Supplement to the Los Angeles and San Francisco
Daily Journal
JANUARY 22, 2020

THE RESOLUTION ISSUE

The Changing Face of Arbitration

Meet Our Newest California Neutrals

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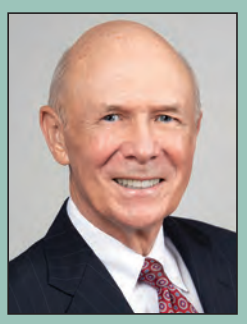

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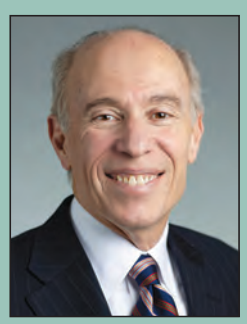

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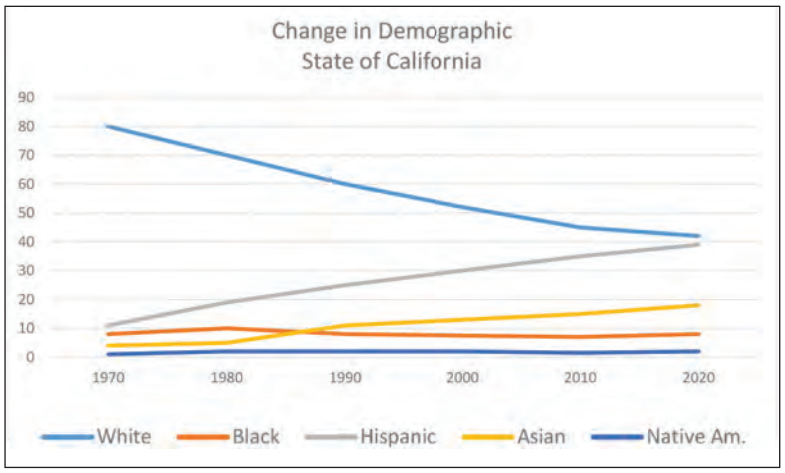

FROM THE DAILY JOURNAL

Dear Reader:

In the mid-1970s, when the alternative dispute resolution industry began to take root, roughly 75% of Californians identified as white – a designation that has dwindled to less than 40% today.

Much has been written and said in recent years about the fact that the face of the industry has not mirrored the changing demographics. Less has been said about the progress the industry has made in this regard. The fact is, the industry has sought to attract more minorities, women and younger people to the profession.

Drivers of this change have included a major push started under Gov. Arnold Schwarzenegger and accelerated under Gov. Jerry Brown to diversify the state courts, from which the ADR industry draws the bulk of its talent. A bill passed last year aimed at attracting more international arbitration to California has also drawn more minorities into ADR, especially people who speak Asian languages.

In our cover story, "The changing face of arbitration," we highlight some of the minorities, women and young people who are reshaping the industry today. They are younger and many of them have not followed the traditional path through the judiciary into the profession.

We also explore some of the reasons more minorities and women have not gravitated to the industry. They are the same human emotions that tend to hold all of us back: worries about acceptance, fears of change and, as with most situations, money. We hope this issue helps to ease some of those emotional hindrances and inspires men and women of all backgrounds to consider becoming part of an industry that has become such a crucial part of the American judicial framework.

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The Changing Face of *Arbitration*

BY JOHN ROEMER
Special to the Daily Journal

From top: Angela Reddock-Wright, Lexi Meyer, Hiro Aragaki

Arbitration in California entered new territory Jan. 1, when SB 707 took effect to nudge ADR providers toward greater diversity on the rosters of arbitrators they offer clients.

From now on, providers must report arbitrator candidate aggregate data that take account of ethnicity, race, disability, veteran status, gender identity and sexual orientation as reported by the arbitrators.

The issue gained national attention after the rap mogul Jay-Z complained in 2018 that there were nearly hardly any neutrals on a roster of arbitrators in New York available to hear his trademark and contract dispute over a clothing line. In early 2019 a selection of African-American candidates was offered and the beef was smoothed over, demonstrating a point the rapper had made earlier: "Everybody needs a chance to evolve."

But even before the Jay-Z controversy, the ADR industry in California tried to diversify its arbitration panels, a reflection of the state's diverse population and business community.

JAMS was the first major ADR provider to add an inclusion rider option in 2018, seeking to increase the number of women appointed as arbitrators. The clause is modeled on the Equal Representation in Arbitration pledge, which JAMS signed onto in 2016. Said Kimberly Taylor, JAMS' senior vice president and chief legal officer, "We've identified this as a challenge. We can provide a diversity of neutrals, but the parties have great latitude in whom they select. Will reporting the demographics move the needle? We're certainly in favor of anything that helps."

In 2019, Taylor added, JAMS amped up its effort by bringing on a diversity program manager to work with law firms, house counsel and affinity bar organizations to broaden the selection of mediators and arbitrators.

Hiro N. Aragaki joined JAMS last year. He has worked as a neutral since 2001 and teaches international and domestic commercial arbitration and mediation at Loyola Law School. "Very experienced older judges have been the norm in the past," he said. "Now, more sophisticated users of ADR are realizing that just because you were a judge, that doesn't necessarily make you a great neutral."

As for finding Asian-Americans in the field, "It makes sense to have a diverse panel, not just along race and gender but also things like practice background and expertise, but the reality is that there are very few racial minorities working now," Aragaki said. "And although there are lots of successful Asian-American litigators, increasing diversity on neutral provider rosters isn't easy. Even if providers do have diverse rosters, that doesn't mean you'll be selected. For example, Asian parties are not necessarily going to select Asian neutrals, and not all at JAMS are equally busy. SB 707 is a positive development and even though change comes slowly, it's happening."

The new law addresses an old problem. "We've been too traditional. The industry has not been progressive," said Lars C. Johnson of Signature Resolution LLC in Los Angeles. "Go into my office, the neutrals are older guys." Johnson is 46. "I'm darn near the youngest guy doing what I do in Southern California," said the mediator and arbitrator, a former plaintiff-side personal injury trial lawyer. "I connect with the younger lawyers who appear before me. I can bridge ethnic and cultural and

age differences."

Johnson said he represents the future. "Glad to say, my firm took me on enthusiastically. We'd love to see more young people of different backgrounds come knocking. We're pushing change here."

Maria-Elena James joined ADR Services Inc. 18 months ago, following 30 years on the state and federal bench. As a judge and woman of color she sometimes saw racial and gender prejudice directed her way in court, but that hasn't been a problem for her in her new role. "Nobody can deny that bias exists, but I can't complain because I've been doing so well here," she said. "The intent of the new law is a good one — because we serve the public, it really helps to bring diversity into our workplace."

She said she has spoken¬ to younger colleagues of color about joining her in the ADR industry, but finds resistance. "There's an anxiety about whether they'd be chosen [from rosters of neutrals to serve on panels], and it can be hard to address that concern. We're going to need to be able to incentivize minorities to come in."

Amy F. Solomon, a former Girardi Keese partner, signed on at Judicate West in January 2019. "In my 30 years in the legal business I've always been in the minority as a woman," she said. "The profession has been a bit slow in recognizing the importance of diversity. That was a motivating factor when I moved to Judicate West. I had a niche practice representing women in medical malpractice and other cases that were sensitive and specific to women. Clients would sigh with relief when they found a woman to represent them but when we ended up in mediation or arbitration it was very difficult to find a woman neutral. That caused discomfort. Now it's really nice to be that woman neutral who is available in such cases."

Judicate West was looking to create more diverse panels, which is why Solomon chose to work there, she said. "How do you recruit more of us? That's a multi-faceted chicken-and-egg conundrum. The trick is to make it known that people with diverse backgrounds are wanted in the field, and SB 707 will help accomplish that."

Because so many judges retire to go into dispute resolution, a diversified bench will help transform the ADR field, said Solomon, who sat on the state commission that evaluates judicial candidates. "Jerry Brown put a lot of women and minorities on the bench, which means more of them will eventually become neutrals."

Democratic state Sen. Robert A. Wieckowski of Fremont, an attorney who sponsored SB 707, pointed to a 2015 national survey of practicing employment arbitrators that found 74 percent were male and 92 percent were non-Hispanic white. Wieckowski said Jay-Z's plight did not inspire the California legislation but "certainly highlights the need for more diversity in the arbitration industry."

The law could well reinforce another — SB 766 — that newly boosts the state's profile on the international commercial arbitration circuit by quashing protectionist rules that discouraged the growing practice. As commerce tilts toward Asia, multicultural arbitrators will likely be increasingly in demand in a thriving California market.

The new diversity law is timely and essential, according to the prominent international commercial arbiter Cedric C. Chao. "There are very few Asian Americans in the world of domestic and international big dollar disputes," he said. "SB 707 opens the door by shedding light on the offerings of each institution, and that's all to the good. A client from Asia wants a panel member who can appreciate the different cultures' different ways of expression. In Asia it's not contentious in the same way as in American litigation. Diversity is a helpful factor in approaching this reality."

SB 707 is a potentially potent nudge toward better minority recruitment. The law is intended to persuade providers to hire neutrals who don't look like their predecessors. Meanwhile, those already in the vanguard of the new wave of arbitrators show that arbitration rosters can indeed include young folks, females and the racially diverse.

"MORE SOPHISTICATED USERS OF ADR ARE REALIZING THAT JUST BECAUSE YOU WERE A JUDGE, THAT DOESN'T NECESSARILY MAKE YOU A GREAT NEUTRAL"

Hiro N. Aragaki, JAMS

Lexi W. Myer became a JAMS neutral two years ago. At 44, "I'm among the younger arbitrators working," she said. Earlier, she did legal research for the company after a stint as a litigator. "I haven't experienced any pushback. People are increasingly open to folks like myself doing the job. Some of JAMS' clients want contemporaries in the arbitrators' role. Clients come from all kinds of backgrounds, and it is important for us to mold ourselves to fit the diverse community we serve."

Adrienne C. Publicover joined JAMS in 2016 after a quarter-cen-

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From top: Sidney Kanazawa, Maria Elena James, Shirish Gupta, Lars Johnson, Phyllis Cheng

JUDICATE WEST

Hon. Jan M. Adler, Ret.

San Diego

Business/Contractual, Class Actions, Corporate Governance, Employment, Intellectual Property, Personal Injury, Products Liability, Securities

Judge Adler served as a United States Magistrate Judge in the Southern District of California between 2003-2018, including as Presiding Magistrate Judge the last two years of his tenure. During this time, he presided over approximately 2,000 civil matters as a settlement judge, handling all types of civil litigation.

Prior to his appointment to the bench, Judge Adler spent 25 years in private practice, including two decades at a national law firm. He has litigated all types of civil matters, focusing on securities, antitrust and consumer class action cases.

Judge Adler has served on numerous boards and committees. He was a member of the Board of Governors of the Association of Business Trial Lawyers (ABTL), serving as president of the San Diego chapter, and he sat on the Ninth Circuit ADR committee. He is a frequent speaker and panelist in the United States and abroad on programs concerning mediation and complex civil litigation.

Judge Adler has carried over to his mediation practice the thoughtful and thorough approach for which he was known during his 15 years on the bench. In addition to his ability to discern complex legal and key factual issues, clients appreciate his collaborative approach. One attorney commented: "Judge Adler is an outstanding mediator who not only understands the human frailties and often heightened emotions of litigation but uses his calm and assuring demeanor to facilitate meaningful and productive dialogue in assisting the parties to get to a deal. He is smart and decisive in his approach."

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JAMS

Hiro N. Aragaki, Esq., FCIArb

Los Angeles

Business & Commercial, Construction, Employment, Entertainment & Sports, Financial Markets, Intellectual Property, International/Cross Border, Personal Injury, Professional Liability and Fee Disputes

Hiro N. Aragaki, Esq., FCIArb is a distinguished JAMS neutral with more than 20 years of experience, including almost a decade of full-time law practice at global law firms and service as a neutral since 2001. He is an internationally recognized expert in arbitration and mediation who has trained judges and lawyers and is frequently called upon to consult on alternative dispute resolution (ADR) reform projects around the world. He brings energy, sharp analytic skills and a talent for thinking outside the box. He is particularly well known for shrewd case management, something he credits to the influence of the Hon. Fern M. Smith (Ret.), for whom he served as a law clerk. He has expertise in business & commercial, employment, securities, international/cross-border, intellectual property, entertainment, sports, personal injury, professional liability, and fee disputes,.

As an arbitrator, Mr. Aragaki strives to design and manage the optimal procedure for a particular dispute. He believes in getting to a hearing on the merits as efficiently as possible and without over-lawyering or relying on technicalities, while remaining open to a variety of process enhancements aimed at achieving accurate results, such as tentative rulings and draft awards. He is familiar with civil and common law adjudicative approaches.

As a mediator, Mr. Aragaki is known for investing extra work prior to the mediation to narrow the issues and ensure that parties and counsel come fully prepared. He sees his role as helping parties make the best-possible decision about settlement based on careful case evaluation, reality-testing about litigation risks and transaction costs, and creative problem-solving. He is accustomed to using a wide range of directive and facilitative interventions, as appropriate.

Mr. Aragaki is a citizen of the U.S. and Japan, and an overseas citizen of India. He has lived in the U.K., Germany and France.

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tury litigation career. "Every single arbitration I ever had as a litigator was presided over by a man," she said. "That world was pale, male and stale. But JAMS encouraged me because of my subject matter expertise in health care, insurance and ERISA to train as an arbitrator. They're not just paying lip service to this. Often when I go in now to hear a case, at least half the attorneys are women. Things are changing."

She made the move to life as a neutral to reduce career stress after a health crisis. "People ask what's the barrier to entry and I say poverty," Publicover said. "I had a good book of business, and then I got breast cancer. Work as a neutral was always something I wanted to do, but I thought it would come later in my career. Now I see it as a fabulous profession — even though you go in like a startup and get paid only a proportion of what you bring in."

Angela J. Reddock-Wright transitioned to Judicate West on Jan. 1 after eight years as the founder and managing partner of Los Angeles' Reddock Law Group, specializing in employment and labor law, mediations, arbitrations and workplace investigations. "I'm excited to be among the few women of color in this field," she said. "I consider it my duty to make sure I'm not the last one. Lack of diversity has clearly been an issue in our profession. Here in L.A., lots of employment issues involve litigants of color, but there haven't been a lot of choices among neutrals. Panels should reflect the diversity of the society we live in, not be reserved for a chosen few. SB 707 brings the issue out of backroom conversation into the light."

Melissa Blair Aliotti of Sacramento joined Judicate West in 2018 after more than 30 years as a litigator. "The pipeline lacks females, and women in the field aren't being used as frequently as men," she said. "It has been best practice for providers to track diversity for years, and it is unfortunate that the Legislature has to mandate that they do it in public. How long are we going to be saying that diversity is the right thing to do — while we haven't done it yet? We used to say things are moving at glacial speed, but glaciers move faster than this."

When Aliotti speaks to youth groups holding mock trials, she encourages them to push themselves to stay engaged with the judicial system. "I tell young people to stay with it. We all have a responsibility to encourage diversity at all levels."

Jay C. Gandhi served for eight years as a magistrate judge overseeing the Central District of California's ADR program before joining JAMS as a mediator and arbitrator in 2018. He was the first federal judicial officer in California from a South Asian family background. "The root of arbitration is in contract law, so SB 707 data should help people select more diverse panels, because better data keeps the topic top of mind," he said. "Inclusivity is an issue that plagues the entire profession, from law firm partnerships to the bench. This is a move on a long road that has a long way to go."

"My background is one factor that keeps me in demand," he added. "I'd certainly like to see more diverse neutrals in the profession. What will help will be public attention married to outreach and the ability of providers to groom minorities for success."

Sidney K. Kanazawa, who worked for 40 years as a litigator, moved in September 2019 to Los Angeles' Alternative Resolution Centers at the suggestion, he said, of ARC President Amy Newman, a friend of long standing. "There aren't many of us Japanese-Americans in the business," Kanazawa said, "but I am finding it personally very satisfying. I'm glad I made the move." He said the disclosures required by SB 707 are likely to improve the profession. "The bill provides sunshine,

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Fred G. Bennett, Esq.

Los Angeles

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Fred G. Bennett, Esq. joined JAMS with over 35 years of experience as an advocate, arbitrator and mediator of complex international and domestic disputes. Mr. Bennett is recognized for his ability to manage large, multifaceted and technical cases, and he has specialized expertise handling business/commercial, construction, energy and utility, entertainment, insurance, intellectual property, complex technology, mining and real property matters. He has served as arbitrator in over 60 international and domestic arbitrations, employing the rules of almost every major arbitration institution. As both an arbitrator and advocate, Mr. Bennett maintained a global practice, managing complex disputes in multiple countries throughout Europe, Asia, North America, Latin America, and the Middle East.

Prior to joining JAMS, Mr. Bennett was a senior partner with Quinn Emanuel for over 20 years, serving as Chair of the firm's international and U.S. arbitration practice, and as an arbitrator or lead counsel in numerous domestic and international arbitrations. Prior to that, Mr. Bennett was at Gibson Dunn, during which time he also became a senior partner and chair of the firm's worldwide ADR group. He is a fellow of the College of Commercial Arbitrators and the National Academy of Distinguished Neutrals, former board and executive committee member of the American Arbitration Association, a member of the International Chamber of Commerce Commission, and the ICC U.S. National Committee on Arbitration.

Mr. Bennett is regularly listed in the Guide to World's Leading Experts in Commercial Arbitration, The Best Lawyers in America and Who's Who Legal (Arbitration), and has received awards as the best arbitration practitioner in North America (2010, 2013, 2014) by Lexology and the International Law Office's Client Choice Awards. He chaired the task force which created the AAA commercial rules in 2013, and was principal co-editor of a major international arbitration treatise.

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Hon. Terence Bruiniers (Ret.)

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Business/Commercial, Class Action & Mass Tort, Employment Law, Environmental Law, Personal Injury/Torts, Real Property

Hon. Terence Bruiniers (Ret.) served as a justice on the First District, Division Five, California Court of Appeal, authoring more than 600 opinions in nearly all areas of the law. He also served on the Contra Costa Superior Court, where he implemented one of the first programs in the state for electronic filing of court documents. He later led the design and implementation of the now statewide appellate e-filing system during his tenure on the appellate court. He served as a respected jurist for 20 years.

Justice Bruiniers has amassed experience in practice areas ranging from business/commercial and class actions, to employment, environmental and real property matters. Before his appointment to the bench, Justice Bruiniers practiced law for 18 years at the San Francisco firm of Farrand, Cooper & Bruiniers. He handled business and commercial litigation and maintained a transactional practice representing national and international clients in technology-related matters. As a deputy district attorney in Alameda County for seven years, he prosecuted more than 100 jury trials to verdict, including capital cases.

Justice Bruiniers believes that credibility is a lawyer's most valuable professional asset and it should never be jeopardized. As a neutral, he has earned a reputation for meticulous preparation and thorough familiarity with all matters coming before him. After handling countless complex cases through the years, Justice Bruiniers understands the importance of the successful and timely resolution of conflicts.

Justice Bruiniers serves as a mediator, arbitrator and special master, and handles neutral analysis matters, including mock exercises and appellate review.

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INCREASE IN MASS ARBITRATION IS IMPACTING THE WAY FIRMS APPROACH THEIR RISK AND COST MANAGEMENT STRATEGIES

BY GLENN JEFFERS
Daily Journal Staff Writer

The day before launching its initial public offering last May, Uber Technologies Inc. announced it would settle a majority of 60,000 arbitration cases alleging the rideshare company had misclassified drivers in several states as independent contractors rather than employees.

The estimated cost was $146 million to $170 million, according to news reports.

Amazingly, more than 12,500 of those arbitration cases came from a single law firm, Larson O'Brien LLP in Los Angeles. Working with Chicago-based Keller Lenkner LLC, the firm organized, filed and managed 12,500-plus individual arbitration cases in federal court. Abadilla v. Uber Technologies, Inc., 18-CV07343 (N.D. Cal., filed Dec. 5, 2018).

For months, the parties argued over the glut of claims and Uber's refusal to pay its share of the initial $1,500 fee each case required to begin arbitration. Larson O'Brien had a motion to compel arbitration with U.S. District Judge Edward M. Chen of San Francisco when the settlement was announced.

But what amazes Glenn A. Danas, a partner at Robins Kaplan LLP in Los Angeles specializing in class action and employment law, is that Uber still has thousands of individual claims left to arbitrate.

"Uber paid $146 million to settle one group of the mass arbitration filings and didn't even get complete closure on the litigation because they're dealing with just individual claims," Danas said. "At some point, companies are going to figure out that this is a losing proposition."

Indeed, mass or swarm filings of individual arbitrations against a single company or employer have become a popular tactic of plaintiff-side lawyers. Frustrated with class action waivers baked into arbitration agreements and stymied by the limitations of filing a claim under the Private Attorneys General Act of 2004 (PAGA), mass filings provide plaintiffs' lawyers the means to bring relief to their clients and enforce state labor laws.

"It was, for me, the only realistic possibility given that my clients had all signed arbitration agreements with class action and collective action waivers," said Lauren Teukolsky, owner and founder of Teukolsky Law APC in Pasadena, which focuses on employment and civil rights matters.

Teukolsky filed 57 individual arbitrations alleging wage and hour violations against a large national company in 2015 after she was unable to get a class

certification, she said. After four of her clients won awards in arbitration, the company settled the other cases for an undisclosed amount.

"There were so many employees in that particular workplace and so many upset about the wage theft that was taking place," Teukolsky said. "They were interested in doing something and they had no other alternative to vindicate their individual workplace rights. So, [filing multiple arbitrations] was a tactic born of necessity."

Others have followed suit. Workers filed similar arbitration claims against rideshare company Lyft Inc. and fast-food chain Chipotle Mexican Grill Inc. This past May, casual sport-bar franchise Buffalo Wild Wings settled with 391 workers who filed individual arbitration cases alleging wage and hour violations. Robbins v. Blazin Wings Inc., 15-CV06340 (W.D. N.Y., filed Dec. 18, 2015).

Most recently, a pair of complaints in the Northern District of California sought to compel gig-economy food delivery service Doordash Inc. to pay its initial fees to the American Arbitration Association so arbitration could begin on more than 6,200 individual claims. Last month, U.S. District Judge William H. Alsup of San Francisco ordered the second of the two lawsuits — Boyd v. DoorDash Inc. —reassigned to his court so he could hear arguments for both motions. Abernathy v. DoorDash Inc., 19-CV07545 (N.D. Cal., filed Nov. 15, 2019). Boyd v. DoorDash Inc., 19-CV07646 (N.D. Cal., filed Nov. 20, 2019).

According to recent news reports, Alsup admonished DoorDash counsel for not adhering to the contract they drafted and not paying initial fees to the neutral provider, which could be as much as $7.6 million. In both cases, the drivers allege misclassification as independent contractors rather than employees.

"Your defense law firm and all the defense law firms have tried for 30 years to keep employment cases out of court," Alsup told Gibson, Dunn & Crutcher LLP partner James P. Fogelman in court, according to news reports. "Suddenly, it's not in your interest anymore, and now you're wiggling around to find some way to squirm out of the agreement. I'm a lot older than you, and there's a lot of poetic justice here."

But many legal experts find the process cumbersome at best and unsustainable at worst, a tactic rife with logistical challenges that puts unnecessary strain on plaintiffs' attorneys and defense counsel when other, more manageable options are available.

"Mass arbitrations are a ridiculous alternative to some orderly form of aggregate litigation such as class action," said Charlotte Garden, co-associate dean for research and faculty development and associate professor at the Seattle University School of Law. "It's inefficient for individuals. It's inefficient for companies."

It's also inefficient for alternative dispute resolution providers who occasionally bring in additional case management staff to handle the glut of incoming filings, said an executive in the industry who asked not to be identified. The number of mass filings against companies increased significantly within the last year and a half, the executive said.

"It's really been in the last 12 to 18 months where we've seen a pattern where a plaintiffs' lawyer decides to file multiple individual arbitrations against a particular company," the executive said. "If we need to add additional case management resources, we would certainly do that."

Despite the headaches, experts agree mass arbitrations aren't going anywhere. They're the product of novel legal problem-solving that comes after a number of decisions rendered employment class actions nearly inert and left plaintiffs with little recourse.

"Given the state of the law now, mass arbitrations are one of the few avenues that plaintiffs' lawyers have to help hold companies feet to the fire when they violate the law," Garden said.

Before, if large numbers of employees or consumers felt aggrieved by a company, attorneys would file class actions with the hope of winning certification and gaining a stronger position to dictate settlements, Danas said.

Then came the first step toward dismantling class actions: The U.S. Supreme Court's reversing the 9th Cir-

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"GIVEN THE STATE OF THE LAW NOW, MASS ARBITRATION ARE ONE OF THE FEW AVENUES THAT PLAINTIFFS' LAWYERS HAVE TO HELP HOLD COMPANIES FEET TO THE FIRE WHEN THEY VIOLATE THE LAW"

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Business/Contractual, Construction Defect & Breach of Contract, Employment, Intellectual Property, Personal Injury, Professional Negligence, all types of Real Estate

A full-time mediator since 2001, Bill joined Judicate West in 2018. Almost 30 years ago, his litigation practice at Rutan & Tucker focused on business, real estate, and construction cases. He started mediating as a settlement officer for the Orange County Superior Court in 1990, and for the Los Angeles Superior Court in 2001. As a result of decades of mediation experience for the courts as well as privately, he has resolved all types of personal injury, intellectual property, and employment matters among a wide variety of other disputes. Bill also taught mediation as an adjunct professor at Chapman Law School.

With a passion for helping people in mediation, Bill believes that, beyond performing a valuable professional service, helping people settle a dispute makes the parties' lives better by ending risky, expensive and emotionally taxing litigation, sometimes before it starts.

He spends hours preparing, including pre-mediation phone calls with the lawyers and has worked to develop a toolset for mediation. Bill uses the tools that work best to settle a particular case. According to Bill, "In many disputes, understanding the key facts and legal principles may be at the center of achieving resolution, a creative realignment of the settlement pieces may be the key in another, and in a third, showing empathy and gaining the trust of the parties might be the central focus."

Recently, an attorney summarized Bill's mediation abilities: "You did the critical job of articulating the important issues and expressing points favoring a settlement in a case that was fraught with emotion. I wholeheartedly believe that without your participation, the parties would not have had the ability to reach a settlement. Thank you most of all for staying so late… a positive experience and outcome for everyone."

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JAMS

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San Francisco

Antitrust, Business, Class Action, Employment, Insurance, IP, Personal Injury, Professional Liability

Hon. Wynne Carvill (Ret.) is a full time neutral at JAMS. He joined JAMS with a rich legal background and experience in a wide range of practice areas, including antitrust, business/commercial, class action, employment, family law and construction. During his 16 years on the Alameda Superior Court, he settled numerous cases. He also spent two of those years serving as a full-time settlement judge, handling an average of 10 settlement conferences per week. During his tenure, Judge Carvill served in one of Alameda County's two complex litigation departments for four years, managing class actions, Private Attorney General Act (PAGA) cases, antitrust, construction, environmental cases and major commercial disputes. During his last two years on the court, Judge Carvill was the Presiding Judge for the Alameda Superior Court. Before his appointment to the bench in 2003, Judge Carvill was a civil litigator for more than 25 years and served as his firm's general counsel for 12 years.

Adept at moving complex disagreements toward resolution in an efficient manner, Judge Carvill enjoys engaging attorneys in discourse to understand fully the issues and arguments at hand. Described as humble and analytical, he is praised by attorneys for his professionalism and the high value he places on integrity and candor. He immerses himself in each matter that comes before him and he believes every matter has an opportunity for parties to reach resolution.

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cuit's decision in Circuit City v. Adams, holding the Federal Arbitration Act applied to individual arbitration agreements. Circuit City Stores, Inc. v. Adams, 532 US 105 (2001).

That was a mistake, said Garden, considering the federal law enacted in 1926 was meant to resolve conflicts between businesses in a quick, inexpensive manner.

"To take a statute that blessed the idea of arbitration between two entities that had relatively equal power and a substantial dispute to resolve in arbitration and apply it to a large company that has relatively low dollar disputes with a lot of individuals, that's not the best reading of the history of the FAA," she said. "Those are claims that cry out for aggregation, and individual arbitration agreements prevent that equity aggregation from happening."

Next was the Class Action Fairness Act of 2005 (CAFA), which moved class actions filed on the state level to federal court. And while companies still had to face class actions and certification motions, many rulings worked their way through the appeals process to the Supreme Court.

In 2010, the Supreme Court court made several decisions that would limit — if not cripple — the use of class actions. First, the court ruled in Stolt-Nielsen v. Animalfeeds International Corp. that arbitrators cannot compel class arbitration for parties who have not agreed to authorize it.

"In other words, if [the agreement] did not contain a [class action] waiver but also did not necessarily address class arbitration in a positive way, that class arbitration was presumably going to be precluded," Danas said. Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010).

But Stolt-Nielsen paled in comparison to what came next. In AT&T Mobility v. Concepcion, the Supreme Court ruled 5-4 any state law impeding the enforcement of an arbitration agreement is preempted by the Federal Arbitration Act, reversing the 9th U.S. Circuit Court of Appeals decision holding class action waivers in agreements were unenforceable. AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

"It was really a rebuke of class actions in general rather than a decision on arbitration," Danas said. "I and a lot of other attorneys at the time viewed it as the U.S. Supreme Court's tremendous antipathy towards class actions."

With those two precedents set, employers began adding class action waivers to arbitration agreements and making them a precondition of employment, Danas said, though employees found some relief in 2014's Iskanian v. CLS Transportation, a case he argued as a member of the plaintiff's team.

There, the California Supreme Court ruled claims filed under PAGA could not be forced into arbitration, but held that class action waivers were still enforceable, rejecting plaintiff's argument they were a concerted activity for workers and protected under the National Labor Relations Act. Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348 (2014).

Finally, the Supreme Court's decision in Epic Systems v. Lewis sided with the state high court's opinion on concerted activities, reaffirming class action waivers were enforceable. Epic Systems Corp. v. Lewis, 138 S. Ct. 1712 (2018).

"It was kind of shooting down option No. 2," Danas said of Epic Systems. "If option No. 1 was fighting arbitration agreements on grounds other than the class action waiver, option No. 2 was to argue the federal labor laws provided an end run to the Concepcion and Stolt-Nielsen decisions."

That left option No. 3, Danas said. "Mass arbitrations."

For plaintiffs' attorneys, mass arbitration filings offer several advantages. For starters, lawyers have a relationship with each individual who filed a claim, said Teukolsky, the Pasadena employment and civil rights attorney.

"There's an attorney-client relationship and that means there's no chance the employer is going to approach any of the employees and try to pick them off," she said.

Teukolsky cited Chindarah v. Pick Up Stix Inc., a 2009 decision holding employers can settle with members of a class action without violating labor laws. Chindarah v. Pick Up Stix, 171 Cal. App. 4th 796 (2009).

"You might have two named plaintiffs and thought you had a class of 100 employees, but then you find out the defendant has picked off 80 or 85 of the employees, so you don't really have a class anymore," Teukolsky said. "That can't happen when you actually represent all of the individual employees."

Another advantage? Quicker payouts, said Teukolsky. Because the courts aren't involved in the arbitration, workers

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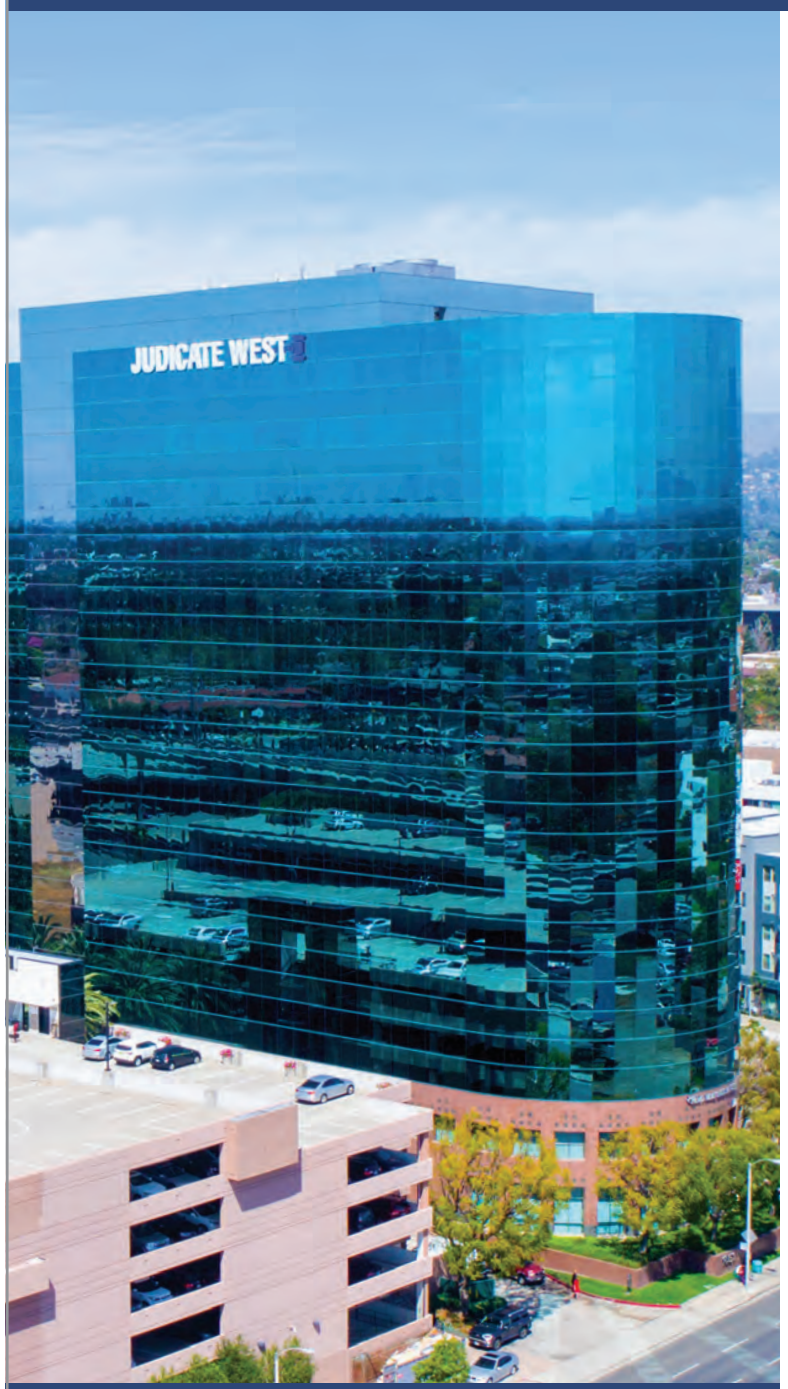

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Hon. David Chaffee (Ret.) brings a wealth of civil litigation experience to bear as a neutral at ADR Services, Inc. Eighteen of his twenty-five years on the bench were devoted to general civil trial work, with an additional two years assigned to handle probate and mental health calendars and trials. Considered approachable, friendly, and courteous, Judge Chaffee was named the recipient of the 2012 Civility Award by the Orange County Chapter of the American Board of Trial Advocates.

In addition to presiding over hundreds of civil jury, court trials, and probate trials, Judge Chaffee's experience prior to the bench also provides him with unique insight into a number of civil practice areas. Judge Chaffee served as Deputy Attorney General for the California Department of Justice for four years, where he handled numerous criminal trials and appeals, federal civil rights and habeas corpus litigation, and administrative and licensing matters. Moving to the Office of the County Counsel for the County of Orange, Judge Chaffee then handled probate cases for six years, followed by a five year assignment handling tax litigation representing the Assessor and Tax Collector. He then spent five years as the County's designated CEQA counsel, handling environmental and land use litigation, before being appointed to the bench in 1994.

Judge Chaffee is the former president and a current member of the board of directors of the William P. Gray Legion Lex Inn of Court; a member of the board of trustees for Devil Pups, Inc., a youth citizenship program allied with the United States Marine Corps; and a founding member of the Beach Crew Alumni Association supporting the Long Beach State rowing teams.

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A U.S. Navy veteran who served two tours of duty in Vietnam, Judge Thierry P. Colaw has dedicated his life to service. He spent 20 years in private practice, primarily focusing on civil litigation, before being appointed to the Orange County Superior Court bench by Gov. Pete Wilson in 1997. During his 21-year tenure on the bench, he served 11 years on the General Civil Panel, overseeing personal injury, medical malpractice and business contractual matters, and 9 years on the Complex Civil Panel, presiding over complex multi-party matters, including toxic torts, product liability, construction defect, California Environmental Quality Act (CEQA) cases and all types of class actions. Judge Colaw also served on the court's executive committee for a decade.

Judge Colaw is a long-time member of the American Board of Trial Advocates (ABOTA) and the Association of Business Trial Lawyers (ABTL). Among his many judicial honors, he was awarded the ABOTA "Judge of the Year" award in 2000, and he served on the board for ABOTA's Orange County Chapter for nearly a decade.

As a mediator, clients commend Judge Colaw's ability to understand the deep-rooted issues in each matter and his keen sense of what needs to be done and how to get the parties together to achieve resolution. He has a way of connecting with people that is unique, and clients value his hard-working, diplomatic and patient approach to mediation.

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GETTING THE MOST OUT OF AN EXPERT AT TRIAL

BY JAIME A. BARTLETT

It is not uncommon for lawyers to lament the moment that a jury trial becomes a "battle of the experts" — years of work developing the facts and arguments, coming down to the contradictory positions of two paid individuals discussing a topic that only they understand. But, for a lawyer who has been strategic from Day 1 in thinking about her expert's role at trial, that expert's trial testimony can be a unique and game changing opportunity. Maintaining a trial focus with an expert at each stage in the expert's engagement is critical. This work includes (1) evaluating how potential experts present themselves, explain what they know, and interact with counsel before they are retained, (2) considering how the written report can incorporate and reflect trial themes, (3) reinforcing through counsel's opening, closing, and examinations of all witnesses, the expert's role, knowledge and credibility, and finally (4) adjusting examination style to build a connection between the expert and the jury. By employing these strategies counsel is partnering with her expert to present the most effective testimony at trial.

Picking an Expert

When it comes to selecting an expert, sometimes counsel's decision is not much of a decision at all — there is just one person out there working, thinking, and writing on the relevant subject (or maybe there are two people, and the opposition has grabbed their guy). Often, however, expert selection involves significant diligence, including review of resumes and publications, interviewing the prospective expert, and speaking with colleagues and other lawyers who have previously hired that expert. Most of this diligence is focused on answering critical pre-trial questions: Will this expert survive a *Daubert* challenge? How will she withstand examination at deposition? Based on her prior work and experience is she capable of evaluating a case's facts and rendering an opinion consistent with the client's legal position?

A trial-focused expert selection pro-

cess includes all these standard inquiries, but also incorporates additional factors to consider and steps to take. *First*, before meeting with any experts, counsel should not think just about the type of opinion being sought, but also about the role the expert may have at trial. Is this person expected to help the jury understand a single discrete issue, or to put the whole case into context? Will she be drawing from the testimony of a series of fact witnesses and helping the jury to evaluate that testimony within industry standards or will she be taking raw data and providing mathematical or scientific analysis? Engaging in this thought exercise in advance of evaluating an expert — at whatever level possible, depending on the stage of the case and the information available — is important to frame the next steps in evaluating a prospective expert.

Second, whenever possible, counsel should meet a prospective expert in person. In talking to the prospective expert, consider whether or not she is a good fit for that role. Ask her questions intended to see if she can comfortably and persuasively speak to a relative stranger about the topic in which she has expertise. If the case requires an expert who can effectively educate the jury, ask the prospective expert to walk through a challenging concept. Is she generous in her explanation or does her way of responding make counsel feel ignorant? If the case requires an expert who is going to take apart the opposing expert's opinion, consider not just whether she disagrees with the opposition, but also whether she is convincing and credible in how she expresses her disagreement.

Finally, just as counsel may have sought transcripts of prior deposition testimony from the prospective expert, wherever possible, get her past trial testimony … and then ask her about that testimony. What did she understand her role to be in that trial? How did she think about explaining her opinion and prepare for her testimony to fulfill that role? Was she comfortable in that role? Did counsel ask her the right questions? Looking at the transcript of the testimony, counsel should also consider whether their reaction to the testimony matches the prospective expert's self-assessment.

All of the expert selection work described here goes beyond evaluating the qualifications of the prospective expert witness for trial. These efforts will also help counsel establish a specific rapport with the expert and facilitate counsel and the expert reaching an understanding of what can be accomplished at trial with the expert's testimony and the best way to do that. Simply put, to connect an expert with the jury, counsel must first connect with the expert herself.

Tie the Expert's Opinion to the Trial Themes.

Without question, an expert must render an independent opinion, based on her own analysis, experience, and well-founded methodology. This does not mean that an expert opinion must be fully divorced from key trial themes or that the written and oral expression of that opinion cannot also reflect the specific role counsel wants the expert to play at trial. Merging expert opinion with trial themes does not have to be a complicated endeavor. In many respects, that is a natural continuation of the work begun in the expert selection process. If counsel has oriented the expert towards an understanding of the trial themes and the experts' role in conveying those themes from the beginning of the counsel/expert relationship, the expert's opinion is also likely to reflect the same.

That being said, there are additional steps counsel can take while the expert is formulating her opinion to help her convey that opinion in a way that reflects the trial themes. Most importantly, counsel can engage regularly with the expert in a dialogue about the case as it develops. Rather than treating the expert like an isolated piece in the trial puzzle, counsel should approach the expert as a collaborator. Regular meetings with the expert by phone or (preferably) in person to talk about the case are not wasted time or money. Indeed, regular contact between the expert and counsel is likely to help counsel to develop those essential trial themes, even as it also helps the expert understand them. The broader impact of these conversations will additionally become apparent when the expert takes the stand and displays a high level of familiarity with the facts and comfort talking with counsel.

A second important consideration at this phase is whether a written report is needed at all. California does not require parties to exchange written expert reports and there are pretrial strategic considerations with which counsel must grapple. There is no one right answer – the point is that counsel

Jaime Bartlett *is a Securities and Shareholder Litigation partner in Sidley Austin LLP's San Francisco office. Jaime has tried both civil and criminal cases to successful outcomes, and she has appeared on behalf of her clients in California and Arizona state courts and in Federal court in the Districts of California.*

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Mr. Collier has been in practice for more than 40 years as a trial lawyer and over 25 years as a mediator and arbitrator. Since first training as a mediator in 1993, he has mediated or arbitrated to completion over 400 disputes across a wide range of civil law, ranging in complexity from smaller value disputes to large, multi-million dollar settlements. Mr. Collier prides himself upon thorough preparation – of the participants as well as of himself. He has proven to be particularly effective in disputes encumbered by high emotions. His respect for the emotional dynamics between the parties, as well as his thorough understanding of the facts and law, allow him to build credibility with the parties and their counsel while crafting settlement scenarios to ensure resolution

As a trial lawyer, Mr. Collier's practice has focused on trust and probate litigation for the past 15 years. He has represented beneficiaries and trustees, both individual and institutional, in removal and surcharge proceedings, cases involving interpretation and modification of trusts, and will and trust contests. Mr. Collier was recognized as a Northern California Super Lawyer in Probate and Trust Litigation for nine consecutive years.

In addition to his probate expertise, Mr. Collier has handled numerous business and commercial disputes on behalf of individual and corporate clients, as plaintiffs and defendants, including actions related to partnership dissolutions, unfair competition, distributor termination, shareholder disputes, trade secrets and trademarks, insurance coverage, and bad faith disputes.

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Charles A. Dyer, Esq.

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Charles A. Dyer, Esq. possesses more than 35 years of experience as an arbitrator and mediator. Prior to his dispute resolution work, Mr. Dyer represented both plaintiffs and defendants at an active civil litigation practice. From this, he gained a unique perspective of the goals and objectives of different parties, enhancing his ability to objectively and comprehensively evaluate cases. Mr. Dyer has been named Trial Lawyer of the Year by the San Mateo County Trial Lawyers Association and received the San Mateo County Bar Association's James M. Dennis Memorial Award for courage and determination, contributing significantly to justice in the community and raising ethical standards for his profession.

As part of his extensive experience as a neutral, Mr. Dyer has served as a Judge Pro Tem, Special Reference/Discovery Referee, and ADR Panelist with the San Mateo County and Santa Clara County Superior Courts. He has also conducted several appellate mediations, serving as a neutral on matters for the Courts of Appeal in both the First and Sixth Appellate Districts in the State of California.

Over the course of his decades of alternative dispute resolution work, Mr. Dyer has resolved disputes in nearly all areas of civil law, and possesses particular expertise in resolving matters in the following areas of the law: business/contracts; complex litigation; construction; employment; partnership dissolution; personal injury; probate, trusts and estates; products liability; professional liability; real estate.

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EXPERT TRIAL CONTINUED

should reflect on whether she views the decision any differently if she assumes the expert will be a trial witness.

Preparing the Jury for the Expert.

Depending on the length of the trial, counsel may have spent days or even weeks in the company of the jury before an expert takes the stand. In order to prepare the jury to hear and absorb an expert's testimony, it is vital that counsel take every appropriate opportunity to foreshadow that testimony and introduce the expert to the jury. Each time this is done, counsel is signaling to the jury that the expert has important information to share and is providing context and credibility to that expert. For example, how the expert is described in the opening statement can have dramatically different effect. Consider the difference between "you will hear expert testimony about the standard practice in the shipping industry and how Defendant's conduct was consistent with that standard" and "Ms. Williams, an expert with twenty-year's experience in the shipping industry, is going to talk to you about industry standards and explain how Defendants' conduct was consistent with that standard." The second opening remark (delivered with a picture of Ms. Williams up on the screen), tells the jury who this person is, why she is an expert, and that her role in the trial is going to be to teach the jury something they need to know to reach their verdict. By naming, showing and describing the expert, counsel has also given the jury information that it is more likely to retain and helped the jury to anticipate and be receptive to Ms. Williams when she takes the stand.

Another way to prepare the jury for the expert is to try to use the language of the expert's opinion in voir dire, opening, and in examination of other witnesses. Once before the jury, counsel can use her platform to socialize key terms and concepts so that they are not brand new to the jury when the expert takes the stand. Of course, this is more challenging with highly technical terms used in a narrowly focused opinion. But when the expert is speaking to concepts such as industry standards, there should be opportunities in questioning fact witnesses to introduce the language of the expert. Repetition of a few key terms or concepts by counsel and other witnesses will amplify the expert's testimony.

Connecting the Expert to the Jury

When it finally is time for the expert to take the stand, counsel and expert should be closely aligned in their understanding of not only the content of the expert's expected testimony, but also how the expert will convey her opinions to the jury. At the same time, counsel should have primed the jury so they are ready to hear and accept that opinion. What remains, is for counsel to bridge the divide between expert and jury.

This effort is about making small, strategic choices in the way in which counsel examines the expert. For example, compare the following:

Q: Ms. Williams, do you have an understanding of what the International Organization for Standardization does?

A: Yes, I do.

Q: What is that understanding based on?

A: My 20 years' of work in the shipping industry.

Q: What does the International Organization for Standardization do?

****

Q: Ms. Williams, how long did you work in the shipping industry?

A: 20 years.

Q: And in your 20 years working in the shipping industry, did you work with the International Organization for Standardization?

A: Yes, many times.

Q: In working many times with the International Organization for Standardization, did you have an understanding of what that organization does?

A: Yes I did.

Q: Please explain to the jury what you came to understand over your years of work that the International Organization for Standardization does.

Without doubt, the first examination gets the job done — it establishes the basis for the expert's knowledge and invites the expert to share that knowledge. But, it is a missed opportunity. The second examination starts by emphasizing the expert's level of experience in two ways: (1) reminding the jury how long she has worked in the industry and (2) highlighting that she is going to talk about something with which she has personal experience. That experience is then reinforced through counsel's "mirroring" of what the expert has said.

The second examination also takes advantage of an "action verb" to signal to the jury what role this expert is playing. In asking Ms. Williams to "explain" the term to the jury, counsel is telling the jury that Ms. Williams is about to teach them something they want to know.

Counsel's role in this examination is, in many ways, to embody the jury if the jury was allowed to ask questions and to remember that (unlike counsel and the expert) the jury is hearing everything for the first time. Thus, the second examination could continue with the following:

Q: The jury has also heard testimony today from Mr. Smith about the World Customs Organization. Are you familiar with that organization?

A: Yes I am.

Q: How did you become familiar with

the World Customs Organization?

A: I also worked with that organization frequently in my years of work in the industry.

Q: Based on your frequent work with the World Customs Organization, how does its role compare to the role you have already described that the International Organization for Standardization plays?

In reality, by the time of trial, a prepared counsel knows the content of the expert's opinion and subject area intimately. But expert testimony must be about the expert sharing her knowledge and views with the jury. If the examination is a slog through the expert opinion, with counsel interjecting the occasional "and what is your next conclusion," the chances are high that the jury simply won't care. On the other hand, if counsel approaches the examination as though she were in the shoes of the jury, it will facilitate a more intimate and direct conversation between the expert and the jury. Taking this approach, counsel can ask the expert to explain terms or give examples to help clarify a point. Counsel can also ask the expert to break long explanations down into pieces, even if it means repeating some information.

Another way to connect the jury to the expert is to get the expert figuratively or even literally up and out of their seat. Counsel should consider putting up on the screen simple graphics to demonstrate concepts or show the expert's work, or even the expert's high-level conclusions as the expert testifies. Where the expert's testimony (and personality) lends itself to old school paper and pen, get the expert a flip chart on onto her feet! In doing this, however, it is critical both to the effectiveness of the demonstratives and the expert's credibility that the expert, *not counsel*, appear in command of the visuals. This is the expert's show and counsel is just the facilitator. For that reason, counsel and the expert should practice in advance how to use these active moments effectively.

Where the expert's trial role is primarily to rebut or dismantle the opposing expert's opinion, consider how to present that rebuttal in as simple and straight forward a manner as possible. In this situation, connecting with the jury means offering them clear and concise points that they can take back to the jury room during deliberations.

Finally, closing argument offers counsel an opportunity to lock in the jury's connection to the expert. An effective reinforcement of the expert's testimony during closing should remind the jury of the most compelling facts demonstrating the expert's basis for knowledge ("Ms. Williams is a 20-year veteran of the shipping industry"), utilize the active verbs to describe the expert's testimony ("She explained to you…"), and reiterate the expert's key terms and phrases.

*****

Utilized together, the strategies outlined above will set counsel and experts on an early path to delivering the strongest possible testimony at trial. This is because the strength of an expert's trial testimony is not just about the soundness of the opinion. Strength comes also from the persuasiveness of the delivery and persuasiveness depends on the expert connecting with the jury. An expert should not be left to her own devises in trying to make that connection. Counsel can and should help facilitate that connection between the expert and the jury through the ways in which she selects, works with, and presents the expert at trial.

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MAINTAINING A TRIAL FOCUS WITH AN EXPERT AT EACH STAGE IN THE EXPERT'S ENGAGEMENT IS CRITICAL.

Jaime A. Bartlett, Sidley Austin

JAMS

Cassandra S. Franklin, Esq.

Los Angeles

Insurance, Entertainment & Sports, Business & Commercial

Cassandra S. Franklin, Esq., joined JAMS after years of experience on both the carrier and policyholder sides of complex insurance coverage disputes. Since joining JAMS, she has drawn upon these dual perspectives to assist parties in resolving disputes involving such issues as directors and officers coverage for subprime mortgage crisis claims and coverage for invasion of privacy claims based on alleged cyber-publication of nude photographs.

Prior to joining JAMS, Cassandra served for almost six years as Managing Attorney of Allianz Global Corporate & Specialty and Fireman's Fund Insurance Company's Claims Coverage Counsel. Leading a team of experienced coverage attorneys, she handled issues arising out of a range of insurance products, from corporate commercial general liability and property policies to entertainment and other specialty insurance policies.

Before serving as Managing Attorney, Cassandra spent over 13 years representing policyholders in insurance coverage disputes. Her policyholder-side matters ran the gamut of liability insurance products, from commercial general liability to errors and omissions and media liability insurance policies, as well as first party insurance, such as entertainment production and event cancellation policies.

Both as counsel to policyholders and in her in-house role, Cassandra developed a reputation for her innate sense of fairness and pragmatic ability to see matters from multiple perspectives. Where appropriate, Cassandra sought to resolve disputes through negotiation and mediation rather than incurring the financial and opportunity costs inherent in protracted litigation.

Earlier in her career, Cassandra served as litigation counsel for both plaintiffs and defendants in commercial and entertainment litigation. She also served for years as a member of UCLA Law School's clinical faculty.

Cassandra began her legal career as a law clerk to Justices Otto M. Kaus and Edward A. Panelli.

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Judge Goodman's depth and breadth of judicial service spans 24 years, beginning with his service as a Municipal Court judge in 1995. After being elevated to the Superior Court in 2001, Judge Goodman presided over direct calendar unlimited jurisdiction civil courtrooms handling antitrust, business, elder abuse, environmental, professional liability, and personal injury matters, and tried over 500 cases to jury verdict or to judgment following court trial.

While serving as a Judge of the Superior Court, Judge Goodman became well known for his intelligence, thorough preparation, ability to master complex legal issues, and judicial temperament. He thereafter was appointed by the Chief Justice of California to serve as an Associate Justice Pro Tem of the California Court of Appeal, Second Appellate District, for a combined total of four years. During this time he authored numerous appellate decisions, including published opinions, in nearly all areas of civil law.

Prior to his judicial service, Judge Goodman served for 9 years as a Deputy Attorney General and, while in private practice for 15 years, provided advice to start-up and development stage businesses.

Judge Goodman is an exceptionally well-respected and thorough jurist who measures the consequences of his decisions with an even hand. His ability to grasp and disentangle complex legal disputes is aided by his diligent preparation and research into the issues at hand. He now brings the same expertise and intelligence to his ADR practice to help litigants resolve their disputes.

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MOCK TRIALS ARE NOW SEEN AS BEST PRACTICES

BY NICOLE TYAU
Daily Journal Staff Writer

Mock trials are becoming increasingly popular for high stakes litigation when millions of dollars are at stake, especially among corporate counsel, experts say.

"Over the last 36 years I've been practicing law it's become increasingly common in high stakes and complicated cases. I think it's something where lawyers and clients like to do it for a lot of different reasons," said Michael P. McNamara, Jenner & Block LLP's Los Angeles managing partner. "Sometimes it'll cause a client to then be more interested in settlement."

Caleb H. Liang, a partner at LTL Attorneys LLP, said mock trials are a best practice, no matter what the case. He said he tries to do a mock for every trial he has, even if it's just among his peers at LTL.

Kennen D. Hagen, the president of Federal Arbitration, sees mock trials becoming more common with corporate counsel because he said they're taking a more active role in litigation rather than leaving all duties to outside counsel.

"These mock trials are not adversarial to the law firms," Hagen said. "They're done in the spirit of trying to understand what the best arguments are and how to refine things. They're not a tool of embarrassment; they're a tool of enrichment. So CLOs are using mock trials more and more."

The problem with mock trials, though, is that they can be expensive, which is why Keller/Anderle LLP partner Jennifer L. Keller said they're usually reserved for high stakes litigation.

Liang, however, is a firm believer that doing a mock trial in house at a law firm can offer benefits that don't cost nearly as much. His firm does an in-house, streamlined mock trial consisting of just opening and closing statements. A mock trial with jurors, whether organized through the firm or an outside entity, costs money, Liang said, and he reserves that for the cases that need it.

Keller said she has only used an outside entity to conduct mock trials. Doing a mock trial in house at a law firm can lead to results that could be biased because an attorney's coworkers might be inclined to sugarcoat hard truths, she said.

"If you have an outside trial consultant putting together your mock and that trial consultant says, 'If you stick with this particular attorney, you're going down,' you can make a change," Keller said. "But if you're doing it in house, that isn't going to happen."

Hagen agreed mock trials are expensive, but he argues they're worth the money. Even as companies and clients anticipate a recession in the coming years, he said having an idea of how much money is at stake gives clients reasonable expectations.

"Oftentimes the general counsel of the company will hire an outside law firm to press ahead on their case for them and the outside law firm will say, 'There's no way we should settle this case,'" Hagen said. But then, sometimes mock trials will show that outside law firm and the general counsel

that the case against them is strong and will likely result in high damages against them, he said. That result can make a client willing to settle.

Southern California-based trial consultant DecisionQuest says it is keeping costs down in a traditionally high-cost mock trial environment. Michael E. Cobo, the chief operating officer and co-founder, said the company's JuryLive service offers convenience and affordability.

"Basically, it's jury research without that brick and mortar," Cobo said. "It's video conferencing based, in which all of our participants are at home or in their offices using their own laptops, iPads, PCs with cameras to both view and participate in our sessions."

Cobo said in many ways, a service like JuryLive is more convenient than traditional in-person mock trials while still providing the same level of interactivity and insight.

"We've had a couple of clients view this internationally, and having a client avoid making a trip from Japan or a trip from Western Europe has virtually justified the cost of running something like this," Cobo said.

The bulk of DecisionQuest's work is on the defense side of civil litigation, so the company works with a lot of corporate counsel, Cobo said. While mock trials might have been saved for high-stakes litigation in the past, now he's seeing more clients using the technique for cases like personal injury, contract disputes and employment litigation.

"The current market for this gives you a range of cases that no more are just at the pinnacle of risk for clients," Cobo said. "They can get feedback for the types of cases that maybe had $1 million at risk or $10 million at risk, not just when they were betting the company or they had $50 million of risk."

Keller also advocated the use of mock trials for attorneys to practice, get feedback and make adjustments.

"Analogize it to being an actor on a stage. You don't just walk out on the stage for the first time without ever having practiced your scene," McNamara agreed.

McNamara added that mock trials can prepare general counsel for risk and a likely outcome, even if it's unfavorable.

Similarly, Keller said mocks can enlighten stubborn or unrealistic CEOs to the reality of a case's outcome and their role in it.

"Let's say you have a CEO witness who refuses to spend any time at trial prep because he knows that he's really a great witness," Keller said. "Then the jurors, when they're interviewed about the different witnesses, say that they just despise this person, that he seems to think he was better than everyone, that they voted against the company because of him. Then you may have a chance to sit down and tweak that person's behavior, play back some video clips and say 'OK, you really do need to be prepped.'"

However, Keller said it's not just people within client companies who can benefit from mock trials. She said attorneys can use this to practice talking to probable jurors and witnesses.

"When attorneys are tossing around Latin catch phrases that are familiar to other attorneys but not familiar to the potential jurors ... those things can be helpful for attorneys who are not experienced trial attorneys in reminding them that this isn't the law review break room and you have to learn to talk to people like people," Keller said.

"THESE MOCK TRIALS ARE NOT ADVERSARIAL TO THE LAW FIRMS. THEY'RE DONE IN THE SPIRIT OF TRYING TO UNDERSTAND WHAT THE BEST ARGUMENTS ARE AND HOW TO REFINE THINGS,"

Kennen D. Hagen, Federal Arbitration

Liang's advice: "Keep it simple." He said overcomplicating arguments, themes and cases can lead to confused jurors and less favorable outcomes.

A reliable mock trial is a combination of demographic mirroring, a good trial consultant and a willingness to change. Liang said the most important part of a mock trial is replicating the demographics of a jury because it will most closely resemble an expected outcome from a trial. He also said the trial shown to mock jurors should mirror what will happen. For example, if the lawyer from the other team is particularly aggressive, they have the mock attorney be aggressive. He said the same goes for factors like gender.

Similarly, Hagen said the judge panel selection at FedArb also has to closely reflect what the client will face in the courtroom. He said the challenge is "finding panelists who mirror the underlying decision-maker."

"You don't want to get a mock panelist who is an expert and has written lots of books on intellectual property to hear your arguments on the strengths and weaknesses of your intellectual property case if the underlying judge is relatively new to the subject matter area," Hagen said.

Keller said mock trials can also show how a jury might react to certain attorneys.

"Sometimes you see the roles of counsel getting rearranged because it becomes clear to the people watching the mock that there's just one lawyer the jurors are all bonding with to a far larger degree than another," she said.

Also mocks can be used to educate attorneys about the problems of a case they won't normally listen to, and having the chance to modify those elements or fix those problems can lead to a better outcome in a real trial, she said.

McNamara swears by using a good trial consultant to run a mock trial. He said they'll be the most adept at selecting a mock jury that mirrors what the client would have in a real courtroom and they can identify valuable additional information from the results of deliberations that can strengthen the client's argument.

JUDICATE WEST

Rebecca Grey, Esq.

San Francisco

Employment, ERISA, Insurance Coverage & Bad Faith including Life, Health & Disability, Landlord/Tenant, Personal Injury

Based in San Francisco, Rebecca Grey became a full-time neutral in 2019. Her experience and passion for dispute resolution started in 2012 when she began serving on multiple court panels and programs, including those for the superior courts of Alameda, Contra Costa, Marin and San Francisco. She was also appointed as a Settlement Officer in the discovery department of the San Francisco Superior Court, and she serves as an early neutral evaluator for the U.S. District Court for the Northern District of California.

Rebecca spent her 20-year legal career as a trial lawyer handling matters including insurance coverage, bad faith and ERISA. As a mediator, she also has resolved all types of cases such as landlord-tenant, real estate, employment and personal injury.

Raised by a family that included many lawyers and law professors, Rebecca eschewed bedtime stories and instead asked her parents to tell her the stories of "cases" instead. She pursued a career in public interest law representing individuals wronged by employers and insurers, mastering every aspect of trial work from case evaluation, intake, discovery, law and motion, mediation, trial and appeal.

As a neutral, Rebecca's style is direct, straightforward and personal. Her process focuses on listening to and understanding the stories of the individual stakeholders, giving space for the range of emotions they evince. According to Rebecca: "Compromise -- though uncomfortable -- can and should include a sense of control and empowerment by individuals whose lives are upended by injury, harm, accusation and the pugilism of the adversary process."

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JUDICATE WEST

Kelly A. Knight, Esq.

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Business/Contractual, all types of Employment Disputes including Class Actions & PAGA, Personal Injury, Real Estate

Kelly Knight brings a wealth of experience to his mediation practice. His career highlights include working as an insurance adjuster for a national carrier; working at a high-profile litigation boutique; opening and running his own law practice for several years handling personal injury, employment, and business matters on both the plaintiff and defense side; and practicing with The deRubertis Law Firm, a top-flight plaintiff's employment and catastrophic-injury firm. Now as a full-time mediator, he helps parties resolve matters in employment, personal injury, class action, and business matters.

A key part of Kelly's approach is to focus on helping mediation participants make better negotiation choices. According to Kelly, "So often, lawyers and parties try to do things that sabotage their own negotiations. Sometimes that's letting emotional reactions determine their conduct; sometimes that's just doing what they do because that's all they know to do. I help negotiators thoughtfully consider each move, each communication, and how that might help or hurt each side make progress toward their objective."

In one mediation, during a mediation of a wage-and-hour class action case, after the grumblings about PAGA and California's strict wage-and-hour laws were all let out, the parties got to the heart of the issue: the workers feeling disrespected by lower management. The complaints never made it up to higher management. He brought the parties together and bridged that gap—by the end of the mediation, the parties were all smiles and were looking forward to a new working relationship.

Heralded for his quick-study habits, unparalleled attention to detail and calm demeanor, Kelly strives to maintain mastery of cutting-edge issues in the law affording him a high level of competence in the subject matter. He utilizes a multitude of strategies and facilitative and evaluative approaches to help bring closure to parties engaged in civil disputes.

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NEGOTIATION CHECKLIST

BY SIDNEY KAMAZAWA

As we start the new year, here is a checklist for your case negotiations. Since 98% of all cases filed do not proceed to trial and since settlement negotiations are common in even the 2% of cases that do go to trial, preparing for negotiations is never a waste of time. Windows of opportunity for a favorable settlement (where leverage is in your favor) often open and close very quickly. A prepared advocate will see the opportunity while an unprepared lawyer may be too focused on the immediate tasks at hand or too fixated on the merits of her case to even be aware of the opportunity. A settlement also requires the agreement of both parties. Knowing what you want is not enough. A skilled negotiator will ask questions to uncover her opponent's hidden interests, motivations, and aspirations and will creatively put together her client's and her opponent's narratives — which may not be consistent — into a resolution that works for all interested parties.

One, what do the applicable jury instructions say? While negotiations and settlements often go far beyond the remedies available in court, it helps to know the necessary elements of proof and possible outcomes available in court. What will the jury instructions say? What elements must be proved or disproved by each side? Who has the burden-of-proof? What outcomes can be expected in court? Where will the case be tried? Who will be the judge and/or jury? What biases may affect how the judge and/or jury views the jury instructions, evidence, and law? Is there a prospect of the case being terminated as a matter of law? What is the likelihood of that outcome?

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Two, what does each side want? What does each side and each person on each side want (including the lawyers)? If a client is a corporate entity, what do the individuals involved on behalf of the client want to achieve? Who is the decision maker? What are each client's and each person's short-term and long-term goals and aspirations? How did they arrive at these goals and aspirations? Are there objective measuring sticks for each side's goals and aspirations (e.g., jury verdicts, other settlements, certified accounting, receipts, electronic transactional data)?

Three, what are each side's strengths, weaknesses, and vulnerabilities? What does each side have that the other side needs? How valuable are those needs to each side? Are the values symmetrical or asymmetrical (i.e., would both sides value the need equally or would one side value the need more than the other side?)? Are both sides on the same timetable? Or does each side place a different value on the timing for the resolution of the dispute? Are both sides equally powerful (i.e., economically, politically, socially)? What are each side's strengths, weaknesses, and vulnerabilities?

Four, what are each party's best and worst legal outcome? What is the highest and lowest likely outcome each party can expect (10% chance)? What is the reasonably highest and lowest likely outcome each party can expect (15% chance)? What is the median likely outcome each party can expect (50% chance)? How much has each party invested in the case to date? What further investment must each party make before trial? What is the likely future cost in money, time, and expense for each side? What opportunities are presented right now? How will these opportu-

nities likely change in the future?

Five, what alternatives would be better than the risks of each side's best and worst outcome's in court? Given the dispute's current risks and rewards, what would be a reasonable "Reservation Point" for each side (i.e., the value below which a Plaintiff will not accept in settlement and the value above which a Defendant will not offer in settlement)? Is there any "Zone of Potential Agreement" (ZOPA) in which there is an overlap of the Plaintiff's and Defendant's "Reservations Points." If not, are there other potential ways of viewing the conflict to bring the parties together (e.g., personal and emotional toll of dispute; severed relationships, availability of evidence and witnesses, credibility of witnesses and documents, risks and costs of going to trial, first of a series of cases, high profile visibility, trade secrets, financial conditions of parties, investment return, etc.)? Are these potential agreements better or worse than each party's risks in court? What is each side's Best Alternative to a Negotiated Agreement (BATNA)?

Six, how can both sides increase their chances of maximizing their respective interests? What can each side do to: (a) increase the scope of the negotiations (e.g., increase the size of the pie rather just fight over a finite sized pie?); (b) claim entitlement to greater value (e.g., justify an increased share of the pie?); (c) create greater value (e.g., persuade an opponent that the offered exchange is more valuable to the opponent than the opponent is currently valuing it); (d) increase leverage (e.g., persuade an opponent of a greater loss exposure without a deal than the opponent currently views the situation); (e) use time as leverage (e.g., payments over time rather than all at once); (f) use termination or continuation of relationships as leverage (e.g., recognizing the value of ending or maintaining business or family or friendship relations); (g) create contingencies (e.g., creating alternative paths depending upon how a future uncertainty is decided); (h) remove egos from the dispute (e.g., often positional haggling is driven by the egos of the parties — are we "winning" or "losing" in the negotiations — rather than the bargained for monetary amount or item; who should talk to whom to minimize this ego battle); and (i) invent mutually valuable options?

Seven, develop a negotiating strategy that incorporates your foregoing analysis. The foregoing is a variation on the interest-based approach of the Harvard Program on Negotiation (PON) — "Getting to Yes: Negotiating Agreement Without Giving In" by Roger Fisher, William Ury, Bruch Patton (ed.). It seeks to produce an agreement that meets the legitimate interests of both sides in an efficient manner that is lasting (i.e., does not create a resentment that could weaken the parties' commitment to the agreement). The Harvard PON approach seeks to: (1) separate the people from the problem; (2) focus on interests, not positions; (3) invent options for mutual gain; and (4) uses objective criteria to negotiate the deal on a principled basis. In this approach, participants are problem-solvers rather than adversaries. They listen for mutual gain rather than threaten for one-sided gain. And they bargain based on objective criteria rather than individual whim.

Eight, pay attention. With this information, be vigilant and prepared for opportunities where the mutual gain of the parties can be explored, highlighted, and acted upon. Remember, a settlement requires the agreement of both parties, not just the hopes and desires of one. The opportunity may be in a lunch with an opponent at the outset of a case. Or at the close of deposition. Or walking out of a hearing. Or in a phone call or chance meeting. With preparation, the general contours of the opportunity and how to exploit it will be obvious. Without preparation, aggressive advocacy — with all its uncompromising ego and over-confidence — may obscure and diminish the availability of the opportunity for all time. Be prepared.

JUDICATE WEST

Hon. Joan M. Lewis, Ret.

San Diego

Business/Contractual, Class Actions, Employment, Family Law, all types of Medical Negligence, Personal Injury

For 30 years, Judge Joan Lewis has been committed to serving the legal community with compassion, deference and toughness. During her 20-year judicial career as a Superior Court Judge in San Diego, she spent five years in the Family Law Division and another 15 years presiding over a Civil Independent Calendar until her retirement. Judge Lewis has presided over a wide range of matters, including Medical Negligence, Catastrophic Personal Injury, Business/Contractual, Employment and Class Action. Additionally, during her time on the bench, she handled a multitude of settlement conferences in both the Civil and Family Law divisions. Prior to her appointment, Judge Lewis tried civil cases in private practice, focused on representing health care professionals in medical malpractice lawsuits. Since her retirement in January 2019, she serves as a neutral in these areas.

Judge Lewis has been consistently active in leadership positions on judicial committees, including serving as chair of the court's Alternative Dispute Resolution (ADR) Committee, and also sat on the Judicial Advisory Board of the Association of Business Trial Lawyers (ABTL). Judge Lewis has received numerous awards, including the Friend of the Community Award by the Tom Homann LGBT Law Association in recognition of her commitment to protecting and progressing LGBTQ rights.

Well-known for her thoughtful and fair command of the courtroom, Judge Lewis has also gained a reputation as a meticulous and fair neutral. Her empathetic and compassionate approach, coupled with her persistence and creativity, has allowed her to earn the trust of all parties involved to successfully resolve disputes.

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JAMS

Otis McGee, Jr., Esq.

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Otis McGee, Jr., Esq. is a full-time arbitrator, mediator and special master. Before joining JAMS, Mr. McGee practiced law for more than 40 years and developed a reputation as a capable and successful litigator and trial attorney. He co-founded the firm of Alexander Millner & McGee (later Arnelle, Hastie, McGee, Willis & Greene) and served as the managing partner. The firm went on to become the largest minority-owned law firm in the country.

In 1997, Mr. McGee became a partner at the international law firm of Sheppard Mullin Richter & Hampton LLP, litigating complex commercial, intellectual property and employment matters before joining the Oakland City Attorney's Office in 2014. As the chief assistant city attorney and head of the litigation division, he was responsible for the oversight of all litigation brought against the City of Oakland, including matters involving catastrophic personal injuries and cases involving alleged police misconduct.

Since 1987, Mr. McGee has been a certified commercial arbitrator and mediator. In 2018, he began his full-time private mediation and arbitration practice, including workplace investigations. Mr. McGee has resolved employment, personal injury, products liability and medical malpractice disputes as well as real property and landlord/tenant cases. He has experience mediating cases as the sole mediator or co-mediating matters with other mediators.

Mr. McGee is a respected neutral, who brings significant experience and a deep knowledge of the law to every dispute that comes before him. His meticulous attention to detail and thorough preparation allow him to bring matters to resolution successfully and expeditiously. He makes it a priority to defuse difficult situations and help bring the parties to resolution.

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ADR SERVICES, INC.

John McGuinn, Esq.

San Francisco

Employment Discrimination, Wage & Hour Claims, Wrongful Termination, Personal Injury, Maritime Law

John McGuinn, Esq. is an accomplished trial lawyer with 54 years of experience handling a wide range of civil matters, with particular emphasis in the fields of employment law and personal injury, including maritime law. In addition to evaluating and settling or otherwise disposing of hundreds of cases prior to trial, he has tried to verdict over 50 jury trials in the areas of catastrophic injury, wrongful death, insurance bad faith, employment discrimination, and wrongful termination.

A graduate of U.C. Berkeley's Boalt Hall School of Law, Mr. McGuinn has been recognized by Super Lawyers as one of the top trial lawyers in the state and by Best Lawyers in America continuously throughout its publication as one of the country's outstanding trial attorneys in the area of employment law. He has been a member of the American Board of Trial Advocates (ABOTA) since 1983, served as President of its San Francisco chapter in 1998, and was President of CAL-ABOTA in 2001. He is a Fellow in the International Society of Barristers, a Fellow of the American College of Trial Lawyers, and a Fellow in the American College of Labor and Employment Lawyers.

Mr. McGuinn has also devoted significant time to developing his skills in alternative dispute resolution. He attended the Straus Institute for Dispute Resolution and has acted as a mediator in numerous disputes since 1991, particularly in the areas of personal injury, wrongful death, and virtually every aspect of employment law.

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JAMS

Hon. Franz E. Miller (Ret.)

Orange County

Family Law, Civil, Construction, Employment, Personal Injury, Professional Liability, Real Property

Hon. Franz E. Miller (Ret.) joined JAMS after 16 years of service on the Orange County Superior Court. His tenure at the court was equally divided between the Family Law Panel and the Civil Law Panel, where he was supervising judge during the last two years of that assignment.

Judge Miller handled thousands of matters, tried more than 500 contested cases and settled many cases that were destined for trial. He served as settlement officer on highly contested matters. The superior court's settlement program afforded him the ability to focus on case dynamics and to resolve cases that might otherwise have moved on to lengthy, expensive trials.

Judge Miller came to the bench with vast and varied legal experience, including more than 13 years of litigation involving more than 30 jury trials and 13 years as a senior staff attorney at the Court of Appeal. He taught in local law schools as an adjunct professor for over 20 years.

During his legal career, Judge Miller was very active in the Orange County legal community, serving as president of the Orange County Bar Association in 1997, and in his local community, where he was a planning commissioner.

Judge Miller brings to JAMS his desire to resolve matters in the most efficient, cost-effective manner.

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MASS ARBRITRATION CONTINUED

don't have to wait for awards if the company settles. "It's much more streamlined," she said. "You can just enter into a settlement agreement and get it done privately between the parties. Everyone signs it and it's done."

Teukolsky has also noticed in both her filings and in others that neutrals will arbitrate just a few bellwether cases so both plaintiff and defense counsel can see how the claims are evaluated.

"We could sort of see which way the wind was blowing," Teukolsky said. "And that aided us in getting a settlement for everybody."

Arbitrations are also less procedural than class actions, Teukolsky added. With her claims, she didn't have to file an extensive trial plan with the judge or deal with the statistical sampling needed in a class action. She had only to file her individual claims, an easier task than wading through a state court docket.

"With the way the courts are backed up right now, if you have a discovery dispute in Los Angeles Superior Court, you can expect to wait two to three months before getting a hearing date on your motion to compel," she said. "Whereas in an arbitration, if I had a discovery issue, I could just email my arbitrator and we would get a conference call set up within a few days."

Finally, mass filings can provide leverage for plaintiffs' lawyers, Teukolsky said, though that depends on the size of the arbitration group and the size of the company. Again, while fees vary, companies that operate across the country use national ADR providers like AAA and JAMS to process their arbitrations. JAMS charges $1,500 to initiate arbitration while AAA charges $1,900.

Though plaintiffs have to pay part of that fee, their share usually tops out at $400. Plaintiffs' attorneys usually work with clients to cover part or all of the charges, knowing they'll recover the costs when they collect their fee, Teukolsky said.

While it's costly in the early stages, it can be worth it to launch the cases and compel arbitration, Teukolsky said. She pointed to a recent complaint filed in the Northern District requesting that a federal judge compel Postmates Inc. to pay nearly $11 million in fees to begin arbitration with more than 5,000 couriers alleging misclassification. Adams v. Postmates Inc., 19-cv-03042 (N.D. Cal., filed Jun. 3, 2019).

A federal court granted the motion, according to court documents. Postmates is appealing in the 9th Circuit.

"It creates a lot of leverage for the plaintiff if the defendant truly is required to pay all of those arbitration fees up front, especially in a large case like Postmates," Teukolsky said. "It's going to be a big fight."

Adding to this is Senate Bill 707, which was passed by the Legislature last September and went into effect Jan 1. SB 707 imposes sanctions against parties that force arbitration but do not pay the accompanying fees within 30 days. If companies fail to pay, they could face penalties, be compelled into arbitration or found to be in breach of the arbitration agreement, allowing workers to file a lawsuit.

"There may not be enough mass arbitrations to prompt a mass rethinking by employers right now, but this law might help move the needle," Garden said.

But Teukolsky also warned of several challenges that come with filing multiple arbitrations, the biggest one being finding clients interested in filing a claim. In most class actions, attorneys will use a Belaire-West notice to gather employees' contact information and allow those who don't want to join to opt out. Arbitrations don't allow for such a mechanism, meaning plaintiffs' attorneys have to use other methods to find clients, including word of mouth and advertisements, Teukolsky said.

"The onus is on the plaintiffs' lawyer to figure out a way to let the employees know that this is even a possibility that they can pursue," she said.

Another way to find clients? File a PAGA claim. Sure, PAGA has its faults, from only allowing claimants to go back a year to claim violations to relinquishing 75% of any penalties awarded to the state of California. But PAGA allows for broad discovery, including a Belaire-West notice, the state Supreme Court held in Williams v. Superior Court 3 Cal. 5th 531. (2017).

"Similar discovery rules apply in PAGA actions as in class actions," Teukolsky said.

But once attorneys find potential clients, convincing them to sign up could be difficult, said Garden. She cited a

2015 study from Jeff Sovern, a law professor at St. John's University in New York, which surveyed 668 participants who were asked to read a seven-page credit card contract that included an arbitration agreement.

The study found only 43% of participants realized that the contract included an arbitration agreement. While 14% knew the contract compelled them to arbitrate, only 9% knew that meant they could not sue in court.

"Many people have had individual arbitration clauses forced upon them when they sign up for a cell phone or applied for a job who won't even know that they couldn't go to court and use a class action mechanism," Garden said. "So just telling people, 'Here's an individual agreement that you agreed to unknowingly' would be a challenge."

Most cumbersome of all is communicating to each client, Teukolsky said. Professional rules of conduct mandate attorneys keep clients informed of major developments in their cases, return phone calls in a timely fashion and advocate in the client's best interest.

But in a case like Postmates or Uber, with thousands of plaintiffs, administrating that kind of work can be nightmarish, Teukolsky said.

"There are lots of obligations when you have an attorney-client relationship with 5,000 clients," she said. "It becomes much more difficult and time intensive."

And conflicts of interest could bubble up if a settlement is reached. Not every claim is the same, Teukolsky said. Unlike class actions, mass arbitrations require each client to sign off on an aggregate settlement proposal. Attorneys are obligated to disclose the total amount of the settlement to plaintiffs and the amount the others will receive prior to getting those individual approvals.

Inevitably, Teukolsky noted, there will be holdouts.

"That creates a conflict of interest because you, the attorney, represent 98 plaintiffs who want to accept the settlement and two plaintiffs who don't because their interests are diametrically opposed," she said.

Teukolsky suggested developing a settlement formula early on in the filing process that includes a point system for related metrics. For example, in a wage and hour matter, the formula should account for criteria like number of hours worked, number of shifts worked and pay rate.

Whatever the formula, attorneys should make sure they get buy-in from all plaintiffs before the claims are filed, Teukolsky said. Attorneys could even build that buy-in into the retainer agreement.

"Even if you don't know what the numbers are going to be, you have buy-in on how we're going to split it up," she said.

While mass filings can be a powerful, if sometimes unwieldy, tool for plaintiffs' attorneys, companies are by no means defenseless, said Damien P. DeLaney, a partner in Akerman LLP's Los Angeles labor and litigation practices. Often companies facing claims from hundreds or thousands of workers are large enterprises with the resources to defend their arbitration agreements.

"Companies think it's important to defend their policies, and they make the sound decision to do that if they've got the resources," DeLaney said.

And despite the mass filing spikes in recent years, DeLaney said he still sees more plaintiffs' attorneys opt for PAGA claims than get bogged down managing thousands of plaintiffs.

"For every time I have a class action and I reach out to opposing counsel and pull a class waiver on them, the response is almost always, 'OK, I'll just turn it into a PAGA case and we'll litigate the PAGA claim," DeLaney said. "Very rarely is it, "OK, well I'm going to go sign up 300 people."

But when it is, DeLaney sees opportunity for both the firm and his team to prosper. DeLaney was part of a defense against 600 individual filings in 2014. Not only are mass filings "a big piece of business" for a firm, they can be a great training tool for senior associates, which he was at the time.

"You can get associates who want to do it because it's trial experience," DeLaney said. "If you have people who are capable, you can give it to one person, have them run with it and try it at the end. From a firm perspective, that could be a real benefit."

Just as with the plaintiffs' attorneys, mass filings require a lot of defense firm resources, DeLaney said. A core team of 15 to 20 attorneys is necessary to create a matter management sys-

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JAMS

Hon. Linda L. Miller (Ret.)

Orange County

Family Law, Business & Commercial, Employment Law, Higher Education & Title IX, Personal Injury/Torts, Real Property

Hon. Linda L. Miller (Ret.) joined JAMS after more than 30 years as a judge in Orange County, California. She spent 16 years handling a family law direct calendar and served for two years on a Superior Court appellate panel. In addition to family law, Judge Miller handled business and commercial disputes, torts, collection matters and real property title and possession cases. As an assigned judge in the Civil Departments of the Riverside County Superior Court, she conducted in excess of 1,200 settlement conferences, with a very high rate of resolution.

Judge Miller has a wealth of experience with complex financial matters related to family law. Her family law experience, in both trials and resolution, ranges from business and realty valuation, reimbursements, custody disputes, income findings for support, to fees and domestic abuse. Judge Miller established the first Children's Chambers in Orange County, where children can be safely cared for while parents tend to court business. It subsequently became a model for courts all over the state.

Judge Miller has a well-earned reputation among colleagues and attorneys for her credibility, consistency, preparation and ability to quickly grasp complex issues and resolve even the most tumultuous disputes. As a mediator, Judge Miller uses persistence and perseverance to creatively help the parties craft their own solutions. As an arbitrator, her strong analytical and case management skills allow the process to flow seamlessly.

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JUDICATE WEST

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For decades, she has been passionate about the reconciliation processes and received training sponsored by the Los Angeles Diocese of the Episcopal Church to resolve church-related matters. She has substantial experience with Korean American cultural issues as a result of presiding over church-related litigation and her own church involvement.

She says, "As a judge, I took great satisfaction in helping civil litigants resolve their differences and move on with their lives. I look forward to using my trial experience and my commitment to justice and peacebuilding to help litigants reach satisfactory resolutions in the private sector."

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THE ENFORCEABILITY OF CLASS WAIVERS IN ARBITRATION AGREEMENTS — *THE PITFALLS IN DRAFTING AN ENFORCEABLE ARBITRATION CLAUSE AFTER LAMPS PLUS V. VARELA*

BY RICHARD T. FIELDS AND BARRY D. KAYE

In light of the U.S. Supreme Court's ruling in *Lamps Plus v. Varela*, 139 S. Ct. 1407 (2019), a hot topic in the business and legal communities is the overall enforceability of class action waivers in arbitration agreements. Trial judges, lawyers and litigants encounter this issue in drafting, arguing, interpreting and ruling on the effectiveness of the myriad of arbitration clauses containing class action waivers. This article seeks to inform the reader of how courts view arbitration clauses generally in light of the purposes of the Federal Arbitration Act and specifically as to class action waivers. It will also show that attempts by courts, legislative bodies, and contracting parties to avoid application of the FAA or thwart its purpose or application will not generally survive judicial scrutiny.

Federal Law and Policy Favors Arbitral Dispute Resolution

In drafting or reviewing arbitration clauses effectively, it is important to understand some basic principles as to how arbitration agreements are viewed by the courts. The principle statute dealing with arbitration is the FAA. The FAA provides that a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012). The FAA "'reflects an emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 565 U.S. 18, 21, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631. Under the FAA courts must "enforce arbitration agreements according to their terms." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2017). It is now unquestionably clear that courts must do so "rigorously." *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 233 (2013). The FAA applies in state as well as federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 14-15 (1984).

Arbitration is a Matter of Consent

According to the Supreme Court, the foundational principle that underscores all of its arbitration decisions is that "[a]rbitration is strictly 'a matter of consent.'" *Granite Rock Co. v. Teamsters*, 561 U. S. 287, 299, quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 479 (1989); *see also Lamps Plus*, 139 S. Ct. 1407. By consenting to arbitration, the parties give arbitrators the power to hear and resolve their disputes. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). The parties also have tremendous power in shaping the process. They may designate "with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Id.* at 683-84. In reviewing arbitration agreements, the fundamental task of the courts is to "to give effect to the intent of the parties." *Id.* at 684. Normally, a court may rely on state law contract principles to give effect to such intent, including things such as whether the parties agreed to arbitrate a particular matter. *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 944 (1995). However, where state law principles "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as articulated by the FAA and interpreted by the courts, they are preempted. *AT&T Mobility LLC v.Concepcion*, 563 U.S. 333, 352 (2011).

For example, although unconscionability is a generally a defense to enforcement of an arbitration agreement under the FAA, "[t]he general applica-

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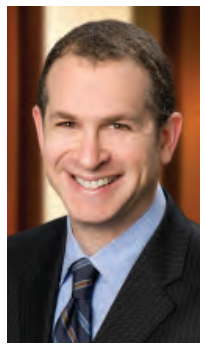

bility of the rule" could not "save it from preemption under the FAA with respect to arbitration agreements" where it "had been interpreted by [a] state court to bar class action waivers in consumer contracts" both in the litigation and arbitration contexts "because it had the consequence of allowing any party to a consumer arbitration agreement to demand class proceedings 'without the parties' consent.'" *Lamps Plus*, 139 S. Ct. at 1418, quoting *Epic Sys.*, 138 S. Ct. 1612 (describing the Supreme Court's action in *Concepcion*, 563 U.S. at 348).

Courts Will Not Compel Class Arbitration Where the Parties Have Not Clearly Consented to Such Arbitration as Contemplated by the FAA

The foregoing arbitration principles are indispensable in determining whether courts will enforce various arbitration clauses or grant or deny petitions or motions to compel arbitration of certain disputes. One of the major issues now presented in the cases is whether courts will order class arbitration in light of the parties' particular agreement and various state and federal laws and decisions dealing with the subject. For example, employers who have entered into arbitration agreements often seek to avoid class arbitration, which as will be later discussed, significantly alters the nature of a traditional arbitration. *Lamps Plus*, 139 S. Ct. 1407. Likewise, there are many cases where a plaintiff will file a lawsuit on behalf of himself or herself individually, as well as claims on behalf of a specified class. *Sandquist v. Lebo Automotive, Inc.*, 1 Cal. 5th 233 (2016). Applying the basic arbitration principles set forth above, the courts will start with a review of the arbitration clause or clauses in dispute. If the arbitration agreement provides for class arbitration, the courts will generally enforce it. This results from the fact that courts will enforce class arbitration if "there is a contractual basis for concluding that the [parties] agreed" to it. *Stolt-Nielsen*, 559 U.S. at 684. This relates back to the fundamental principle that arbitration is a matter of consent.

Nevertheless, the Supreme Court has noted that class arbitration fundamentally changes the traditional nature of arbitration. *Id.* at 685-86. These differences between class action arbitration and individual arbitration strongly affects the court's view of class action waivers. In traditional individual arbitration, the parties avoid the usual procedural formality, rigor and heightened stress of a trial in the courts and, with few exceptions, give up the right to appellate review of the arbitrator's decision. *Id.* at 685. In exchange, their matter is heard in a proceeding in which there are "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* In the Supreme Court's view, class arbitration is slower, more formal, "more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. With class arbitration, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, [are] shorn away and arbitration [winds up] looking like the litigation it was meant to displace." *Epic Sys.*, 138 S. Ct. at 1623. "Because of these 'crucial differences' between individual and class arbitration" courts will not infer

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THE DISCOVER BANK RULE WAS FOUND TO BE INCONSISTENT WITH THE FAA AND INVALIDATED BY THE U.S. SUPREME COURT IN CONCEPCION. IN CONCEPCION, THE SUPREME COURT CONSIDERED THE EFFECT OF SECTION 2 OF THE FAA ON THE STATE COURT RULING HOLDING THE CLASS WAIVER UNENFORCEABLE.

4th District Justice Richard T. Fields, California Court of Appeal and Barry D. Kaye, USC Gould School of Law

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Hon. Risë Jones Pichon (Ret.) joined JAMS after a distinguished judicial career spanning more than 35 years. Most recently, Judge Pichon was a superior court judge for the County of Santa Clara for more than 20 years and was elected to serve as presiding judge of the Santa Clara County Superior Court in 2015 and 2016. Prior to this, she served as a municipal court judge from 1984 to 1998 and as a court commissioner from 1983 to 1984. Judge Pichon was elected to serve as the presiding judge of the municipal court from 1990 to1991. She earned her Bachelor of Science in mathematics and her Juris Doctor from Santa Clara University School of Law.

While she was a judge, Judge Pichon oversaw the completion and opening of the Family Justice Center Courthouse in San Jose. She successfully implemented a new case manager system in the criminal/felony division. Judge Pichon presided over Santa Clara County's probate calendars and is known for her experience in the estate/probate area, which makes her uniquely qualified to serve as a mediator and arbitrator for estate/probate/trust matters. Her ability to weigh all parties' concerns—including financial, familial and emotional—in these types of cases will also help her to resolve any type of dispute that comes before her.

Judge Pichon has a well-earned reputation for fairness, credibility and consistency, as evidenced by the many honors and awards she has received during her career, including the Lifetime Achievement Award from the Santa Clara County Trial Lawyers Association in 2019 and the Legendary Champions of Justice Award from the California Association of Black Lawyers in 2018. Judge Pichon is known among colleagues and attorneys for managing difficult situations and cases with grace and dignity, which will enable her to lead parties to resolution effectively as a neutral.

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James F. Pokorny, Esq. is a talented mediator who brings with him a wealth of experience as a civil litigator and San Diego Superior Court mediation panelist. As a mediator, he has successfully resolved disputes involving litigants in a variety of matters, including personal injury, insurance coverage, and business litigation. His mediation experience is enhanced by his depth of experience as an attorney whose forty year practice focused on both plaintiff and defense work in the areas of catastrophic personal injury, insurance litigation, construction litigation, business litigation, and air crash litigation.

Having participated in scores of mediations, Mr. Pokorny knows that there is no "one size fits all" approach with respect to conflict resolution. People are different; their legal claims are different; and the mediator must take this into account. Mr. Pokorny draws upon his decades of experience and in-depth training to adapt his approach and meet the unique needs of each matter before him.

Mr. Pokorny's aviation-related matters are enhanced by his comprehensive understanding of aeronautics. He has been an instrument rated, FAA licensed commercial pilot for over thirty years. He has owned several airplanes and has flown over 3,000 hours as pilot in command in various types of single and multi-engine aircraft. He is a Co-Founder of the San Diego County Bar Association's Aviation Law Section. In addition, he served on the legal services panel of the Airplane Owners and Pilots Association for decades and as a member of the Board of Directors and Past President of the Lawyer Pilots Bar Association.

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A practicing attorney for nearly 25 years, Angela Reddock-Wright became a full-time neutral and workplace and Title IX sexual assault investigator in 2011 with the opening of her own dispute resolution firm. Prior to that time, Angela was an employment and labor law litigator for 15 years where she represented clients in the full array of cases including wrongful termination, harassment, discrimination, public policy and wage and hour claims. She also developed specialties in handling highly sensitive hazing and bullying cases involving K-12 schools, colleges and universities. She litigated two of the nation's leading hazing, wrongful death and personal injury cases involving two top sororities. She also handled the appeal in a high-profile juvenile criminal case involving a wrongful death resulting from teen bullying.

Additionally, Angela has worked on some of the most compelling projects in the Los Angeles area, including serving as a co-administrator for the Project Labor Agreement (PLA) for the So-Fi Stadium where the NFL's Los Angeles Rams and Los Angeles Chargers will play; working with the Screen Actors Guild (SAG-AFTRA) to assist in updating its member policies relating to sexual harassment reporting; and serving as the compliance manager for the multi-billion dollar LAMP construction project at the Los Angeles International Airport.

Angela has demonstrated her commitment to the field of mediation and conflict resolution by her service as a volunteer mediator with the U.S. District Court, Central District of California; her service as the 2019 President of the Southern California Mediation Association (SCMA) and board member for several years prior; and as an Adjunct Professor in the Negotiations, Conflict Resolution and Peace program at California State University, Dominguez Hills.

Angela's passion for people, peace and resolution is a driving force behind her practice as a neutral and underlies her compassionate and direct style.

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Hon. Glen M. Reiser (Ret.) joined JAMS with vast experience adjudicating and resolving thousands of complex trust, commercial, and real property/environmental disputes as a respected trial judge and litigator. Judge Reiser spent more than 20 years on the Ventura County Superior Court, serving as both supervising probate/trust/conservatorship judge and California Environmental Quality Act (CEQA) judge for more than a decade. Prior to his appointment to the bench, over two additional decades he litigated hundreds of civil cases to successful conclusion in trial and appellate courts throughout California.

Judge Reiser is sought-after as a mediator and arbitrator throughout the state. He does not bill for travel time or expenses. Counsel who have mediated with Judge Reiser note:

"I greatly appreciated your assistance with this mediation. Your pre-mediation telephone conference was extremely valuable, as well, to discuss the specifics of the case, the claims, and settlement postures taken by the parties and counsel, in advance. I felt that we immediately hit the ground running when we began that morning."

"Your professionalism, approachability and sage counsel kept things on track, and it appeared that you were able to see through literally decades of smoke and discern the family dynamic at issue."

"Yet again, you did a masterful job in reading the parties and counsel involved; kept us talking productively at all times; used your experience on the bench to help the parties adjust their pre-existing 'I'm not going below...' expectations by having them confront new information and its impact on their pre-determined strength of their case; and then made the call at the right time to separate parties to put everyone on shaky ground, which led to all parties incentivized to reach a global settlement."

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LAMPS PLUS CONTINUED

mutual consent to class arbitration. *Lamps Plus*, 139 S. Ct. at 1411. Such consent must be manifested by a contractual agreement to arbitrate class claims. *Id.* Silence on the matter of class arbitration in an arbitration agreement has been declared a legally insufficient basis to conclude the parties consented to class arbitration. *Stolt-Nielsen*, 559 U.S. at 687.

The question then arises as to "whether the FAA similarly bars an order requiring class arbitration when an agreement is not silent, but rather 'ambiguous' about the availability of such arbitration." *Lamps Plus*, 139 S. Ct. at 1412. For the same reasons set forth by the court with respect to silence on the issue of class arbitration, the court has held that ambiguity cannot form the necessary contractual basis for compelling class arbitration. *Id.* at 1416. Ambiguity arises when some clauses support one interpretation of an issue and other clauses support a different interpretation of the same issue but both interpretations are reasonable under the circumstances. *Id.* at 1414-15. The court has held that the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." *Id.* at 1415. Moreover, a state law doctrine, known as *contra preferendum*, which provides that ambiguities are resolved against the drafter, cannot be used to compel class arbitration where the agreement is ambiguous on that issue because class arbitration which is "'manufactured by [state law] rather than consen[t], is inconsistent with the FAA.'" *Id.* at 1412 quoting *Concepcion*, 563 U.S. at 348.

Thus, the preferred method for dealing with class arbitration is to do so expressly within the arbitration agreement. If the parties wish to exclude class arbitration from the scope of arbitral issues, they would be well served to expressly manifest their intent within the arbitration agreement. This applies with equal or greater strength if the parties wish to include class arbitration within the scope of the arbitral issues as the courts will not infer that intent from silence or ambiguity. This analysis highlights the importance of reviewing the arbitration clause in its entirety, searching for possible ambiguities, and clearly and unambiguously setting forth the parties' intent. *Lamps Plus*, 139 S. Ct. at 1418.

State Laws and Court Decisions that Limit Parties' Ability to Waive Class Action

Proceedings in Arbitration Are Generally Preempted by Application of the FAA

Parties often enter into agreements that waive their right to class proceedings. The question arises as to whether a "refusal to enforce such a waiver on grounds of public policy or unconscionability is preempted by the FAA." *Iskanian v. CLS Transportation Los Angeles*, LLC, 59 Cal. 4th 348, 360 (2014). In other words, can such waivers be appropriately written into arbitration agreements or will state law or court decisions prevent the enforcement of class action waivers? The evolving case law suggests that state laws prohibiting the enforcement of class action waivers on the grounds that they violate public policy or unconscionability are preempted by the FAA. *Id.* at 360.

Discover Bank Rule Invalidated by *Concepcion*

Beginning in 2005, by virtue of the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), California had what was known as the *Discover Bank* rule. That rule "re-

IN DRAFTING OR REVIEWING ARBITRATION CLAUSES EFFECTIVELY, IT IS IMPORTANT TO UNDERSTAND SOME BASIC PRINCIPLES AS TO HOW ARBITRATION AGREEMENTS ARE VIEWED BY THE COURTS.

4th District Justice Richard T. Fields, California Court of Appeal and Barry D. Kaye, USC Gould School of Law

stricted consumer class action waivers in arbitration agreements." *Iskanian*, 59 Cal. 4th at 361. The court in *Discover Bank* stopped short of holding that all class action waivers are unconscionable and therefore unenforceable. However, the *Discover Bank* court did enunciate the rule that "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another'" in violation of California law. In this scenario, the court said that "such waivers are unconscionable under California law and should not be enforced."

The *Discover Bank* rule was found to be inconsistent with the FAA and invalidated in by the U.S. Supreme Court in *Concepcion*. In *Concepcion*, the Supreme Court considered the effect of Section 2 of the FAA on the state court ruling holding the class waiver unenforceable. Section 2 of the FAA provides that arbitration agreements "may be declared unenforceable … 'upon such grounds as exist at law or in equity for the revocation of any contract.'" That section has been often referred to as a "savings clause."

In *Concepcion*, the court stated that although the savings clause found within Section 2 of the

FAA, "preserves generally applicable contract defenses, nothing in it suggests an intent to

preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." The court found that the *Discover Bank* rule wrongfully "interferes with arbitration." Although the rule was limited to adhesion contracts, the court found that that limitation was not particularly helpful in saving the rule because virtually all consumer contracts are contracts of adhesion. The court found that the rule "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" and therefore was preempted.

In 2014, in light of *Concepcion*,

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Peter K. Rosen, Esq. joined JAMS in January 2019 following his prestigious legal career handling high-profile insurance matters covering a wide range of commercial issues and policies, including directors and officers (D&O) liability, general liability, property, cyber, employment, professional liability, construction, fidelity, environmental, representations and warranties insurance, and reinsurance. Mr. Rosen has deep expertise in handling coverage issues arising out of mass disasters. His role in the World Trade Center insurance coverage litigation gained him worldwide recognition. He received accolades from The Legal 500 and Chambers USA, which noted, "He is recognized for his 'wealth of expertise' and is described as 'someone you would bring in as a big hitter.'"

Throughout his career, Mr. Rosen has driven hundreds of matters to a mediated resolution, including insurance, securities and construction matters, and has been involved in numerous high-stakes domestic and international arbitrations.

Mr. Rosen is the author of leading texts on D&O liability and business interruption claims. He teaches insurance law at USC Gould School of Law. He has also taught corporate governance at USC Gould School of Law. Mr. Rosen coaches UCLA Law School's Vis International Moot team Mr. Rosen serves as a mediator, arbitrator, and neutral evaluator nationwide. He encourages early intervention to resolve complex, but smaller dollar value insurance disputes such as fee disputes. He is a Fellow of the Chartered Institute of Arbitrators (CIArb), a Fellow in the American College of Coverage Counsel, and a Centre for Effective Dispute Resolution (CEDR) accredited mediator.

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George M. Rosenberg, Esq., has over 40 years of experience as a trial lawyer representing both plaintiffs and defendants in a wide variety of civil matters. He brings a wealth of experience to his dispute resolution services, having tried personal injury and wrongful death cases resulting in multi-million dollar verdicts involving dangerous conditions of public property, automobile accidents, premises liability, medical malpractice, insurance bad faith, construction accidents, and products liability. Mr. Rosenberg has also handled cases involving civil rights, employment termination and discrimination, business disputes, and real estate matters.

Mr. Rosenberg began his mediation practice in 2003 after attending the Straus Institute for Dispute Resolution at Pepperdine. He previously served as a court mediator and arbitrator for over ten years before the program was dismantled. Having litigated cases for over 40 years, Mr. Rosenberg fully understands the emotional and financial toll litigation has on the parties and is able to convey from first-hand knowledge the risks and benefits they may face in trial.

Early in his career, Mr. Rosenberg was a partner with the prominent plaintiffs' trial firm of Greene O'Reilly Broillet Paul Simon McMillan Wheeler & Rosenberg (now Greene Broillet & Wheeler). He later served as a consultant to then California State Controller, Gray Davis, before partnering with Stanley Jacobs to form the plaintiffs' personal injury firm of Jacobs Jacobs & Rosenberg. In 1996, Mr. Rosenberg formed his own firm, where he tried and litigated numerous civil cases and later became Of Counsel to the highly respected defense firm, Bremer Whyte Brown & O'Meara. In 2003, Mr. Rosenberg formed Rosenberg Mediations, where he continued to resolve civil disputes before joining ADR Services, Inc. in 2019.

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the California Supreme Court in *Iskanian* overruled its own 2007 decision in *Gentry v Superior Court*, 42 Cal. 4th 443(2007). In *Gentry*, like *Discover Bank*, the court had held that some class action waivers were unenforceable. *Gentry* dealt with class action waivers in arbitration contracts in employment cases. The *Gentry* court held that where a plaintiff employee was alleging that an employer had "systematically denied proper overtime pay to a class of employees" and the employee sought class arbitration notwithstanding an arbitration agreement prohibiting class arbitration, a trial court must consider several factors to determine whether the class action waiver would be enforceable. If a court concluded based upon factors such as "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration" "that a class arbitration [was] likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and [concluded] that the disallowance of the class action [would] likely lead to a less comprehensive enforcement of overtime laws for the employees alleged to be affected by the employer's violations, it [would be required to] invalidate the class arbitration waiver to ensure that these employees [could] 'vindicate [their] unwaivable rights in an arbitration forum.'"

In *Iskanian*, the court ruled that *Gentry* ran "afoul" of the principle in *Concepcion* that the FAA "prevent[s] states from mandating or promoting procedures incompatible with arbitration." The court thus held that the FAA preempted the *Gentry* rule. The court noted that "the fact that *Gentry*'s rule against class waiver is stated more narrowly than *Discover Bank*'s rule does not save it from FAA preemption under *Concepcion*." The court pointed out that the Supreme Court held in *Concepcion* that even when a state law prohibiting consumer class waivers is limited to "'class proceedings [that] are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,'" "it would still be preempted because states cannot require a procedure that interferes with fundamental attributes of arbitration 'even if it is desirable for unrelated reasons.'"

Additionally, the court noted that "*Concepcion* held that because class proceedings interfere with fundamental attributes of arbitration, a class waiver is not invalid even if an individual proceeding would be an ineffective means to prosecute certain claims." The *Iskanian* court concluded that by virtue of *Concepcion*, it had become apparent that the FAA preempts the *Gentry* rule. This is largely due to the fact that "the FAA … prevent[s] states from mandating or promoting procedures incompatible with arbitration." Therefore, class action waivers which are viewed as interfering with the full purposes of the FAA are likely to be held preempted.

Conclusion

When it comes to the enforceability of class arbitration waivers, the courts will focus on the question of consent. If the parties have clearly manifested their intention to permit or exclude class proceedings in their arbitration agreement, the courts will enforce such agreements rigorously. Neither silence nor ambiguity regarding class proceedings in the agreement provide a sufficient basis to conclude the parties have consented to class arbitration. The reader is cautioned that courts have not looked favorably upon legislative attempts to void class waivers as such legislation is often viewed as interfering with the full purposes of the FAA which allows the parties to define, in their agreement, the things to which they consent.

Courts, legislative bodies, or contracting parties must understand the purposes of the FAA and should avoid taking actions that thwart or frustrate those purposes or risk the possibility the actions they take may be voided or otherwise determined to be unenforceable and unable to survive judicial scrutiny.

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Hon. Gerald Rosenberg (Ret.) joined ADR Services, Inc. in 2019 after an impressive 44-year career as a civil litigator, Court Commissioner, and Judge of the Superior Court.

After graduating from Southwestern Law School, Judge Rosenberg established a successful civil litigation practice in Sherman Oaks, specializing in real estate, business, family law, personal injury, and construction cases. He maintained his litigation practice until he was appointed by the judges as a Court Commissioner in 1995. He served in this role for both the Beverly Hills and Santa Monica Courthouses until he was elevated to a judgeship in 2000.

Judge Rosenberg is well regarded as a learned and considerate jurist with an impeccable judicial temperament and a thorough knowledge and application of the law. After initial assignments in Criminal Preliminary Hearings and Trials, Civil Trials, Family Law, and Probate, Judge Rosenberg spent the majority of his career presiding over Unlimited Jurisdiction Civil Cases in the Santa Monica courthouse, earning a reputation for his patience, extensive preparation, and evenhanded rulings. In addition, he served as Assistant Supervising Judge and later Supervising Judge of the Los Angeles Superior Court West District.

In recognition of his judicial achievements, Judge Rosenberg was named the 2017 Trial Judge of the Year by the Los Angeles Chapter of the American Board of Trial Advocates (ABOTA) and the 2011 Outstanding Judicial Officer by Southwestern Law School. He is available for mediations, arbitrations, reference assignments, mock trials, and private trials.

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Amy Fisch Solomon, formerly a senior partner with Girardi|Keese, joined Judicate West in July of 2019. She says she could not be happier. After 33 years as a successful trial attorney in both state and federal courts, Amy brings to the dispute resolution arena her experience having tried almost 50 cases in the areas of medical negligence, product liability, personal injury, catastrophic injury, and medical devices.

As a trial lawyer, Amy was known to be an intelligent, respectful, civil, hardworking colleague and adversary, who addressed each case with a practical and resolution-oriented approach. She has quickly earned this reputation as a neutral as well. Amy was inducted into ABOTA in 2003 and the International Academy of Trial Lawyers in 2016. Since 1997, she served on numerous court mediation panels and programs.

Indeed, problem-solving is a goal Amy pursues with a keen tenacity. She says, "In mediation, I hope to exhibit my long-standing belief that with each difficulty lies an opportunity. I am dedicated to uncovering all issues in a case whether they are obvious or buried deep beneath the surface with the goal of helping the parties reach a settlement and obtain closure."

Amy approaches each mediation with a fresh look and meticulous preparation. She recognizes that no two cases are exactly alike as each involves new and different personalities, both from the attorneys and their clients. She cares deeply about the mediation experience and creates an environment for all to be heard with an eye toward finding points of agreement and, eventually, total resolution of the matter. Her honesty and integrity quickly create a trusting rapport with all involved.

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San Francisco

Business/Contractual, Employment, Government Liability, Medical Negligence, Personal Injury, Real Property including Inverse Condemnation

Judge Donald Sullivan retired from the San Francisco County Superior Court on Mar. 1, 2017, following more than 13 years of distinguished service. During his tenure on the bench, he presided over a broad spectrum of civil matters, including toxic tort, product liability, personal injury and real estate cases. He also spent several years on the court's Family Law and Appellate panels. His passion for dispute resolution started while he was a judge, where he participated in the court's Day of Trial Settlement and judicial arbitration programs while also conducting settlement conferences for several years.

He began his legal career working in the San Francisco Regional Office for Caltrans, where, for 15 years, he tried numerous cases, covering everything from dangerous conditions of public property to inverse condemnation, to eminent domain actions. Afterwards, he worked with civil litigation firms where he focused on toxic torts, product liability, personal injury, medical malpractice, employment, catastrophic injury and wrongful death cases. Overall, he tried cases before juries in 17 counties throughout California.

Judge Sullivan has been a member of the American Board of Trial Advocates (ABOTA) since 1992 and, as an attorney, was Board Certified by the National Board of Trial Advocacy (NBTA) and American Board of Professional Liability Attorneys (ABPLA).

His reputation as a friendly, fair and hard-working judge has also proved to be true in the private sector. An attorney commented, "Judge Don Sullivan has the 'trifecta' with respect to being in a position to be a superb mediator. He was a defense trial lawyer and then a plaintiffs' trial lawyer and then became a trial judge late in his career. On top of all of it, he is a great guy."

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JAMS

Stephen H. Sulmeyer, J.D., Ph.D

San Francisco

Business/Commercial, Employment, Entertainment, Estates/Probate/Trusts, Family Law, Intellectual Property, Personal Injury/Tort/Elder Law

Stephen H. Sulmeyer, J.D., Ph.D., joined JAMS as a full-time neutral after nearly 20 years as a mediator in private practice. With a dual background as a commercial and intellectual property litigator as well as a clinical psychologist, Mr. Sulmeyer specializes in the settlement of disputes involving professional and intimate relationships, particularly in areas such as family law, probate and estate planning, elder law, family businesses, workplace, sexual harassment and partnership disputes, as well as commercial and business disputes. His skill at working with the human issues that drive disputes has earned him a reputation for resolving the most challenging high-conflict and high-emotion cases.

Mr. Sulmeyer's approach to dispute resolution focuses on understanding as thoroughly as possible the parties' material and non-material interests, as well as their financial and legal positions—hence his commitment to thorough and diligent pre-mediation preparation. His ability to listen empathically, think analytically and communicate clearly allows parties and counsel to feel genuinely heard and understood, and ripens negotiations for creative and pragmatic problem-solving. His combination of tenacity, legal acumen and amiable practicality contributes to his high rate of settlement.

In addition to his mediation practice, Mr. Sulmeyer is highly-sought-after as a speaker and trainer of dispute resolution, nationally and internationally. He is also the founder and former president of Integrative Mediation Bay Area, an organization that brings together psychotherapist, financial industry and attorney co-mediators in family law and other cases. Mr. Sulmeyer is the co-founder (with Judge Verna Adams) of the Marin Superior Court's Interdisciplinary Settlement Conference program, in which mental health professionals and lawyers trained in dispute resolution team up to assist judges to resolve the most intractable child custody, probate and other civil cases.

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and it gives a green light to many who may not have considered themselves a fit with the world of alternative dispute resolution. Because of the limited nature of appeals in arbitration, the composition of panels is of the utmost importance. SB 707 shows the ADR community welcomes more perspectives."

Phyllis W. Cheng said that she's sought as an ADR Services Inc. neutral due to her gender, her Chinese American background and the fact that she speaks three Chinese dialects. She is a former DLA Piper LLP partner and the former director of the California Department of Fair Employment and Housing.

"I've been told by clients they wanted a woman for, say, sexual harassment cases," she said. "And I've handled several cases recently in which my language skills were needed." She said that SB 707 will draw needed attention to the diversity issue, which is based on the great varieties of human experience. "People are complicated. It's not obvious, but I am actually a convert to Judaism. I disclose that too when it's called for. A lot can be hidden in a person, and it is wonderful to see the legal profession diversifying. There was a time when women could hardly go to law school. So we take the long view."

Also at ADR Services is Stacie Feldman Hausner, who joined three years ago after a 15-year litigation career. "A big group of lawyers only want to use judges as neutrals," she said, "so I went back to school at Pepperdine to get a LL.M. at the Straus Institute for Dispute Resolution."

Now she said she feels equipped, though it hasn't been easy. "I'm under 50 and female, but this is a hard profession to crack because it's so saturated," she said. "There is already a shift happening toward a more inclusive demographic because some of the older male judges working as neutrals are retiring now."

JAMS neutral Shirish Gupta practiced commercial and employment law and is a former president of the South Asian Bar of Northern California. He joined JAMS in 2015. "I saw that mediation and arbitration were how most of my litigation cases were resolving, so I got training, hung out my shingle and flew around the state offering my service pro bono for a time. It helped me develop my style. By 2015 I had grown enough to jettison my practice and be a full time neutral."

About 10 percent of his practice involves South Asian clients. "There are just a handful of us; I was the first at JAMS. Now, I am actively recruiting folks to consider this as a career. You don't have to be a retired judge to get here. Lack of diversity can be a perceived injustice."

Suzanne G. Bruguera joined ADR Services three years ago after 27 years on the Los Angeles Superior and Municipal Courts. She once was unsuccessfully challenged for retention based on her ethnic forename, Soussan, she said, which she later changed. "I'm Armenian and Russian, raised in Iran," she said. "Now, as a neutral, I find we female retired former judges are very sought after. I'm sure people have said no because I'm a woman, but I have plenty of cases."

SB 707 will encourage transparency, she said. "I encourage people to work as a neutral by telling them, 'Do a good job and you'll be busy.'"

As for Jay-Z, "We're pleased to see how quickly California moved on this," said his lawyer, Alex Spiro, a New York partner at Quinn Emanuel Urquhart & Sullivan LLP. "So much gets resolved in these closed forums. [The new law is] definitely cool; we want to be agents of progress and change."

MASS ARBITRATION CONTINUED

tem that tracks information — including discovery requests, depositions and dispositive motions — and shares work across the team.

"You want to create those efficiencies for your attorneys so they can focus," he said.

There's also the possibly of coming across neutrals who have arbitrated several of the cases, DeLaney said. Regardless of how they've come down on past claims, the last thing defense counsel wants are grounds for plaintiffs' attorneys to appeal the arbitrator's decision.

"You should track in your matter management what the arbitrators are doing and how they're engaging with the issues," he said. "You should have a good idea of who you want to work with as the process goes forward."

Most importantly, the defense team needs to keep in constant contact with the company, DeLaney said. Mass filings are a constantly evolving situation and employers need up-to-date information so they can make informed decisions.

"The client is going to be looking at your bills, looking at the results in the individual cases as they go to hearing and awards are determined and doing that risk assessment on an ongoing basis," DeLaney said. "You need to do that in partnership with your client."

Also sharing the duty of managing these types of filings are ADR providers who must adjudicate these matters. For the most part, the executive at a national neutral provider who asked her name be withheld said her company hasn't felt any adverse effects to its infrastructure as mass filings become more commonplace.

Typically, she said, her provider receives filings in batches of 10 or 20 at a time, sometimes 100. If the number gets higher, the executive will set up a conference call with both parties to determine next step.

"We want to get a better understanding of what we're facing," the executive said "How many are coming in? What kind of cases are we dealing with? Are there agreements among the parties about who's paying the filing fees? We just try to get the lay of the land so we administer the cases in an efficient way going forward."

While she couldn't speak to other providers, the executive said her group hasn't had any issues with companies refusing to pay their initial fees. And if a company tried to avoid payment, the group has measures in addition to SB 707 it could implement.

This includes sending a letter to plaintiffs' counsel detailing the provider's multiple attempts to collect the fee, and because the employer hasn't responded, they cannot move forward with arbitration.

"That would be the vehicle [claimants] could use to go to court to either invalidate the arbitration agreement or get the court to force the company to comply and to pay so that the arbitration could move forward," the executive said. "We've always monitored those cases and then tried to provide some sort of remedy to the claimant if there's a nonresponsive company."

The executive also said occasionally the provider has shifted resources when it received a new batch of filings, thanks in part to having multiple locations across North America. The provider has been able to reinforce the case management staff when necessary and prepare claims for arbitration once counsel for both sides agree on the basic parameters.

To safeguard against repeat sessions with the same neutral, the provider monitors work flow so it can swap arbitrators in and out seamlessly.

"We've always tried to be flexible and nimble in our case administration," the executive said. "We're making sure we meet both sides' desire for due process and fairness. Right now, it's manageable, and if this is a trend going forward, we'll adapt and respond accordingly."

Garden hopes that trend ends soon. Now that mass filings have proven that individual arbitration agreements cannot stop plaintiffs' attorneys from bringing some kind of collective action, she'd to see employers move back to more traditional means of resolving disputes.

"Companies have these individual arbitration agreements because they hope that nobody will take them up on individual arbitration," Garden said. "But I think companies have realized it would be much better for them if they had an aggregated form of dealing with these disputes with their workforces."

JAMS

Hon. Lynn O'Malley Taylor (Ret.)

San Francisco

Business/Commercial, Construction, Employment Law, Estates/Probate/Trusts, Family Law, Personal Injury/Tort

Hon. Lynn O'Malley Taylor (Ret.) joins JAMS as a full-time neutral, bringing over 35 years' experience as a trial court judge. In 1982, Judge Taylor was the first woman elected to the court in Marin County. She has served three times as presiding judge. During her tenure as supervising civil law judge in Marin County, Judge Taylor worked with colleagues to eliminate the court's backlog by identifying and focusing on settlement of aged cases and managing remaining cases on realistic time schedules. She encouraged mediation and required settlement conferences for cases that did not settle in mediation. She settled hundreds of cases in partnership with mediation trained attorneys and experts.

Judge Taylor has served in counties across Northern California and for the last seven years in the SF Superior Court as part of the Judicial Council's Assigned Judges Program, where she settled numerous cases specifically assigned to her and at the request of other judges. Judge Taylor has heard and settled multiple cases involving employment discrimination and sexual harassment, wage/hour, employment/independent contractor issues, insurance coverage, indemnity, bad faith, judicial review of administrative determinations, toxic torts, CEQA, inverse condemnation, medical/dental/engineering/legal/accountant malpractice, personal injury, product defect, and property disputes involving easements and covenants, conditions and restrictions. She is trained as a Title IX external adjudicator for colleges in sexual assault and harassment cases.

Treating all with dignity and kindness, Judge Taylor has well-deserved respect from the lawyers and litigants who have appeared before her. She approaches each matter that comes before her with optimism and persistence. Having served as faculty at the California Judicial College and in trial skills workshops at Stanford University Law School and USF Law School, she continues to serve as faculty for the CJER Civil Law Institute, most recently with a course on Advanced Settlement Conferences.

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JUDICATE WEST

Bradley S. Thomas, Esq.

Sacramento

Business/Contractual, Employment, Insurance Coverage & Bad Faith, Personal Injury, Products Liability, Professional Negligence

Following a 40-year career as a civil litigation trial lawyer, Brad Thomas joined Judicate West as a mediator in 2018. He participated in hundreds of mediations throughout California as a practicing attorney and has handled a wide array of cases, including personal injury (automobile accidents, defective products and dangerous conditions of property), employment (wrongful termination, harassment, discrimination, wage/hour), insurance coverage/bad faith and business disputes. As a practicing lawyer, Brad tried more than 100 jury trials throughout Northern California to as far south as Bakersfield.

Brad was invited to join the initial appellate mediation panel for the Third District Court of Appeals and served as a Settlement Officer in the Sacramento County Superior Court. His years of service on these panels, combined with his extensive mediation training and rich litigation experience, sparked a passion and skill for resolving disputes. Today, as a mediator available statewide, Brad strives to be both facilitative and evaluative according to the needs and expectations of those participating in the mediation process. Clients find Brad's gentle, kind demeanor and his deep experience as the perfect blend of skills to help guide matters to resolution.

A long-time active member of ABOTA, Brad has served as President of the Sacramento Valley Chapter and on the board of directors for CalABOTA. He has been honored as recipient of both the Chapter's Trial Lawyer of the Year award and its Professionalism and Civility award.

Brad has substantial training in mediation, including Pepperdine Law School's Strauss Institute and various trainings and seminars presented on behalf of the Third District Court of Appeal.

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ADR SERVICES, INC.

Hon. Thomas Warriner (Ret.)

San Francisco

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Judge Warriner is a dedicated public servant with an accomplished legal career spanning five decades. After graduating from UCLA School of Law, Judge Warriner joined the California Department of Justice as Deputy Attorney General. He then worked as Deputy Director and Chief Counsel for the California Department of Health, before returning to the Department of Justice to serve as Senior Assistant Attorney General.

Judge Warriner later headed one of the largest public agencies of the State of California as Undersecretary and General Counsel of the California Health and Welfare Agency, serving in this capacity until his appointment to the bench in 1990.

As a Judge of the Superior Court of California, County of Yolo, Judge Warriner handled a great variety of civil matters and presided over all trial court assignments, including civil, criminal, juvenile, family, and probate. After retiring from the bench in 2010, he served in the Assigned Judges Program at the direction of the Chief Justice of California, presiding over court and jury trials in the counties of Solano, Napa, Yolo, Sacramento, Placer, El Dorado, San Joaquin, Tahama, Shasta, and Butte.

Judge Warriner joined ADR Services, Inc. in 2019 as a full-time mediator, arbitrator, and referee. He is available to conduct hearings in all counties across Northern California with no additional travel fees.

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ADR SERVICES, INC.

Hon. Joshua Weinstein (Ret.)

San Francisco

Character, Value and Division of Property, Child and Spousal Support, Custody and Visitation, including Move-Away, Post-Trial Disputes, Premarital and Marital Agreements, Tracing, Transmutation

Judge Weinstein joined ADR Services, Inc. in 2019 after an accomplished legal career spanning 33 years. After earning his J.D. from Golden Gate University School of Law in 1985, Judge Weinstein began his legal career as a research attorney for the Santa Clara County Superior Court. He then served as a Deputy Public Defender before eventually working as a training supervisor for the Washington Appellate Defender Association from 1990 to 1994. In 1994, he joined the Sixth District Appellate Program as a staff attorney, a position he held for the next four years.

Judge Weinstein joined the Judicial Council of California as a senior attorney in 1998. He practiced there for nine years, in addition to serving as a Judge Pro Tem for the Counties of Alameda, Marin, San Francisco, and Santa Clara. During this time, he also acted as a Special Master for the San Francisco Superior Court, conducting reviews of police personnel files in Pitchess motions. He also served as a visiting professional at the International Criminal Court at The Hague.

Upon his return to the United States in 2008, Judge Weinstein became a judicial staff attorney for the First District Court of Appeal, a position he held until he was appointed to the bench in 2014.

As a Judge of the Santa Clara County Superior Court, Judge Weinstein presided over criminal, appellate, and family law matters and served as Presiding Judge of the Appellate Division, eventually capping his judicial career as an All Purpose Judge of the Family Court, handling a wide variety of family law matters.

Judge Weinstein is available to serve as a Mediator, Judge Pro Tem, and Discovery Referee throughout Northern California.

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