCITRAL’s rules specify that the arbitrators shall administer the proceeding.

If the arbitration agreement does not specify use of a specific set of either domestic or international rules, the AAA applies the UNCITRAL definition of what constitutes an international dispute. If deemed to be international in scope, the AAA’s International Centre for Dispute Resolution (“ICDR”) will administer the case using the ICDR’s International Dispute Resolution Procedures. If the arbitration agreement specifies use of a set of AAA’s domestic rules, but the dispute is deemed by AAA to be international in scope, the ICDR will administer the proceeding using both the domestic rules and the Supplementary Procedures for International Commercial Arbitration unless the parties agree otherwise. Use of the Supplementary procedures is highly recommended if a party will be seeking to enforce the resultant award in a foreign court under the auspices of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards.

5. State Arbitration Statutes Are Not Uniform and Are Subject to Revision

In the absence of party agreement, provisions of a state’s arbitration statute will govern whenever a dispute does not affect interstate commerce or the applicable state statute contains a procedure that does not conflict with the provisions of the FAA and application of the state procedure is necessary to effectuate an arbitration agreement. In 1995 the Uniform Law Commissioners decided that the time was ripe to modernize state arbitration statutes by promoting passage of the Revised Uniform Arbitration Act (“RUAA”). In essence the RUAA turns the concept of party autonomy on its head. Under the FAA and UAA, arbitration is essentially an opt-in process. If the parties want a special administrative procedure to apply, such as expanded discovery rights, the parties have to include such a provision in their arbitration agreement. In contrast, the RUAA approaches arbitration as an opt-out process. Thus, the RUAA includes a number of administrative procedures, some of which may not be waived. To date the RUAA has been adopted without amendment by three states and with amendments by five others. Currently seven additional states are actively debating whether to adopt, revise or reject the legislation.

6. Class Arbitration – An Evolving Legal Concept

In Green Tree Financial v. Bazzle (02-634, 6-23-03), the U.S. Supreme Court held that when an arbitration agreement or submission is silent concerning the availability of class-wide arbitration and the arbitration agreement or submission provides that the arbitrator shall resolve disputes “relating to” the underlying contract, the arbitrator must determine whether the contract forbids class arbitration. In response to this decision, AAA immediately issued Supplementary Rules of Class Arbitrations. These rules supplement AAA’s existing rules (commercial, construction, employment, consumer, etc.) and provide for a very non-traditional arbitral proceeding.

On June 15, 2009, the U.S. Supreme Court decided in Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., No. 08-1198 that the FAA does not permit arbitrators to impose class arbitration solely on the basis that an arbitration agreement that is “silent” regarding class treatment.

---

4 Id.
5 A copy of the UNCITRAL definition is available on the American Arbitration Association website at www.adr.org. Founded in 1926, the not-for-profit American Arbitration Association is the world’s leading provider of conflict management and dispute resolution services.
7 Id.
8 A copy of the Supplementary Rules of Class Arbitrations is available on the AAA website.
On April 27, 2011, the U.S. Supreme Court found in *AT&T Mobility LLC v. Concepcion* (No. 09-893) that the FAA preempts the California Supreme Court’s *Discover Bank* rule, which held that class action waivers in arbitration agreements were unconscionable and unenforceable.

On November 9, 2012 the Supreme Court granted certification in a case that will address whether federal arbitration law permits the invalidation of arbitration agreements on the basis that the agreement does not permit class arbitration (*American Express Co. v. Italian Colors Restaurant*, No. 12-133, 667 F.3d 204).

7. Arbitrators Issue Subpoenas, but Courts Enforce Them

Arbitrators do not enforce subpoenas or discovery orders. Courts provide the mechanism for such enforcement. Prior to March 12, 2004, the process for either taking the testimony of a witness or enforcing a discovery-related order against a person in another state was fairly straightforward. A party to the arbitration proceeding obtained a subpoena signed by the arbitrator(s). The subpoena was entered as an order of the appropriate court in the state where the arbitration hearing was being conducted. The court order was taken to the state in which the witness resided and either a subpoena or an order upon which a subpoena could be based was issued by the appropriate court in that state. If the subpoena was ignored, the party seeking enforcement returned to the appropriate court in the state in which the witness resided and obtained an order to either compel testimony or find the witness in contempt. Much of this multi-step procedure was purely a formality and, thus, steps two and three could be done ex parte.

On March 12, 2004, the U.S. Court of Appeals for the Third Circuit created a new split among the circuits when it ruled that the FAA does not allow arbitrators to issue subpoenas compelling only the pre-hearing production of documents (*Hay Group, Inc. v. E.B.S. Acquisition Corp. et. al.*, 360 F.3d 404 (3d Cir. 2004). The *Hay Group* ruling is a direct rebuke to the findings of the Eighth Circuit in *Security Life Insurance Co. of America* (228 F.3d 865 (2000) that while an arbitrator is not explicitly authorized by the FAA to require a non-party or third party to produce documents alone, it implies that arbitrators may require production of documents prior to a hearing and there is nationwide jurisdiction to enforce this type of subpoena.

Following *Hay Group*, the 2nd Circuit in *Stolt-Nielsen SA v. Celanese AG*, (430 F.3d 567 (2005) added another impediment to enforcement of this type of subpoena by holding that federal court requires an independent basis for jurisdiction other than the FAA, such as diversity or federal question.

8. Party-Appointed Arbitrators

On March 1, 2004, revisions to the original 1977 Code of Ethics for Arbitrators in Commercial Disputes took effect. Although the preamble stresses that it is preferable for all arbitrators to serve in a neutral capacity, the new Canon X addresses exemptions to certain code provisions for party-appointed partisan arbitrators. According to Canon X, partisan party-appointed arbitrators “may be predisposed toward the party who appointed them,” but they “should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.” Canon X arbitrators also must disclose whether they intend to communicate with the party that appointed them, which would make them free to communicate without need for continuing updates. Canon X arbitrators, however, are prescribed from communicating to appointing parties certain information, such as deliberations and any final or interim award, in advance of disclosure to all participants. As early in the arbitration as possible, party-appointed arbitrators are obligated to ascertain and disclose whether he or she will be acting as a neutral or non-neutral. In the event of doubt or uncertainty, party-appointed arbitrators will serve in a neutral capacity until such doubt is resolved.

9. Arbitrator Conduct

__9__ Arbitrators can, however, subpoena non-parties to appear before them for a pre-merit hearing and bring the documents with them to this hearing. But the document subpoena can be enforced only so long as the person being subpoenaed was subject to the district court’s jurisdiction.


__11__ See also Guyden v. Aetna (2006 U.S. Dist. Lexis 73353 (D. Conn. 2006); Dynegy Midstream Services L.P. v. Trammochem (451 F.3d 89 (2d Cir. 2006).

__12__ A copy of the 2004 Revised Code of Ethics for Arbitrators in Commercial Disputes is available on the AAA website.
In addition to applying a presumption of neutrality, the revised code of ethics imposes the following substantive new responsibilities on all arbitrators, including party-appointed arbitrators. (1) An affirmative and on-going duty to disclose interests or relationships likely to affect impartiality or which might create an appearance of partiality.  (2) Limits on the permissible communications between arbitrators and parties are clarified and new guidelines are established regarding communications between party-appointed arbitrators and the chair of the tribunal in tripartite arbitrations.  (3) In addition to imposing impartiality and independence standards that form the basis of the presumption of neutrality, the arbitrator is obligated to determine his or her competence and availability to serve in a case.

In response to the anticipated changes to the ethics code, AAA revised their commercial arbitration rules effective July 1, 2003.  The revisions (1) require that party-appointed arbitrators meet impartiality and independence standards, unless the parties specifically agree otherwise.  (2) Require all arbitrators to disclose circumstances likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence.  (3) Clarify that the disclosure obligation remains in effect throughout the arbitration.  (4) Explains that disclosures made pursuant to the rules are not to be construed as an indication that the arbitrator considers the disclosed circumstances likely to affect his or her impartiality or independence.  (5) Adds additional language outlining an arbitrator’s responsibility to be impartial and independent, as well as grounds for disqualification.  (6) Provides that the AAA may on its own initiative disqualify an arbitrator.  (7) Clarifies acceptable and unacceptable ex parte communication between parties and arbitrators or candidates for arbitrator.

10. Old Time Litigation

Arbitration is like old time litigation where you meet your witnesses for the first time at the hearing and you do not know the answers to questions in advance.  If you get any discovery it will be far less than what is currently available under the Federal Rules of Civil Procedure.  Since there is an element of surprise in arbitration, it is essential that the attorney question his or her own client very carefully in order to assess the other party’s position and legal arguments.  You must then tailor the written and oral presentation to fit the knowledge level of the decision maker(s).  For instance, if the arbitrator is a non-attorney, the practitioner should consider providing a legal education during the hearing.  In contrast, if the arbitrator is an attorney the presentation might require technological or business content.  Finally, seriously consider the use of demonstratives to heighten the effectiveness of the presentation since there are fewer constraints in arbitration.

Conclusion

Widespread use of a variety of ADR processes has added to the existing complexities of legal practice a labyrinth of traps for the unwary.  A proliferation of ADR related contract clauses, rules, statutes and court decisions has become standard.  Young lawyers need to vigilantly seek to acquire the expertise necessary to effectively incorporate the increasingly complex use of ADR processes into their commercial and business practices.

*P. Jean Baker, Esq. is a vice president with the American Arbitration Association in Washington, DC.  The article expresses her private views and is not intended to reflect in any manner the views of the AAA.

Mediation is not a one-sized process that fits resolution of every type of dispute. There are a variety of mediation approaches that can be used, including facilitative, evaluative, transformative, collaborative, elicitative, and wisely directive. Every year seems to spawn a new book followed by a different approach to mediation.

The best mediators function to varying degrees as negotiation coaches for the participants, both attorneys and parties. They are able to employ multiple styles at different points during a mediation based on their assessment of what approach is most likely to move the participants toward resolution. The majority of mediators, however, lacking the skill, training, or experience, typically use one of four basic styles.

**Style One: Facilitative—Broad**

I refer to this as the blank style of mediation. When the mediator enters the room, his or her mind is a blank slate ready for the parties to write upon. This approach is most often used by non-attorney mediators seeking to avoid allegations related to the unlawful practice of law. The primary focus regarding selection of the neutral is the mediator's process skills—not subject-matter expertise. The goal is to quickly resolve a fairly simple and straightforward dispute, such as those involving small claims matters or neighborhood spats.

To accomplish that goal the mediator seeks to help the parties define, understand, and resolve problems the parties wish to address. Typically the parties are not represented by legal counsel, so the mediator encourages the parties to consider their underlying interests rather than their legal positions. The mediator helps the parties generate and assess nonlegal solutions designed to accommodate both parties' interests. This type of mediator does not make assessments or predictions concerning legal outcomes nor propose solutions or provide settlement recommendations.

**Style Two: Facilitative—Narrow**

I refer to this as the preserve the relationship style of mediation. This approach is most often used by attorneys or industry professionals who possess both in-depth process expertise and specialized legal or industry knowledge. There is usually an ongoing personal or business relationship that the parties want to preserve. Thus, although the parties are usually represented by legal counsel, the mediator is tasked with taking a less adversarial approach. The goal is to resolve a legal dispute and preserve an existing relationship.

The mediator accomplishes this goal by helping the parties realistically assess their situation by asking insightful “what if” questions based on the mediator’s underlying subject-matter expertise. The most revealing or challenging questions are asked during private discussions with each party and legal counsel, referred to as a caucus. The questions are intended to provide each party insight into both sides legal positions, their mutual relationship needs, and the consequences of non-settlement—legal as well as relational. Firmly committed to the belief that the burden of settlement must rest with the parties, the mediator does not request or study relevant documents; never makes recommendations; and does not apply pressure or use his or her own assessments, legal predictions, or proposals to promote settlement.

The mediator does, however, serve as a communications coach by demonstrating ways in which better communication techniques can prevent tensions from escalating and minor misunderstandings from erupting into full-blown disputes. By learning how to jointly approach, discuss, and resolve the current problem, the parties have a much better chance of preserving a mutually satisfactory relationship over the long term.

**Style Three: Evaluative—Broad**

An evaluative approach to mediation is more directive than either of the two facilitative approaches. I refer to this
approach as the neutral evaluation style of mediation. To be used successfully, the mediator must possess both process skills and in-depth subject-matter expertise. At the very minimum, the mediator must possess sufficient knowledge to be able to evaluate the situation, propose potential solutions, assess party-proposed solutions, and assist with drafting the settlement agreement. This approach is typically used to resolve family law disputes and by mediators with collaborative commercial law practices. One or both parties may not be represented by legal counsel; the mediator will review relevant documents both before and during the session.

The goal is for the mediator to help the parties fully understand their legal circumstances and settlement options prior to entering into an agreement. The mediator accomplishes this goal by moving beyond asking leading questions to making direct observations, predictions, and assessments, either in private caucus or joint sessions. While explaining his or her view of the situation, the mediator will emphasize the parties’ interests over their stated legal positions. The mediator’s recommendations will consist of options designed to address the underlying interests of all interested parties rather than as compromises on discrete narrow issues. Because the mediator typically assists with drafting, the settlement agreement tends to emphasize the mediator’s understanding of the legal circumstances at least as much as that of the parties and legal counsel.

**Style Four: Evaluative—Narrow**

I refer to this as the settlement judge style of mediation. This approach works best when the mediator is perceived as knowing as much if not more than the attorneys. This is the most adversarial of the four approaches. It is typically used when having an ongoing personal or business relationship isn’t a priority. It is the preferred approach when an attorney has a client control problem or the parties have totally unrealistic expectations resulting from watching too many *L.A. Law* reruns. It is frequently used by retired judges to resolve property damage or personal injury disputes resulting from auto accidents. The principal strategy is to help the parties understand the strengths and weaknesses of their legal positions and the likely outcome at trial.

To accomplish this goal, the mediator will carefully study relevant documents, such as pleadings, depositions, reports, and mediation briefs prior to the start of the mediation. During mediation, the mediator will employ a range of evaluative techniques, including proposals, predictions, assessments, and recommendations. Recommendations will focus on resolving discrete narrow legal issues.

**Knowing When to Hire a Mediator**

There are three situations that clearly indicate a need for assistance from a neutral third-party mediator. The first is the bad blood scenario, which occurs when you or your client are unable or unwilling to surface and defuse conflicts in a non-confrontational way because of an emotional involvement that you or your client have with either opposing counsel or the other party. I once had two attorneys get into a fist fight during mediation. While legal counsel was being escorted from the building by security I mediated a settlement directly with the truly disgusted parties.

The second situation is the bad communication skills scenario. This occurs when you or your client is unwilling or unable to vary the content or manner in which you or your client deliver messages to the other party and opposing counsel. The first step to successful negotiation is to understand that hearing a message is not the same as really listening to the message. To get someone to really listen to what you are saying and grasp the meaning, you need to know how to tailor your delivery of the message so that it matches the listener’s preferred communication style.

The third situation is the rookie negotiator scenario. This occurs when you are asked to negotiate with an individual—either opposing counsel or the other party—who is a more experienced or accomplished negotiator and the outcome is extremely important to your client. Negotiation is a skill set that must be learned and practiced. Law schools do not routinely teach this skill set, and some of us are just inherently less effective negotiators than others. Do not hesitate to seek assistance from a mediator if you will be going up against a more skillful opponent.
Selecting the Right Mediator

It has been noted in numerous articles that mediation is only as good as the mediator. So how do you identify the right mediator? Professor Leonard L. Riskin has written extensively on mediator style. His seminal text on the subject is titled “Mediator Orientations, Strategies, and Techniques.” He distinguishes the different approaches based on how narrowly or broadly a mediator defines a problem and whether a mediator typically uses facilitative or evaluative strategies and techniques.

To assist in evaluating a particular mediator’s style, Professor Riskin created a two-part survey. The first part measures the scope of a mediator’s problem-solving activities, while the second part measures the strategies and techniques typically employed by a mediator. By administering the survey and cross-referencing the responses, you can identify a particular mediator’s preferred approach and match the approach to the type of dispute and the needs of your client.

If you are unable to get the prospective mediator to complete the survey, the next best way to identify the right mediator is by asking process-related questions, such as how do you avoid impasse or how do you approach a generation of potential solutions. If the mediator looks like a deer in the headlights, you might want to go to the next name on the prospective mediator list. In addition to process questions, always elicit the following information: specifics concerning mediator skills training, number and types of mediations conducted, and references from attorneys who represented clients during mediations conducted by the prospective mediator.

P. Jean Baker Esq. is vice president with the American Arbitration Association.