ADR UPDATE

Photos by: Christine Jegan

A recent study by the Journal of Empirical Legal Studies analyzed over 2000 cases in California and found when matters failed to settle and went to trial, both parties did worse than if they accepted the last demand or offer. So if mediation is the way to go, how do you best prepare? When is the best time to initiate mediation? Will the economic downturn mean an increase in mediation? Gathered to discuss these topics and more were **Guy Kornblum** of Guy Kornblum & Associates, **Elizabeth Link** of Link Mediation, **Judge Hadden Roth** of Resolution Remedies, **Judge Bonnie Sabraw** of ADR Services, Inc., and **Jerry Spolter** mediator at JAMS.

MODERATOR: In the context of mediation, what are the responsibilities of the attorneys?

LINK: The reality is that most cases settle because going to trial is so expensive. Therefore, settlement – regardless of the amount – is almost always in the best interest of the parties. Unfortunately, lawyers place far more emphasis on learning the mechanics of trying a case than settling one. Lawyers need to develop their settlement skills and apply them in the mediation context.

JUDGE SABRAW: Attorneys need to understand, and most do today, they're wearing different hats when they come into the mediation process. And they need to make sure their clients understand the differences between mediation and trial preparation; their attorney is still their advocate, but they are not going to necessarily be making an opening statement that is of a hostile tone. It's an education process for everybody concerned.

JUDGE ROTH: Rather than consider yourself as a lawyer advocate, the key is to view yourself as a problem-solver.

SPOLTER: Mediation has become an essential and integral part of the litigation continuum. You get the case, file it, then determine when to mediate. It's no longer a question of whether you're going to mediate; the question is when you're going to mediate.

KORNBLUM: I'm looking at this from the perspective of the advocate, not the mediator. There are three things that you have to stress. First, there's consumer's confusion about what mediation is. We have an obligation to make sure our clients understand that process. Second, as managers of litigation, we have an obligation to drive the case to a plateau where there's the opportunity to get together and try to bargain. In a sense we're not preparing for trial yet; we're preparing the case to mediate because we have an obligation to the client to make sure they have that opportunity. I tell my clients it can be their best economic day because we can achieve a settlement without trial, and save the time and money required to take the case 'all the way.' Third, we cannot walk away

from an unsuccessful mediation day and say 'the end.' There's still an ongoing obligation to continue to explore the opportunities to resolve a case short of trial. We are not dispute perpetuators, we're dispute resolvers. In her excellent and incisive book, "*The New Lawyer, How Settlement is Transforming the Practice of Law*," the author, Professor Julia Macfarlane, says the lawyer's role has changed from that of this swashbuckling warrior out there who is trying to cut off all the heads of everybody in his or her way to someone who is there to serve the client's needs.

MODERATOR: When is a good time to initiate mediation?

JUDGE ROTH: The earlier the better, even before litigation if that's possible. It's important to work toward an efficient, effective, quick resolution so people can get on with their lives.

JUDGE SABRAW: There isn't an across-the-board answer. Each case is unique with its own personality and facts. If it can be sooner, that's better to save litigation costs. But it has to be at a point when the parties are truly ready to roll up their sleeves and try to compromise. Sometimes that means they need to do some more discovery. It's frustrating when you have these contracts that say parties must mediate before they can arbitrate. One side will come in ready to try to do something, but the other side just sees it as a process to get to arbitration. They don't really prepare; they're not really ready to look at the pitfalls of their own case and the upsides of the other side's case.

SPOLTER: It depends on the nature of the case. In complex, or seven-figure or multi-party cases, sometimes the attorneys will want to get in early, not with the eye of settling the case that day, but having a get-acquainted session, finding out what homework needs to be done, putting a date on the calendar two months hence for a half day or full day to wrap it up. Employment cases come to mediation early, even pre-filing, because most of them have FEHA fees provisions: if the plaintiff prevails then the plaintiff's attorney will recover attorneys' fees. That's anathema to the defense. I see the smart defense firms suggesting early mediation, although they could be earning $100,000-$200,000 in fees by having these cases prolonged. With PI cases sometimes you have to have a certain amount of discovery. The case has to be ripe both legally and factually. The defense wants to know whether the plaintiff's attorney is willing to spend the money to do the discovery, hire the experts, put on the dog and pony show that will maximize the value of the case.

JUDGE SABRAW: That's a very productive way of handling mediation in the complex arena. With respect to employment issues, are you referring to class actions or individual actions?

SPOLTER: Individual gender, race discrimination, sexual harassment, FEHA kind of cases. What's becoming pretty common now are the Family Medical Leave Act cases where people are trying to get some time off because they have a sick relative or due to family pregnancy.

LINK: I agree that it's a good idea to come to mediation before the lawsuit is even filed. Unfortunately, early on in a dispute, the emotions are often so high that the parties aren't really ready to talk settlement. Having more than one mediation session can be helpful in these situations so that the parties can slowly get into a settlement frame of mind. Many times the parties need to feel the pain of discovery before they will be willing to settle their case. Most importantly, attorneys need to take the mediation process seriously and be prepared; otherwise, it's a waste of time for everyone.

Christine Jegan

"I want the clients and the attorneys to understand that I'm the neutral, but I'm as invested in this process as they are. If you come across as someone who is just the messenger, you're not developing the kind of trust and confidence that is needed from both sides."

— Judge Bonnie Sabraw
ADR Services, Inc

JUDGE SABRAW: You have to give the mediator something to work with so he or she can defend your position to some extent. If you come to the mediation and just say, 'Well, let's throw out numbers and see if we can break somewhere in the middle,' that's not good enough. You need to be prepared with your damages and the basis for them.

KORNBLUM: The exploratory mediation process is very interesting. What you do is propose to the other side, 'Look, we might not be ready to settle this case right now but let's go to the mediator and sit down, work out a plan, spend a half a day getting the case postured so we can come back and try to resolve via mediation or through direct negotiations. Let's talk to the mediator and see what the mediator needs and six months from now, three months from now, two months we come back.' We focus our planning on hitting that plateau. The timing is very important. Some kinds of cases, for example, insurance bad faith cases, you have a lot of information at the outset. You have communications between the insurance company and the insured; you may have a claims or underwriting file. As soon as you get that information you may be ready to talk.

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Link Mediation

With PI cases, I'm seeing insurance companies that aren't ready to negotiate early on, so you have to put together a claim file for them. When we put our demand letter together, it's not a three-page summary. We build this big file of paper and say, 'Okay folks, we've done all your work for you, what's your excuse for not talking?' We give them 30 days, 45 days to study the file. We say, 'Here are five mediators we'll be happy to go to. If you want somebody, pick that person, we'll go.' Once that is done then you urge them to negotiate or mediate. Then the timing of the mediation statement is important. If you're not prepared to get a statement to the parties at least 10 days prior to the mediation then it's not time for mediation. And this business of faxing a mediation brief four pages the night before is a very bad practice. Finally, I do not understand why parties sometimes don't want to exchange mediation statements.

JUDGE ROTH: I want to emphasize I don't see a down side to having a mediator at the very beginning. There may be work to be done, investigations and so forth, but the earlier the better to have the mediator part of the process.

MODERATOR: What about the attorney making contact with the mediator prior to mediation?

JUDGE ROTH: I don't see any problem with that. In my practice I have a ton of conference calls, getting the technicalities out of the way, where it's going to be, how long, and so forth. After that, I talk to the parties individually either in person or by telephone as a way of starting the process.

LINK: My work as a mediator begins before the actual mediation session. I always have private telephone conferences with the attorneys prior to the mediation session to learn more about the case, its nuances, and their client's interests and motivations.

SPOLTER: As a mediator, I appreciate it when counsel picks up the phone and calls me. I typically don't have the opportunity to ab initio contact the attorneys in advance. I'm not comfortable initiating a pre-mediation joint conference call because my mother once said, 'Never do business over the phone.' You can't observe people's body language, and you don't know the relationship among these individual attorneys. I'd rather have private conferences. I disclose to the other side I am talking with the opposing counsel. I won't say who initiated the call, and I won't disclose any of the content. What that does is start developing trust. If nothing else comes from this roundtable, I would really encourage the attorneys who are reading this article at some point to pick up the phone and contact the mediators. Not only do you submit your brief, but you also can submit a confidential brief, plus you can have confidential communication. Attorneys go through law school thinking you can't have ex parte communications with a "judge"; in mediation all the rules are out the door. You can have unlimited ex parte communications.

KORNBLUM: And that's the most fun in mediation--talking to the mediator one-on-one about your case. You're at a high professional level, you've got a neutral who tells you you're all wet or that's a good point-- you're testing your case with a bright mind.

SPOLTER: How I look at it, it's just the first private caucus.

MODERATOR: Several of you have mentioned the sophistication of the user and the process. We've had mediation for a while now. How has the maturation changed the process?

JUDGE ROTH: The opening statements are not as essential as they used to be. Often times I've used very brief openings by the attorneys, by the mediator.

JUDGE SABRAW: Today, I rarely get everyone in the same room together to start the mediation and explain the process. That said, if it's a personal injury case, with a plaintiff who isn't experienced in litigation or hasn't been through mediation before, I do talk about the process. Sometimes if it's a large group, and particularly in a business context where these people have had business contacts before, I will get them together for the purpose of introducing each other and making sure everybody knows who's in the other room. I sometimes find it's very helpful, and I can get a lot of insight about who's the decision maker in that other room from the other side because they know the players.

LINK: I spend very little time explaining the mediation process and confidentiality if I can sense that the attorneys and their clients are familiar with the process. However, I like to have a brief joint session in the beginning to review the ground rules and to get everyone involved to agree to the process. It also helps me to see the interaction of the attorneys and parties. I can learn a lot by reading body language even if it's only for a few minutes. Sometimes an attorney will inform me that their client would rather

not be in the same room with the opposing party. In those cases, I forego the joint session and go directly to private caucuses.

SPOLTER: I began mediating in 1985. Jay Folberg, former Dean of USF Law School, and the person who wrote the book on mediation back then, told the story that when he offered a mediation course up at Lewis and Clark, half the students came in with blankets and candles because they thought it was meditation. Except in the labor field and family law, nobody had heard of mediation really. I remember commencing mediations with an opening statement that consumed 20 minutes, talking about confidentiality and how the process was going to proceed. Now the user has become very sophisticated. These attorneys who come before us are so good, they've been to so many mediations. You're not talking one, two or ten mediations-- you're talking 50, 100, 150 mediations. I often tell students in law school that for every case you try during your legal career, you're probably going to mediate 50 cases. That just seems to be how things are going. And so the process has changed dramatically. There's no one right way to do this, as all of us know. There is a mediator here at JAMS who never has a joint session, never has the parties in the same room, and I can't comprehend that because I am really a joint session person. I believe that's where the work gets done. I have changed one aspect of my mediating dramatically: I don't have all of the parties in the same room when they arrive. I meet the parties and counsel in separate rooms. I use the confidentiality agreement as my method of sitting down and getting everybody's signature, getting acquainted, and acquiring their buy-in to engage in a joint session.

KORNBLUM: I'm not opposed to joint sessions. I tell the clients it's a day of diplomacy. I have a different hat on. I want the other side to hear me tell them to go to hell but think they got the Congressional Medal of Honor. And so my approach is to do whatever is necessary, joint or separate, to make sure we take a high plane and that we can complete the process of a diplomatic negotiation.

JUDGE SABRAW: That's critical in my view because if the mediation brief or the opening statement is used by one side to degrade or make insulting comments or put the other side down in an offensive way, it just gets everything off to a bad start. This makes it much more difficult to get the parties to focus on compromise because of feeling personally attacked and offended. I am surprised, despite the fact that many people understand the mediation process so much better today, that you still see that happen.

JUDGE ROTH: I generally like to make a brief opening statement and I prefer the joint session. By phone beforehand, I've discussed with the parties the feasibility and how we're going to handle the joint session and the caucuses, so I don't get too many surprises. I find the joint session is very productive, and I like to keep it going as long as possible.

MODERATOR: As attorneys have become more sophisticated with the process, do you find more attempts to manipulate the mediator?

KORNBLUM: Any mediator I can manipulate I don't want. Now that doesn't mean I can't try to persuade them. Persuasion in mediation is not manipulation, it's logic, it's intellect, it's credibility. It doesn't mean I can't defend against some point that the mediator makes. I treat the mediator with respect and diplomacy just like my adversary, but I do not have to accept everything the mediator says and don't normally. I like to be able to walk out the door, down to the first bar, and have a beer. But in that mediation room there is a process, and you have to respect that and respect the participants.

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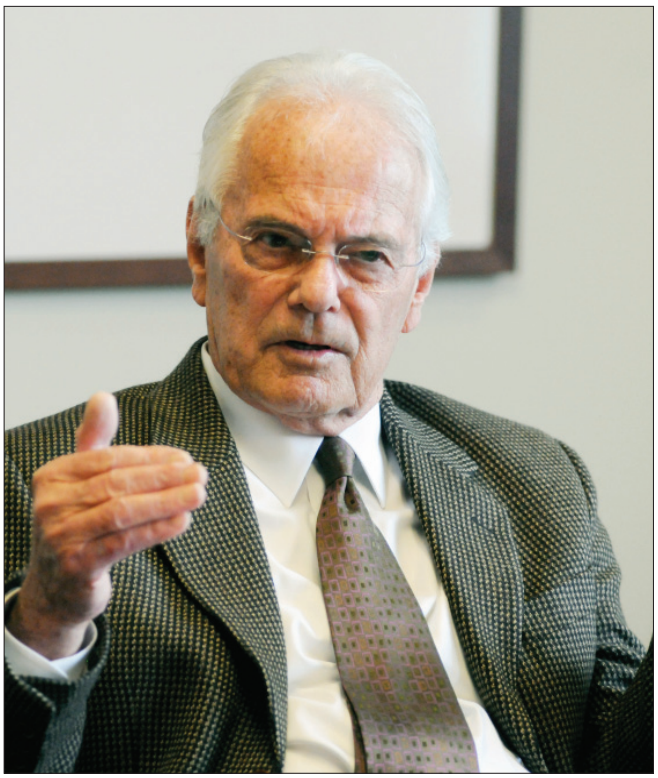
JAMS

JUDGE SABRAW: If they're doing it they're very good at it and I'm not aware they're doing it.

LINK: Mediators have an unusual role. We're sort of up above these conflicts and can see what's really going on. Attorneys who have become mediators usually understand what the attorneys and parties are doing in a given dispute because we've done those same sorts of things when we were litigators. We understand the gamesmanship that goes on in cases.

JUDGE ROTH: The attorney is going to try anything he or she can to move the settlement range his or her way, and that's okay.

SPOLTER: I don't like the word manipulation because of the negative ethical implications. But in terms of the sophistication or maturation of the attorneys, what they're doing is 'managing' the process to a large degree. They've spent a lot of money and made a big investment of time in terms of their preparation and mediation brief. Managing the case means what's the best way to showcase their client, showcase their case, persuade the other side that their value is the right settlement value. They know this is a critical opportunity to get this case resolved. And they want to make sure-- even if they like and trust the mediator and know the mediator has got the skills—that at the end of the day, they won't miss this opportunity for resolution.



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— *Judge Hadden Roth*
Resolution Remedies

KORNBLUM: One problem I have is in the selection of mediators. In our demand letter, we provide a list of mediators. I pick mediators based on subject matter affinity or a style of mediation that might fit the case, or a skill at dealing with certain kinds of things that might come up. But sometimes that list is rejected, and the other side comes up with someone else. I have to be assured that mediator is someone who has certain qualities: good skills in mediation, a reputation for settling cases, an ability to follow-up, and a willingness to read the briefs. So if the other side gives me a name of someone I've never dealt with before, I have to say, 'Okay, maybe. But I need to check this person out because I don't want to waste my time with someone who does not meet the criteria that I believe are essential to a productive session.'

SPOLTER: What I see happening today is attorneys playing musical mediators. I can have a great result with an attorney and think they'll say, 'Oh gosh, Jerry, we love you and we're going to use you forever,' and I don't see them again for two or three years. They've gone and used three or four different mediators in the interim. Because different mediators bring different things to the party. For example, a judge mediator might have an edge over an attorney mediator when there's a county involved or governmental entity involved: they want to have a judge tell them that this is a fair settlement, so they can return to their board of supervisors or whomever their agency is and say Judge so and so said this is a good settlement. In other cases female mediators-- this is possibly politically incorrect-- have an edge up on the male mediators in a sexual harassment case because the last thing a woman who's been trashed by her employer needs is some male sitting at the head of the table running the process. The smart attorneys really do pick and choose the right mediator for the right case.

MODERATOR: What about the mediator's role in private sessions? Is there a role and has it changed over time?

KORNBLUM: My approach is that a mediator is part of our team. So when we pay for mediation I've got a friend in the mediator who can participate in the conferences with the clients. I've had mediators start to get up to leave because he or she wants us to caucus privately, and I'll say, 'Wait a minute, hold on. If we're going to discuss our next move or what our approach is, we'd like you to be involved. We need your input.' Once in a while I maybe need a little private caucus with a client but that's for client control. But most of the time, I want the mediator with us. I'm not asking for disclosures of confidence; I'm asking for participation in the process of helping us decide our strategy and how we should proceed with the next step in the process.

JUDGE SABRAW: I want the clients and the attorneys to understand that I'm the neutral but I'm as invested in this process as they are. That everyone in the room needs to truly be invested in the process. If you come across as someone who is just the messenger, you're not developing the kind of trust and confidence that is needed from both sides. As a mediator, you have to show the parties the process is exciting, it's really fun to watch it unfold. Once they see that, they become more invested.

MODERATOR: What happens if you're in a mediation/arbitration setting and your mediator decides he/she is not going to serve as the arbitrator. What can an attorney do?

LINK: It's important to find out in the beginning if your mediator is willing to also serve as your arbitrator. I'm not. Arbitration and mediation are very different processes. The whole point of mediation is to allow the parties to come up with their own solution to the dispute. The mediator's role is to help the parties achieve this goal. If the mediator switches hats mid-stream and becomes an arbitrator instead, it defeats the mediation philosophy.

JUDGE ROTH: Are you saying that you don't think that med/arb by the same neutral is good?

LINK: That's right. But, ultimately, it's up to the parties and the mediator to decide which processes will be used.

JUDGE ROTH: The main problem is the mediator feels that he or she has learned something privately in the mediation and therefore the arbitration is tainted. But if the parties are willing to go forward and trust the person to do the arbitration without considering unshared information, it seems to me it can work.

SPOLTER: I agree with Hadden. In a recent boundary dispute case, we got 90 percent of the way, but it was possible down the line, issues would arise. The attorney said, 'Jerry we'd like you to go ahead and serve as the arbitrator of any future disputes. We've invested time and money with you and you know the issues.' On the large complex cases, where there's tens of millions of dollars involved, and the parties stipulate they want you to arbitrate any differences that might evolve in the drafting or interpretation of the settlement agreement, then I'll do it.

LINK: If there are any disputes later with regard to the terms of the formal settlement agreement or otherwise, the parties can come back to me and I will mediate those disputes.

MODERATOR: Does everyone here require opening statements? Do you prefer them?

LINK: When I talk to the attorneys privately prior to the mediation session I inform them that they will have an opportunity to give an opening statement. I'm not going to force anyone to give an opening statement if they don't want to. However, I explain to the attorneys that a brief opening statement, without getting argumentative, can be helpful to educate the opposing side about their case. If neither side wants to give an opening statement, I'll have a brief joint session and then go directly into private caucuses.

KORNBLUM: The tone of an opening statement should be diplomatic. And the statement should be informational. I clear it with the mediator. Sometimes I say, 'Let's not start out that way.' I would prefer to see where we are and then, if we need an opening statement, and it's informational and diplomatic, and perhaps allows my client to say a few things, maybe that's a good idea.

SPOLTER: I'm a firm believer in all parties making opening statements. I heard a line once from a plaintiff's attorney who told me, 'Exhibit A is the plaintiff, Exhibit B is the plaintiff's attorney.' You've got a multi-party case, big money involved, carriers have flown in from New York City and Chicago. They've never seen the plaintiff, never met the plaintiff's attorney, they're unfamiliar with our local landscape so they don't know what the reputations are, and all they've received are the reports from their respective attorneys. What a missed opportunity, in my opinion, if there aren't opening statements. If the plaintiff's attorney has a terrible plaintiff, fine. Put a sock in the person's mouth. But most of these plaintiffs have a story to tell. The good attorneys are added value. We know, all of us sitting around the room, that if X attorney comes in with this case it's going to have one value. If Y attorney comes in with this case, the case may have half or twice the value. In my view, the joint session is where the exceptional attorneys, plaintiff and defense, earn their stripes and reputation by demonstrating to the other side—in a professional and articulate fashion—why the case should settle for a particular value.

JUDGE SABRAW: Opening statements can be of great benefit, particularly in the more complex cases. In your pre-mediation conference, which you're probably going to be more likely to have on a case like that anyway, that topic should be discussed ahead of time. One side shouldn't be blindsided with somebody preparing this great opening statement and they didn't know that was the way the mediator was going to proceed.

JUDGE ROTH: In the pre-mediation discussion, I usually discuss the opening statement, whether there will be one, the nature of the statement, and make sure that it's not adversarial and confrontational. We clarify the issues and information, which may be presented. I normally recommend that there be one, but I leave it up to the parties to decide.

MODERATOR: Given the economic downturn, how is ADR being affected? What do you predict for the future of mediation?

LINK: I'm seeing more in pro per parties. I had a case last week where the party said he didn't want his attorney to represent him at the mediation because he didn't want to spend the money. It ended up being a problem so we took a break and he came back with his

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Guy Kornblum & Associates

attorney. This economy is forcing everyone to make tough decisions; however, being un-represented in a lawsuit is rarely a good idea. As a mediator, it is always easier to settle a case when all parties are represented by counsel.

JUDGE ROTH: Mediation will continue to increase, but litigation will go down. And because litigation will go down there will be less mediation in the future than there would have been otherwise.

JUDGE SABRAW: We might see the effect of the downturn later because a lot of the cases we see going to mediation are cases that have been in existence for a while. Clearly there is a downturn in filings. Also there will be fewer trials. People are not spending the money on litigation to go to trial, which may result in more mediations and successful mediations. I have a background with public agencies, land use, that type of case, so I do a fair number of eminent domain cases. These projects may be slowing down. We will have to wait and see what a government stimulus package may bring to this arena.

KORNBLUM: I'm seeing some reluctance on the part of insurance companies and some defense counsel to come to the mediation table at an earlier point in time. There are some law firms that have financial problems and the billable hour is the driving force. We are struggling to get insurance company people to talk with us before too long in the litigation process in the effort to get them to settle the case. In one case, I've even encouraged the claims person to come to the mediation without a lawyer. I'm trying to offer some things that will say, 'Look, I understand you've got some economic

consequences; we have got some economic consequences. These are not great times. You don't want to spend a lot of extra money, let's try and get the thing done.'

SPOLTER: As long as there are more than 30,000 attorneys in the Bay Area, the amount of litigation will remain the same. What's going to happen is a change in the nature of the cases. A perfect example: I recently read an article that said in 43 states the number of automobile accidents is dramatically down. That's because of the gas crunch: people aren't driving. That's because of employment--people don't have jobs to drive to. Accidents are down because seatbelt regulations and drunk driving laws are being enforced. And in California, there's a two-year statue for personal injury matters. A lot of these injured individuals get their cases resolved at the claims adjustor level so they never get to the attorney. That will happen in construction injury cases as well. As long as you don't have construction, you won't have people falling off the buildings. Those cases are going to decrease. What I see a huge up-tick in is going to be construction-related contract disputes. Even though they're not building new buildings, the last project is going to become the litigation focus. I also see employment as being a huge area because these plaintiff's attorneys who don't have the PI cases anymore are going to be focusing now on wage and hour cases, employment cases. They're going to learn about FEHA. Business disputes, securities disputes with people losing money in the stock market, those NASD type cases are going to increase. So mediation will continue to be a growing field, but the areas that we practice in or the cases that we see will be changing.

KORNBLUM: Other areas that are going to increase are tax shelter fraud litigation, and financial product sales. Insurance and financial institutions and their agents have been selling all these fancy things to help you save money, make money, and not have to pay taxes and all that. We've had several of those come in the door. Other kinds of sales fraud practices where people are out there trying to sell things and they're going to cut corners--that may increase insurance disputes. We're seeing insurance companies pulling back, not settling cases and declining claims. First party property, casualty losses, those types of cases--that's an area where the insurance companies are looking harder at the claim, and they take a longer time to pay them. They don't have the cash.

SPOLTER: Ten years ago I would say employment matters represented 10 percent of mediations and now it's close to 30 percent.

JUDGE SABRAW: Employment cases are very, very big in the complex litigations and I think they will continue.

MODERATOR: What's your opinion on the current movement to certify mediators?

LINK: When I was a litigation attorney for 18 years, I remember how challenging it was to find a good mediator since just about anyone could call themselves a mediator. It would have been helpful to have some respected organization give their "seal of approval" on mediators so I could be assured they had met a certain standard as to their education level and peer review. There are now non-profit organizations such as the International Mediation Institute based in the Netherlands, which are attempting to establish a peer-reviewed certification process. I know some mediators may not see the need for a peer-reviewed certification process, but I do. It will elevate the mediation profession and make it easier for litigation attorneys to select qualified mediators.

JUDGE SABRAW: It's interesting, before you brought up that topic I had never heard of a process to certify mediators. Then I got the retired judges' program that's coming up next month in Monterey and it's part of the agenda. Retired judges who are doing private mediations and arbitrations have to be members of the state bar, as do attorneys who are mediators or arbitrators. Since we have MCLE requirements, I find it troubling to add another layer of bureaucracy.

KORNBLUM: It depends on what the certification process is. I'm certified in civil advocacy by the National Board of Trial Advocacy, which is an ABA-sponsored national certifying process. It's an extensive process to get certified and then every five years you need to get recertified. You need to supply names of lawyers against whom you've tried cases, judges before whom you have tried cases, you have to make lists of cases, supply names, addresses, phone numbers, take a full day examination. Overall, though, it seems to work pretty well.

JUDGE ROTH: Is there a problem? That's the first thing I ask. If there's no problem, there's no need. If there's some type of abuse going on then perhaps we should do something. So far I just don't know enough to support it.

SPOLTER: Amen. This subject comes up every 15 years. It's absolutely ridiculous in my opinion. The marketplace certifies the mediators. If you're no good you don't last, and if you are good you thrive. Certification brings with it a whole new level of bureaucracy and unintended consequences. If you have to be a certified mediator, then of course you have to get insurance for mediator malpractice, and then there has to be a disciplinary committee to investigate complaints against mediators. If people want to go into the mediation field and take courses to make them better at it and shadow mediations and therefore get certifications from various organizations, all the more power to them. But it could be perceived as just a mechanism to keep people out, as opposed to ensure that you've got better quality in the field of mediation.

NINA SCHUYLER, Bay Area writer and lawyer, served as Moderator and Editor for this Roundtable. She has covered legal issues for over fifteen years. You can reach her at ***ninaschuyler@hotmail.com***

HON. BONNIE SABRAW is a full time neutral with ADR Services, Inc. Recently retired as one of the complex litigation judges in Alameda County, Judge Sabraw specializes in resolving the most complicated cases. During her 20 years on the bench, Judge Sabraw presided over hundreds of settlement conferences, court and jury trials in all categories of civil litigation. Known for truly investing herself in the settlement process, she earned a reputation for working through complex legal issues and emotions to bring parties together to resolve disputes. This knack for brokering settlements was formed during her 12 years of hearing numerous consumer and employee class action, unfair business practice, catastrophic and mass tort, insurance coverage, and real estate disputes.

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