

Resolution

**Newsletter of the National Bar Association
Alternative Dispute Resolution Section**

August/September 2019

[National Bar Association Alternative Dispute Resolution Section](#)

IN THIS ISSUE

ADR Section Chair's Message

by Gloria Johnson, Esq.

pg. 2

AAA/ADR Section Mediation and Arbitration Training (July 21, 2019)

pg. 3-5

The Diversity Dilemma: ADR in the Aftermath of Jay-Z

pg.6

CPR/ADR Section Panel Discussion:

Jay-Z Was Not in the House - But We Were! (July 24, 2019)

By Gail Wright Sirmans, Esq.

pg. 7

Corporate Due Diligence and Alternate Dispute Resolution Symposium:

“Streamlining and Reducing the Cost of Conflict Through Arbitration”

Panama City, Panama (January, 2019)

By Rebekah Ratliff, CCLS

pg. 8

Developments After the Supreme Court Decision in *Epic Systems Corp. v. Lewis*

By Carl Turpin, Esq.

pg. 9-10

Other Cases of Interest

By Carl Turpin, Esq. and Joyce A. G. Mitchell, Esq.

pg. 11

Section Member Honors and Recognitions/Section Members on the Lecture Circuit

pg.12

“INSIDEOUT: Self-Reflection for Conflict Resolution Professionals

By Joyce A. G. Mitchell, Esq.

pg. 13-16

ADR Section Training Faculty, 2019 National Bar Association Convention

pg. 17-19

Officers and Board Members of the ADR Section 2019-2020

Monthly Telephone Meeting Dates and Call-In Information

Credentialing Committee Information

pg. 20-21

Convention Photos

ppg. 22-26



ADR Section Chair's Message

By Gloria Johnson, Esq

A major goal of the ADR Section has been to provide economic opportunity for our members. Harold Coleman, Senior Vice President, American Arbitration Association ("AAA") returned to the 2019 annual convention with a five credit hour training program. Coleman used several ADR Section members as trainers: Alfreida B. Kenny, Esq.; Joyce A. Mitchell, Esq.; and Rebekah Ratliff, CCLS. They were joined by Ingeuneal C. Gray, Vice President of the AAA Houston Regional Office, and Darrell S. Gay, Esq., Partner, Arent Fox LLP. In addition, AAA underwrote lunch for seminar participants. The AAA seminar will provide qualifying continuing education credits that can be applied towards membership on the NBA Certified Panel of Arbitrators and Mediators.

Many services, programs and activities have contributed to make this a memorable year. Several Committees and Section members actively pursued our goal of providing economic opportunity for our members. They have breathed life into our collective efforts - to move ADR Section members forward in the pursuit of their mediation and arbitration careers. My thanks go out to 2nd Vice Chair Alfreida Kenny for her efforts to get ADR members posted on a New York based list of arbitrators and mediators. I also applaud the continuing efforts of Earlene Baggett-Hayes, Esq., Erika Butler Davis, and Natalie Robinson Kelly, Director of the Law Practice Management Program, of the Georgia State Bar, who is assisting Earlene and Erika in getting the certified panel of arbitrators and mediators posted on the NBA website. Rebekah Ratliff has been invaluable in her efforts to work with 2nd Vice Chair Kinney to organize an intra-NBA marketing effort to make other Sections and Divisions aware that when they are looking for ADR professionals – they can find talent and expertise in the ADR Section.

Many thanks to Gail Wright Sirmans, who organized a joint seminar with the International Institute for Conflict Prevention and Resolution("CPR"), "**Does Arbitration Afford an Equal Opportunity for Minority Arbiters and Arbitrators in Complex Matters: The Case of Jay-Z.**" Gail also organized a reception immediately following the seminar, on July 24th, at Debevoise & Plimpton.

In January, Rebekah Ratliff joined me in Panama City, Panama, where we participated in a Judicial Conference seminar that gave 100 Panamanian judges, lawyers and ADR practitioners an overview and explanation of the use of ADR, mediation and arbitration, in the United States. We discussed various areas and types of disputes effectively resolved by ADR, *inter alia*, commercial, insurance, employment, labor, securities, construction and real estate. We also compared and contrasted private and government based ADR systems and providers, and briefly highlighted the three major labor-relations statutes in the United States; i.e., the Railway Labor Act, the National Labor Relations Act, and the Federal Service Labor-Management Relations statute.

The ADR Section has continued the practice of conducting monthly meetings, to which all members are invited. We welcome the participation of members who want to take an active role in programs.

AAA/NBA ADR Section Mediation and Arbitration Training

5 Credit Hours

July 21, 2019

Two highly interactive foundational ADR training sessions were held at the National Bar Association 94th Annual Convention on July 21, 2019. The sessions gave an overview of contemporary practical and ethical dimensions of ADR and explored pervasive challenges/emerging trends arising in mediation and arbitration practice. Both sessions were moderated by Harold Coleman, Jr., Senior Vice President for Mediation, American Arbitration Association ("AAA") and Executive Director, Mediation.org, a division of the AAA. Through presentation and analysis of illustrative anecdotes and actual cases, both sessions presented key concepts and stimulated questions. Panelists offered insights and techniques for managing the unique difficulties arising in their ADR proceedings, in response to the questions from the audience. The [Code of Ethics for Arbitrators in Commercial Disputes](#), was the resource used by attendees during the training.

The first session panel featured Darrell Gay, Esq., Partner, Arent Fox LLP; Joyce A. G. Mitchell, Esq. of Joyce A. Mitchell and Associates; and Rebekah Ratliff, CCLS, President of Capital City Mediations.



from left to right: Harold Coleman, Senior Vice President for Mediation, American Arbitration Association; Joyce Mitchell, Esq.; Rebekah Ratliff, CCLS; Darrell Gay, Esq.

Negotiation Preparation Checklists

Panelist Joyce Mitchell, Esq. indicated both mediators and party representatives would benefit from training about how to negotiate to successfully resolve disputes. Mitchell cited the [Harvard Law School Program on Negotiation Preparation Checklist](#), which is below. The checklist will position you to prepare thoroughly to create value and claim value in your next important negotiation/mediation. For mediators, the checklist can serve as a guide to your inquiry about the parties' interest(s) and position(s). The preparation will also help parties avoid some impasse areas of their negotiations.

Possible Preliminary Questions for Parties (Attorneys/Clients/Disputants) to Ask Themselves:

1. Why should this negotiation take place at all?

2. Is there another (or better) option?
3. How does this negotiation fit in with previous, future, or parallel negotiations?
4. What other parties might have a profound effect on the results of the negotiation?
5. What other negotiations may effectively serve as a template for these negotiations?

Then Analyze Your Perspective Using the Harvard Checklist:

1. What do I want from this negotiation? List short-term and long-term goals and dreams related to the negotiation.
2. What are my strengths—values, skills, and assets—in this negotiation?
3. What are my weaknesses and vulnerabilities in this negotiation?
4. Why is the other party negotiating with me? What do I have that they need?
5. What lessons can I apply from past negotiations to improve my performance?
6. Where and when should the negotiation take place?
7. How long should talks last? What deadlines are we facing?
8. What are my interests in the upcoming negotiation? How do they rank in importance?
9. What is my best alternative to a negotiated agreement, or BATNA? That is, what option would I turn to if I'm not satisfied with the deal we negotiate or if we reach an impasse? How can I strengthen my BATNA?
10. What is my [reservation point](#)—my indifference point between a deal and no deal?
11. What is my aspiration point in the negotiation—the ambitious, but not outrageous, goal that I'd like to reach?
12. What are the other side's interests? How important might each issue be to them?
13. What do I think their reservation point and BATNA may be? How can I find out more?
14. What does their BATNA mean in terms of their willingness to do a deal with me? Who has more power to walk away?
15. Is there a zone of possible agreement (ZOPA) between my reservation point and the other side's? If there clearly is no room for bargaining, then there's no reason to negotiate—but don't give up until you're sure. You may be able to add more issues to the discussion.
16. What is my relationship history with the other party? How might our past relationship affect current talks?
17. Are there cultural differences that we should prepare for?
18. To what degree will we be negotiating electronically? Are we prepared for the pros and cons of negotiating via email, teleconference, etc.?
19. In what order should I approach various parties on the other side?
20. What is the hierarchy within the other side's team? What are the patterns of influence and potential tensions? How might these internal dynamics affect talks?
21. What potential ethical pitfalls should we keep in mind during the negotiation?
22. Who are my competitors for this deal? How do our relative advantages and disadvantages compare?
23. What objective benchmarks, criteria, and precedents will support my preferred position?
24. Who should be on my negotiating team? Who should be our spokesperson? What specific responsibilities should each team member have?
25. Do we need to involve any third parties (agents, lawyers, mediators, interpreters)?
26. What authority do I have (or does our team have) to make firm commitments?
27. Am I ready to engage in [interest-based bargaining](#)? Be prepared to try to create value by trading on differences in resources, preferences, forecasts, risk tolerance, and deadlines.
28. If we disagree about how the future plays out, can we explore a [contingency contract](#)—that is, stipulate what will happen if each side's prediction comes true?
29. What parties not yet involved in the negotiation might also value an agreement?

30. Have I practiced communicating my message to the other side? How are they likely to respond?
31. Does the agenda make room for simultaneous discussion of multiple issues?
32. Is an agreement likely to create net value for society? How can we reduce potential harm to outside parties?

What other questions would you add to your negotiation preparation checklist?

For the second panel Darrell Gay was joined by Alfreida B. Kenny, Esq. of the Law Offices of Alfreida B. Kenny; and Ingeuneal Gray, Vice President of the Houston Regional Office of the American Arbitration Association. Through presentation and analysis of illustrative anecdotes and actual cases, both sessions presented key concepts; stimulated questions and discussion; and offered practical insights and techniques for managing unique difficulties, arising for neutrals and advocates, in the practical and ethical dimensions of ADR.



from left to right: Darrell Gay, Alfreida B. Kenny, Ingeuneal Gray, Harold Coleman

The Diversity Dilemma: ADR in the Aftermath of Jay-Z

July 24, 2019

On November 28, 2018, Shawn Carter, aka Jay-Z, rocked the world of arbitration, when his lawyers filed a motion in the New York Supreme Court for a temporary restraining order to halt a scheduled arbitration. The case involved the use of the Roc Nation logo on Major League Baseball (MLB) apparel. In 2007, JZ sold the Roc Nation trademark and certain [Rocawear](#) intellectual property rights to [Iconix Brand Group](#), in a \$204 million transaction. After a series of disputes, in 2015, JZ and Iconix agreed to arbitrate remaining disputes.

In April 2017, Iconix filed a suit against Jay-Z, MLB and related parties at the US District Court for the Southern District of New York. Jay-Z [responded](#) with counterclaims. In October 2018, Iconix commenced arbitration proceedings against Jay-Z, in the U.S. District Court, New York, [Iconix Brand v. Roc Nation Apparel, 17-cv-3096](#). According to JZ's [petition](#), the arbitration action was “presumably seeking to put pressure on certain parties—who are also defendants in Iconix’s trademark action—by suddenly demanding financial information about the businesses they had not received in the ordinary course of performance.” Jay-Z’s counsel sought a stay of the arbitration, on equal protection grounds. In a [memorandum in support of the stay](#), Counsel argued the roster of the American Arbitration Association (“AAA”) was discriminatory pursuant to the New York State Constitution, and New York City human rights laws because the roster did not include African Americans arbitrators. In a hearing on November 20, 2018, the Court granted JZ’s motion for a stay. A transcript of the hearing is available [here](#). Following the grant of the stay, AAA confirmed it would stay the arbitration. In addition AAA indicated an openness to an arbitrator selection process that would allow JZ to meaningfully consider African-American arbitrators, and to broader “measures intended to improve the diversity of the arbitrator roster for future arbitrations.” After discussions with AAA, JZ withdrew his request for the Court to grant a stay. JZ’s letter to the Court withdrawing the request can be found [here](#). The merits and underlying intent of Jay Z’s argument, that a lack of diversity could void an arbitration provision in a contract, have been questioned and scrutinized. However, the case has served as a catalyst to generate discussions focusing on the need for diversity within the field of arbitration, and alternative dispute resolution, generally.



Panel from left to right: Gloria Johnson, Section Chair; Noah J. Hanft, President and CEO, International Institute for Conflict Prevention & Resolution; Gail Wright Sirmans, Esq.; Natalie L. Reid, Esq.; Honorable Timothy K. Lewis (retired)

CPR Diversity in ADR Taskforce/ADR Section Panel Discussion Jay-Z Was Not In The House - But We Were!

By Gail Wright Sirmans, Esq.

On July 24, 2019, a program entitled The Diversity Dilemma: ADR in the aftermath of Jay-Z was presented by the CPR Institute and CPR's Diversity in ADR Task Force, in collaboration with the ADR Section. Gloria Johnson, Chair of the ADR Section, launched the session with probative statistical data that reflected the dearth of black arbitrators. Johnson's analysis confirmed arbitrators are typically and traditionally selected from a pool of retired judges or major law firm partners, which includes no more than a miniscule number of blacks. Johnson discussed the ADR Section ongoing programs and initiatives designed to break down the roadblocks black arbitrators encounter and to build up "real opportunities".

The President and CEO of CPR, Noah Hanft, examined CPR's multifaceted diversity efforts, including the Higginbotham Fellows, the CPR Diversity Task Force, and a mentoring program. Hanft reported on Resolution 105, adopted by the American Bar Association, on August 6, 2018, which urges ADR providers to "expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities" and to encourage the selection of diverse neutrals. In a recent article, former US Court of Appeals Judge Timothy Lewis contended, "I'm not even sure we know what we're talking about sometimes when we discuss diversity. It's become a codeword with a lot of different meanings and coded language can be a convenient place to hide from inconvenient truths." Lewis offered remarks that poignantly placed the issue of diversity in a historical context. Lewis' vivid descriptions of the role and impact of racial discrimination in American life were riveting. Disrupting the old boy network and eliminating subjective decision making, he contended, is a challenge that must be met. The critical role of the marketplace was critiqued by Nathalie Reid, of Debevoise & Plimpton LLP. Reid acknowledged law firms must encourage and direct their clients to select black ADR professionals - the pipeline must be fluid and flowing - it's good business!

The moderator and panelists provided candid insights and recommendations about steps that have or should be taken to create a more equitable system of identifying, listing and selecting arbitrators. The panelists also offered strategies Black arbitrators may consider to enhance their opportunities. It is anticipated this dialogue should serve as a platform for formulating and implementing strategies that create concrete change and meaningful opportunities. It definitely will be one of the main initiatives of the ADR Section. After the program, Debevoise & Plimpton LLP hosted a reception. Articles referenced during the panel can be found at <https://cprinstitute.box.com/s/i55w3yc2y31g7in9uhyg7axsejha3en>: [Making Diversity Happen in ADR: No More Lip Service](#), by Noah J. Hanft, Esq.; [Report to the House of Delegates](#), the American Bar Association Section of Dispute Resolution, updated July 26, 2019; and [Promoting Diversity in Mediation](#), by Judge Timothy Lewis.





Corporate Due Diligence and Alternate Dispute Resolution Symposium

“Streamlining and Reducing the Cost of Conflict Through Arbitration”

NBA Mid-Winter Conference

Panama City, Panama

By Rebekah Ratliff, CCLS

Section Chair, Gloria Johnson, Esq. and Section Secretary, Rebekah Ratliff, CCLS, represented the Section at the Corporate Due Diligence & Alternate Dispute Resolution Symposium at the NBA Mid-Winter Conference in Panama City, Panama. The symposium panel was moderated by John L. Woods, Jr., Esq., Co-Director of the ADR Program and Adjunct Law Professor at Howard University School of Law. Panelists were arbitrators, Gloria Johnson, Esq.; Rebekah Ratliff, CCLS; Margie Jaime, Lawyer, FCI Arbitrator, Former Legal Advisor to the Ministry of Commerce; and Jorge Federico Lee, (Panama) member, International Chamber of Commerce Court of Arbitration. The Symposium provided American and Panamanian perspectives about the following:

- The cost and benefits of ADR/Arbitration
- The essential/key points that should be addressed when negotiating an ADR/arbitration clause,
- What areas of law typically resolve disputes via arbitration? Where are the opportunities to expand the use of arbitration?
- What reputation does Panama hold as a center of arbitration? How does it compare as a chosen seat of arbitration vs. other locations?
- What is the attitude of courts to arbitration in Panama and the U.S.?
- What is the reputation of the courts (Panama and the U.S.) for enforcing arbitral awards?
- To what extent will the courts (Panama and U.S.) assist with the arbitration process when called upon – for example, by empowering the arbitrator, ordering preliminary relief, and granting injunctions?
- Concerning the choice of seat of an arbitration based on local arbitration laws, does the substantive law of the jurisdiction matter (Panama and the U.S.)?
- How does the infrastructure and role of Panama as an arbitration Centre for resolving international, cross-border disputes compare to other Centres in the world?
- What partnership opportunities exist between the Panama Bar Association and the National Bar Association in (1) increasing the use of arbitration by their respective members; and (2) creating joint arbitration panels to address the unique needs, if any, of their respective members?
- Have any recent developments affected the arbitration process in Panama and the U.S.?

The panelists discussed the American ADR infrastructure, including organizations and opportunities, and the differences and similarities between the American and Panamanian systems. The English and Spanish translators, who skillfully conveyed the presentation, questions and answers, facilitated an enriching experience for more than 100 attendees. !Viva los Estados Unidos! ... and viva la NBA ADR sección!

Developments After Supreme Court's Decision in *Epic Systems Corp. v. Lewis*

By Carl K. Turpin, Esq.

The U.S. Supreme Court's decision in [Epic Systems Corp. v. Lewis](#) is more than one year old. The High Court's May 21, 2018, decision held that making workers sign arbitration agreements, which waive their rights to pursue class actions, is both enforceable under the Federal Arbitration Act and does not violate the National Labor Relations Act. The ruling provided employers the ability to funnel wage-and-hour and discrimination claims to solo arbitration instead of a court. To some employers this is an attractive option because arbitration is not public and individual claims are not likely to earn employees the large damage awards, a successful class action can bring.

In February, 2019, the *New Law Journal* website published an analysis by ALM Media data editor, Ben Hancock, and *National Law Journal* labor law reporter, Erin Mulvaney, '[Epic' Impact: How a Major SCOTUS Decision in Favor of Arbitration Is Shaping the Landscape for Workplace Lawsuits](#). Of the 92 decisions from U.S. courts of appeal and federal district courts that cited *Epic*, during the seven months following the decision, 10 were circuit court and 49 were district court cases that centered on arbitration of workplace claims. Decisions in the majority of the cases either compelled arbitration, or revived arbitration as a live issue.

The NLJ's analysis revealed the following statistics:

- About 63 percent of decisions citing *Epic*—across all case types—broke in favor of the defendant, although the fact patterns in many cases differed widely.
- The bulk of the cases were class actions. About 53 percent of the circuit court cases, and roughly 71 percent of the district court cases, were class actions. Of class actions in both district and circuit courts, 52 percent were compelled to arbitration, and in another 7 percent arbitration was revived as a live issue.
- The most common case type of case centered on wage-and-hour claims. A handful were sexual harassment and discrimination cases. Around 47 percent of circuit court cases, and just under 51 percent of the district court cases, were wage-and-hour cases.
- In the district courts, most of the cases involved workplace claims—allegations of wage-and-hour violations, sexual harassment at work, workplace discrimination or worker misclassification — 67 percent were compelled to arbitration. That accounted for 33 cases. In one additional case, arbitration was revived as a live issue. About 12 percent of decisions denied arbitration, and roughly 18 percent resulted in another outcome.

A 2018 Economic Policy Institute report, [The Growing Use of Mandatory Arbitration](#), found more than half of employers in the USA are subject to mandatory employment contracts, and a third of those include class action waivers. Additionally, the survey also found employees in low-wage workplaces, women and African-Americans are more likely to be subject to mandatory arbitration agreements. Nearly 65 percent of workplaces where the average wage is less than \$13 an hour require these agreements.

There has been some push back against the *Epic* ruling.

1. The overall number of Fair Labor Standards Act cases filed between May 21, 2018, and May 17 of this year dipped only slightly when compared with the previous year.
2. Many employee-side attorneys have “pivoted to ‘mass arbitration,’ filing dozens or hundreds of solo arbitration demands against employers they would have otherwise pursued via class action.”
3. In a few cases, plaintiff firms have filed thousands of arbitration cases at once, and then demanded arbitration fees be paid by the companies up front.

Congressional Democrats announced a package of bills that would ban forced arbitration of disputes involving employment, consumer and antitrust issues, and civil rights disputes:

- The *Forced Arbitration Injustice Repeal (FAIR) Act* would end the use of forced arbitration in consumer, worker, civil rights, and antitrust disputes. The House bill has 147 cosponsors. The companion Senate bill, introduced by Senator Blumenthal, has 34 cosponsors.
- The *Ending Forced Arbitration of Sexual Harassment Act* would end the use of forced arbitration in disputes involving sexual harassment or discrimination.

- The *Restoring Justice for Workers Act* would restore workers' rights by ending the use of forced arbitration in employment disputes and ensuring the enforcement of workers' protections under the National Labor Relations Act.
- The *Justice for Servicemembers Act* would restore the rights of veterans, servicemembers, and their families by ending the use of forced arbitration in cases under the Uniform Service Employment and Reemployment Rights Act and the Servicemember Civil Relief Act.
- The *Fairness in Long-Term Care Arbitration (Sanchez)*: ensures that older Americans in long term care facilities have access to the courts.



Carl K. Turpin, Esq. is an attorney with 32 years of extensive litigation experience. He has tried over ten multi-day jury trials, over 140 bench trials and administrative hearings, and approximately 50 labor arbitration hearings. Mr. Turpin has participated in numerous alternative dispute resolution (ADR) sessions representing labor unions and management. Mr. Turpin recently started an ADR practice as an arbitrator, mediator, hearing officer and workplace investigator.

Other Cases of Interest

by Joyce A. G. Mitchell, Esq. and Carl K. Turpin, Esq.

In [*New Prime Inc. v. Oliveira*](#), the Supreme Court held independent contractors in the transportation industry may not be subject to forced arbitration. Writing for a unanimous Court, Justice Gorsuch relied on statutory interpretation to hold independent contractors met one of the exceptions of the Federal Arbitration Act.

In [*Henry Schein, Inc., et al. v. Archer & White Sales, Inc.*](#), the Supreme Court considered who should determine whether a dispute is subject to arbitration, where the parties to a dispute have an arbitration agreement. Is it the arbitrator, or a court? Writing for a unanimous Court, Justice Kavanaugh held arbitrators, not judges, must not only resolve the merits of a dispute, but also decide whether a dispute is subject to arbitration when the parties contract to have arbitrators decide that issue. Courts cannot override the terms of the parties' contract, even if the arguments for arbitration are completely baseless or "wholly groundless." The Court found a "wholly groundless" exception was inconsistent with the Federal Arbitration Act.

In [*Lamps Plus, Inc. V. Varela*](#), the Supreme Court ruled, in a 5-4 decision, under the Federal Arbitration Act ("FAA"), an ambiguous agreement cannot provide the necessary contractual basis for concluding the parties agreed to submit to class arbitration. Lamps Plus arose from class action, filed by employee Frank Valera, about a data breach that led to the disclosure of approximately 1,300 employees' tax information. Lamps Plus moved to compel individual arbitration on the basis the arbitration provision, in Varela's employment contract, was ambiguous on the question of class arbitration. The majority based its holding on the policy underlying the FAA: arbitration agreements cover only disputes the parties affirmatively agreed to arbitrate and [*Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*](#): arbitration agreements that are *silent* on the question of class arbitration can not support the arbitration of class claims.

Section Member Honors and Recognitions

Earlene Baggett-Hayes, Esq. recently received the State Bar of Michigan annual award for Distinguished Service in ADR. In conjunction with the State Bar of Michigan, Baggett-Hayes is establishing a mentoring program to enhance diversity among mediators and arbitrators. In addition, Baggett-Hayes, who is a Distinguished Fellow with the International Academy of Mediators, recently led a discussion on Diversity in Mediation at the Fairmont Hotel in Banff, Canada. We applaud you Earlene!

Rebekah Ratliff, CCLS was awarded the October 2018 Light of Life 7th US District Congressional Award from Congressman Danny Davis. Congratulations Rebekah.

On April 2, 2019, **Carl Turpin, Esq.** was appointed to a three-year term as a volunteer arbitrator for the District of Columbia Attorney/Client Arbitration Board ("ACAB"). Additionally, Carl received the Washington Bar Association President's Award (June 2019) and National Bar Association President's Award (August 2018).

Section Members on the Lecture Circuit

In June, 2019, The Center for Alternative Dispute Resolution, founded by Marvin Johnson in 1986, held its annual conference, "Managing Conflict and Removing Barriers to Collaborative Decision Making". The conference featured informative and instructive lectures on a myriad of topics related to mediation and conflict resolution. This year three members of the ADR Section made presentations:

- Earlene Badgett-Hayes, Esq., Pontiac, Michigan
"Another Way to Build Your Practice and Educate the Public-Creating Your Own Reality Mediation Show"
- Joyce Mitchell, Rockville, Maryland
"A Chain is Only As Strong As Its Weakest Link"
- Gail Wright Sirmans, New York, New York
"Lessons From Abroad: Mediation Systems Beyond the United States"

“INSIDEOUT: Self-Reflection for Conflict Resolution Professionals”

By: Joyce A. G. Mitchell, Esq.

INTRODUCTION

In *“Bringing Peace in the Room”*, Daniel Bowling and David Hoffman write there are 3 stages to the development of mediators:

- Training in the basic skills;
- Developing a greater intellectual understanding of the process; and
- Developing the personal qualities that make us effective dispute resolvers: Self-awareness, Presence, Authenticity, Intuition, and Empathy.

Bowling and Hoffman proffer the mediator is inevitably part of the conflict, which he or she seeks to resolve; The mediator is influential in shaping the process, understanding the conflict and “knowing” from an unconscious level, the shape of the conflict as the parties see it.

Each of us has different qualities and different strengths, which have often been shaped by time, history, fears, aspirations, failures, family, ethnicity, personal challenges, level of intuition and intent. This article focuses on the third prong: The personal qualities that make us effective dispute resolvers.

SEE ME, SEE YOU

What are the stories that shape us?....

My thoughts about being a conflict resolver developed in my early home life when I was often exasperated by the family disputes that seemed endless and recurring. My grandmother was the peacekeeper, and I admired her patient, gentle, yet stern approach to getting us to let go and be done with the matter. First, I chose to become a lawyer. Later, I was introduced to mediation and arbitration.

If you want clarity about what started your journey, choose a time when you can center yourself for about five minutes. Take 3-4 short breaths, sit quietly and see what spontaneously comes into your mind as you focus on the time you first realized that you had the thought or feeling you’d like to help others resolve conflict in a positive way. Now remember with your body and emotions what prompted you to do so. Who was there? When and where was it? How did it surface in your hopes, ideas and feelings, your intentions? Relive those days. Now share your story in a journal or with a respected colleague. Ask the colleague to share his or her story.

PERSONAL SELF-DEVELOPMENT

Gratitude

Each morning as you rise: Establish a routine, Center Yourself, Find Yourself, Do Yogic breathwork, Exercise, Be alone, Meditate, Pray or as Denzel Washington says: *“Give Gratitude: Thank you for grace, mercy, peace, prosperity, and understanding”*. Others repeat a mantra such as: *“I am blessed; I am strong; I am prosperous; I am focused; Everyone makes mistakes and so do I; I am love and I am loved, or “What can I do today to give everything that I’ve got.”* (Anchoring)

Empathy

If you can see yourself, know yourself, you can be prepared to see others and how they see themselves, empathize, perceive the conflict and view differently even the simplest of concepts. We are all the same human dynamic at our core, whether a baker, cook, waitress, salesman, or lawyer, etc.

Try some mindfulness exercises or listen to [Brene Brown's Short YouTube video on Empathy:](#)

When you stay grounded in yourself, you can seek to understand, and to be understood. You can emanate a spirit of *"I seek to connect with you today, in this dialogue, which we will have, and I want to be a part of the framework for resolution. Today, I will give my all."*

LESS ANXIETY, STRESS, MILD DEPRESSION

How often have you gotten up in the morning, hurried to your hearing room, mediation site or courtroom, rushed in, greeted the parties and begun to notice that something was missing? You are what was missing. How often have you have worked for a long time with your parties and they are still at an impasse? One reason may be that you are not in the game.

Ask yourself: *Why am I here? What am I intended to do? Who needs to talk more? Do we need a change of venue or a short walk?* Know that failure is there to point you in the right direction. Accept that you can access understanding and intuition when you find yourself and quiet yourself.

Method:

Pause, Take several short breathes, Stop talking or actively engaging,
Find yourself by anchoring, Do some self-talk or self-worth affirmations,
LISTEN TO YOUR BODY, OBSERVE THE BODY LANGUAGE IN THE ROOM,
Observe what is occurring with the others in the room,
Pay attention to the parties' emotional clues, unacknowledged feelings, concerns,
Access your internal clues, Accept the answers,
Then Re-engage, based on your assessment.

FACING FEEDBACK/SMACKBACK

Did you receive a bad evaluation or did a party in the session orally blame you for the lack of a resolution? I urge you to find truth in the response, no matter how it was delivered.

Method:

Collect yourself...Breathe deeply...Understand and be curious about all aspects of the feedback.
Engage in an Examination (Fluff or Substance/Anger or Fear), Use your breath and signals from your body to identify judgments, your strong emotions, and theirs, Be Empathetic, Connect to the "what is", Recover. Then be proactive in how you integrate the feedback into your delivery and into your emotional intelligence/intuition/energy field.

A MODEL for JOINT REFLECTION and FEEDBACK

One group of mediators in California has formed a self-reflection group to help with their work as mediators. Their weekly group and 2 partner meetings are based on materials and techniques in the book *InsideOut*, by Gary J. Friedman. It is chronicled in " SCPI: INSIDEOUT: <https://www.youtube.com/watch?v=GqU45jn-GhE>

SOME in the MOMENT TOOLS

In 2016, in a response to a report about the possibilities of who could win the presidential election, President Obama said: "Anything can happen...!" In the circle of humanity, we know that anything can happen: Colin Kaepernick, football player and social activist, is now the \$6 Billion Dollar Nike man.

When there is an impasse, do not slump, lower your enthusiasm, act or show on your face that a tragedy has happened. Rather, silently, ask yourself, “What is **the** next right step?”, “Where do I go next?” Say to yourself: “It is going to be alright!” or “What can I learn from this experience?”

Seek to connect and consciously think: “*I can see myself in you and your conflict, and you in me when I am in conflict.*” Connect to the emotional framework underlying the parties concerns and carry that understanding into the discussion of the solutions.

Summon your intuition and empathy, then ask: “What is **my** next right step?” If the answer is the parties are not ready to settle, *Accept the answer!!* Sometimes it is not time to settle, or something, or someone is missing. Take a break or recess the hearing and reschedule.

In moments like this, think of the concepts in Art Williams book: “**All you can do, is all you can do, and all you can do is enough.**” Essentially, in real time, you are grounding yourself again, to pull on the wisdom and information which you gained from Steps 1 and 2 in your training. Once you ground yourself, your intuition will also kick in, your perceptions of the synchronicities of what is occurring in the room and what occurred in the conflict will seem more evident to you. Find patience, slow down and listen for the human spirits of each person there to guide you in being their guide. The process answers will come.

MIND, BODY, AND SOUL

Physical and Emotional Health

Your health and well-being are your tools just as your knowledge and understanding of the process. *Be Open to Change in your Health*, both emotional and physical. When your body is giving you signals of change or discomfort, *Stop, Breathe, Be Silent, Listen Intently*, Ask yourself: “*What are my next steps?*” “*Where do I go next?*” Wait for the Answer. Act. It is also an opportunity to explore future good health options. Change, Introspection, Patience, Contemplation are part of one of my favorite poems: “*Stopping by Woods on a Snowy Evening*”, by Maryland poet, Robert Frost. Frost writes:

*Whose woods these are, I think I know.
His house is in the village, though.
He will not see me stopping here to watch his woods fill up with snow.*

*My little horse must think it queer to stop without a farmhouse near...
The woods are lovely, dark and deep.
But I have promises to keep, and miles to go before I sleep.
And miles to go before I sleep.*

Please remember when you enter the room to help others, you have made a commitment to “the miles to go before you sleep”.

RESOURCES

Bringing Peace in the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution by Daniel Bowling and David Hoffman, Jossey-Bass, 2003

InsideOut, by Gary J. Friedman, Section of Dispute Resolution, American Bar Association, ABA Publishing, 2014, Listening and breathe work exercises herein are based on inspiration and techniques by Mark Nepo in his books: *7000 Ways to Listen : Staying Close to What Is Sacred*, Atria Books, 2013; and *The Book of Awakening: Having the Life You Want By Being Present to the Life You Have*, Conari Press 2000

“Breathing: The Master Key to Self-Healing”, audiotope by Andrew Weil, MD, Sounds True Inc., 1999



ADR Section Training Faculty 2019 National Bar Association Convention



[Harold Coleman, Jr., Esq.](#), Senior Vice President for Mediation, American Arbitration Association ("AAA") and Executive Director/Mediator for MEDIATION.org, a division of AAA. Coleman is a Fellow and Director of the College of Commercial Arbitrators and Director of the International Mediation Institute. Coleman works out of AAA offices in Los Angeles and New York. A former multi-disciplinary project manager and complex litigation attorney, Coleman's legal and ADR career spans more than 29 years. He is a former member of the AAA's international Board of Directors, a Fellow of the College of Commercial Arbitrators, a director of the International Mediation Institute.



[Darrell S. Gay, Esq.](#), Partner, Arent Fox handles employee-related issues, international issues and has led internal investigations of senior level executives on behalf of the corporate board of directors. Gay formerly served as a Commissioner with the New York State Civil Service Commission. His appointments include: Commissioner, New York State Civil Service Commission and member, Departmental Disciplinary Committee of the Appellate Division of the Supreme Court of the State of New York. Gay previously chaired the Labor Law and Commercial Law sections of the National Bar Association, and is a Fellow of the College of Labor and Employment Lawyers and the American Bar Foundation.



[Ingeuneal C. Gray, Esq.](#), Vice President, Houston Regional Office, American Arbitration Association ("AAA"). Gray interacts with AAA clients who file commercial cases, and panelists, who serve as arbitrators and mediators in Houston, Louisiana and Mississippi. Gray is a member of the American Bar Association and the Chair of the Houston Bar Association ADR Section. Before joining AAA, Gray ran ICG Law Firm, PLLC, which focused on business development, compliance, conflict prevention, and alternative dispute resolution.



[Noah J. Hanft, Esq.](#) is the President and CEO of the International Institute for Conflict Prevention and Resolution ("CPR"). Prior to joining CPR, Hanft was General Counsel and Chief Franchise Officer for MasterCard, and Senior Vice President and Assistant General Counsel of AT&T Universal Card Services. Hanft is a member of the Council on Foreign Relations. In 2012, he was named General Counsel of the Year at the Association of Corporate Counsel Global Counsel Awards.



Gloria Johnson, Esq., Chair, National Bar Association, Alternative Dispute Resolution Section; is a member of the American Arbitration Association Labor Arbitration, and Employment and Commercial Arbitration Panels; the National Panel of Arbitrators of the Federal Mediation and Conciliation Service, and the National Mediation Board; the Impasse Panel, of the Metropolitan Washington Airport Authority Employee Relations Council; the Prince Georges' County, MD Public Employment Relations Board; the United States Postal Service REDRESS Panel - Mediator Resolute Systems, LLC; the National Association of Railroad Referees; and the United States Postal Service Redress Panel - Mediator Resolute Systems, LLC



Alfredia B. Kenny, Esq. is a member of the panel of mediators for the United States District Court for the Southern District of New York, and the Alternate Dispute Resolution program of the Commercial Division of the Supreme Court of the State of New York, New York County. Kenny also is a neutral on the panel of arbitrators of the American Arbitration Association and a mediator on the panel of the Federal Mediation and Conciliation Service. A member of the Executive Committee of the Dispute Resolution Section of the New York State Bar Association, Kenny is a member of the ADR Section of the National Bar Association.



Honorable Timothy K. Lewis (retired) is Co-chair of the Schnader Harrison Segal & Lewis, LLP ADR Practice Group. Before entering private practice, Lewis served on the US Court of Appeals for the Third Circuit and the US District Court for the Western District of Pennsylvania. Lewis also served as an Assistant US Attorney for the Western District of Pennsylvania and as an Assistant District Attorney in Allegheny County, PA. Lewis is Co-chair of the CPR Diversity in ADR Task Force and is a member of the Board of Directors of AAA.



Joyce A. G. Mitchell, Esq. is a Board Member and Distinguished Fellow of the International Academy of Mediators ("IAM") and President of **Joyce A. Mitchell and Associates**, Rockville, MD. She is on the mediator rosters of the EEOC, the Financial Industry Regulatory Authority (FINRA) and arbitrates for the commercial panel of the American Arbitration Association (AAA). Mitchell, who has been an adjunct professor at the Columbus School of Law, Catholic University and the Carey School of Law, University of Maryland is a former Chair of the Maryland State Bar, ADR Section.



[Rebekah Ratliff, CCLS](#) President of Capital City Mediations LLC, is a former complex casualty claims professional. Capital City Mediations, LLC is an Atlanta based Mediation, Arbitration and Consulting firm with international scope. Rebekah is a civil and domestic Mediator and Arbitrator. She is also on the FINRA panel of Arbitrators. Rebekah is the Secretary of the NBA ADR Section and serves as Co-chair of the Diversity Committee for the ABA ADR Section. Rebekah is a recipient of various prestigious awards to include the National Bar Association SFSPD Outstanding Service Award and a 7th US District Congressional Award.



[Natalie Reid, Esq.](#) is a partner in the International Disputes Group of the New York office of Debevoise & Plimpton LLP. Prior to joining Debevoise, Reid was an Associate Legal Officer at the International Criminal Tribunal for the former Yugoslavia. Reid has been named a “Rising Star” in 2015 by the *New York Law Journal*. Reid co-chairs the CPR Young Attorneys in Dispute Resolution Steering Committee, and serves on the Board of Editors of the *American Journal of International Law*. Reid is a co-author of the *International Criminal Law Practitioner Library* (Cambridge University Press) and has been a guest lecturer at Yale Law School, New York University School of Law, and Columbia Law School.



[Gail Wright Sirmans, Esq.](#) is a Distinguished Fellow, International Academy of Mediators, and member of the Board of Directors of the Asian American Legal Defense and Education Fund, and the National Employment Lawyers Association of New York; former Chair, New York State Bar Association Civil Rights Committee; Associate Counsel, NAACP Legal Defense and Education Fund; Assistant Counsel/Special Assistant to the General Counsel, US Equal Employment Opportunity Commission; Associate Professor, Pace University School of Law, Cornell College of Industrial and Labor Relations, and St. John’s Law School. Sirmans is actively involved with Mediators Beyond Borders.

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Monthly Conference Calls

Third Tuesday of every month

Dial in:

605-475-6711

access code: 377449#

6:30 PM EST

*unless otherwise noted

Dates:

Tuesday, August 20, 2019

Tuesday, September 17, 2019

Tuesday, October 15, 2019

Tuesday, November 19, 2019

Tuesday, December 17, 2019

Tuesday, January 21, 2020

Tuesday, February 18, 2020

Tuesday, March 17, 2020

Tuesday, April 21, 2020

Tuesday, May 19, 2020

Tuesday, June 16, 2020

Tuesday, July 21, 2020

Tuesday, August 18, 2020

CREDENTIALING COMMITTEE INFORMATION

The NBA-ADR Credentialing Committee was created to make recommendations regarding criteria for admittance of new members to the NBA-ADR Committee Rosters of Arbitrators and Mediators. The Committee is comprised of Otis McGee, Alfreida Kenny, Gail Wright Sirmans, and chaired by Dean Burrell. Conference calls were conducted on July 3, 7, 10, and 15, 2019. The Committee Report and Recommendations were presented and accepted during the NBA-ADR Section meeting at the National Convention on July 21, 2019. The Committee agreed the two most important criteria for inclusion in the Rosters are 1) affiliation and active membership with the NBA and its ADR Section by all candidates, thereby ensuring all prospectively admitted arbitrators and mediators positively represent the NBA and neutrals of color; and 2) ensuring prospective arbitrators and mediators meet the mandated professional qualifications in the jurisdictions, in which they arbitrate or mediate.

It was concluded the first criteria can be best achieved by requiring the potential roster member to attend training provided by the NBA-ADR Section. An example is the five-hour Continuing Legal Education Program provided on July 21, 2019, during the National Convention by the NBA-ADR Section, in conjunction with the American Arbitration Association.

Regarding the second criteria, most states have their own qualifications for an individual to hold themselves out as a mediator. All candidates must meet those requirements as a threshold to belong to the panel, and must meet any continuing obligations to remain on the panel. Arbitrators must meet and continue to meet the ongoing requirements of the arbitration panels to which they belong. The Committee has developed a letter, to be sent to all potential candidates, which sets out each of these requirements. We appreciate the opportunity

to have been of service, and look forward to contributing in the future. For further information, please do not hesitate to contact the Committee at DLBurrell1@gmail.com.

Newsletter Committee: Carl Turpin, Esq., Gail Wright Sirmans, Esq. and Sabrina Dodd, Esq.



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THE DIVERSITY DILEMMA: ADR IN THE AFTERMATH OF JAY-Z

The Diversity Dilemma: ADR in the aftermath of Jay-Z: The CPR Institute and CPR's Diversity in ADR Task Force in collaboration with the ADR Section of the National Bar Association (NBA) are pleased to present The Diversity Dilemma: ADR in the Aftermath of Jay-Z. This dynamic program will feature an expert panel and networking event for inside counsel, outside counsel and neutrals. The panel discussion will take place during the National Bar Association's 94th Annual Convention and will be followed by a meeting of the CPR Diversity in ADR Task Force and a networking reception generously hosted by Debevoise & Plimpton. This event is by invitation only.

AGENDA

- Wednesday, July 24, 2019
- 3:00 - 4:30 pm: Diversity in ADR Panel Presentation* @ NBA's 94th Annual Convention
- 5:30 - 6:30 pm: CPR Diversity in ADR Task Force Meeting**
- 6:30 - 7:30 pm: Networking Reception** @ Debevoise & Plimpton LLP

LOCATIONS

- *National Bar Association's 94th Annual Convention Sheraton New York Times Square 811 7th Avenue (W 53rd St), New York, NY 10019
- **Debevoise & Plimpton LLP 919 Third Avenue, New York, NY 10022

REGISTER

[REGISTER HERE](#)

Email Richard Murphy at rmurphy@cpradr.org to request an invitation

SPEAKERS

- NOAH J. HANFT**
President & CEO, CPR Institute
Co-founder, AcumenADR
- GLORIA JOHNSON**
Chair, National Bar Association ADR Section
Arbitrator, Mediator
- HON. TIMOTHY K. LEWIS**
Counsel, Schnader Harrison Segal & Lewis LLP
Arbitrator, Mediator
Co-Chair, CPR Diversity Task Force
- NATALIE L. REID**
Partner, Debevoise & Plimpton LLP
Co-Chair, CPR Y-ADR Steering Committee
- GAIL WRIGHT SIRMANS**
Moderator, Board of Directors,
National Bar Association ADR Section
Mediator









