ADVOCACY IN MEDIATIONS

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TWENTY THINGS TO THINK ABOUT

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1. **Plan a Strategy With Your Client.**
   Talk about your client's goals, both monetary and non-monetary. Know what your *best alternative to a negotiated agreement* looks like, and be prepared to rethink it based on what you hear and learn at the mediation. Don't go in with a bottom line. Bottom lines are moving targets.

2. **You Can't Select Your Judge. DO Select Your Mediator.**
   Mediators come with different training, experience and predilections. Not one size fits all. Do you want a retired judge? An attorney advocate knowledgeable in the subject matter of your dispute who is willing to serve as a mediator? An attorney who serves as a full-time neutral? A non-attorney? An evaluative mediator? A facilitative mediator? A transformative mediator? A mediator who has mediated 20 times with the other side or never mediated with the other side? ASK the proposed mediator how he/she intends to conduct the mediation, what techniques he/she proposes, what roles joint and private caucuses play, and what style the mediator employs. Ask for references.

3. **Prepare Your Client.**
   This is your client's opportunity to speak to the other side and to be understood. Your client needs to be heard, that's why he hired you. It is the duty of the opposing client to listen. Your client should be prepared to speak and be able to listen. Decide what subject matter he is – and is not – going to address, and rehearse what he is going to say. The impression he makes on the opposing lawyer and that lawyer's client is every bit as important as the impression he would make on a jury.

4. **Think About Who Should Be At The Table.**
   You do not want to reach the end of the day only to find that the agreement you have reached needs the approval of a spouse, a significant other, a business colleague, or a distant adjuster who has left his office for the day. Bring the people who are necessary to making a decision to the mediation. Ask the other side whom they intend to bring and ask them whom they want *you* to bring. And assess the benefit/risk of the presence of possibly inflammatory individuals – do you want/not want the sexual

harasser there, the driver of the truck that killed a child, the boss who fired your client? Don't assume you know the answer to those questions without talking to your client.

5. Prepare Yourself.

Mediation is not a judge-hosted hour long settlement conference where you pick up your file on the way to court. It is your chance to show the strength of your case to the other side. Know what your strengths are, and be prepared to discuss your weaknesses.

6. Prepare With The Mediator.

Plan a pre-mediation conference call with your mediator. Decide whom you want to be present at the mediation – from your side and theirs. Talk about whether you want to begin in joint caucus or each side privately with the mediator. Make sure everyone attending has cleared their calendar and that actual settlement authority is present to close the deal.

7. File A Confidential Memorandum.

Flatten the learning curve of the mediator by bringing him up to speed. Yellow- marker contract language or case law that you want her to pay particular attention to. Discuss confidentially your hot-button issues and theirs; relationship issues between you and opposing counsel; relationship issues between your client and the other side; your goals as you see them, without revealing a bottom line (bottom lines are moving targets); your client's interests and needs; the opponent's interests and needs; potential solutions other than money; perceptions of your litigation strengths and weaknesses; perceptions of opponent's litigation strengths and weaknesses; barriers to settlement.

8. First Seek To Understand, Then To Be Understood.

In order to understand both what your opponent wants and what his interests are, you have to listen carefully. Show your opponent empathy and respect, and re-phrase his concerns so he knows he has been heard. He should then do the same for you. You can disagree with what your adversary wants, but you should understand and acknowledge his point of view.

9. Know What Your BATNA And Your WATNA Are.

Your BATNA is your "Best Alternative to a Negotiated Agreement." Your WATNA is your "Worst Alternative to a Negotiated Agreement." If the deal you can strike is less attractive than the risks you face in litigation, then litigate. If litigation is less attractive – or a worse alternative to the settlement you can reach – then settle.

10. Know Your Client's Risk Preferences.

Most people would rather receive $100 than have a 20% chance of winning $1000 (the value of the latter is $200). Assess your client's tolerance for risk. No lawyer I know will guarantee a client that he will get more at trial than what a reasonable settlement offer provides. If your client is risk-averse, he would prefer settlement to risk of trial. If your client is risk-seeking, then rolling the dice – win or lose – may be something he prefers over a reasonable offer of settlement.

11. Don't Be In A Rush.

Bringing peace into the room takes time. You are not bargaining for a brass pot in a bazaar. Plan to spend as much time as necessary, and since that will inevitably be more

time than you expect, have contingency plans for flights home and hotel reservations for the night. Do not schedule a court appearance or deposition for the same day.

12. Watch Your Language.

Mediation is not a bar room brawl. It is not trial advocacy. Set the tone with a cordial hello, a statement that you expect to work hard today, and that you will do everything you can to try to create a solution to the dispute. This is not a promise of settlement, just a commitment to hard work.

13. Plan an Opening Statement.

Begin with an overview of your case from your client's point of view. Touch, but do not dwell, on the legal issues. Explain the impact of what happened to your client, but avoid accusatory language and language that will evoke a hostile reaction. People who are attacked are unable to listen.

14. Talk to the Right People.

You are not in a courtroom. The mediator is not the judge. Address yourself to the clients on the other side, not to opposing counsel or to the mediator. The mediator is powerless to impose a resolution. You have to convince your adversaries that it is in your mutual interest to reach one. You and your opponents own the dispute, know more about it than anyone else, and are the best people to put it to rest.

15. Let Your Client Talk.

This is your client's "day in court", his opportunity to be heard. He needs to engage in the process and be part of it. In many ways he is a better teller of his tale than you are. He, and the client on the other side, own this dispute. They should be active participants in its settlement.

16. Avoid the "You" Word.

Of course, your adversary is an ****[expletives deleted]. After all he has sued you or you have sued him, so your mediator knows a fair amount of pain and insult has been handed out all 'round. But talk to him from your perspective. Tell him how you see the situation and what has happened to you. If you punch your finger in her face, use pejoratives liberally, and tell her just what a jerk she is, her reaction will be "fight or flight." He will either shut down and walk out, or pay you back in kind. No one can listen who is under direct attack. The point is not to minimize the fact that harm has been inflicted – contract breach, negligence, recklessness – but to show the damage that harm has caused *you*, not how evil the person is who caused it.

17. Strategize With Your Mediator.

Brainstorm possible solutions. Make lists of possible (and impossible) solutions to the problem. Throw out the ones that are obviously unacceptable to both sides. To avoid reactive devaluation, use your mediator to convey realistic proposals as a mediator's inquiry. Collaborate on the best way to make concessions and the message they convey.

18. Privately List All the Concessions You Are Willing to Make, And Then Start With The Small Ones.

Starting with single, small concessions signals your opponent that you are willing to compromise. It sets the tone for win-win bargaining and models behavior you want your opponent to imitate. Since you also may not know what is important to your opponent,

you may find that a small concession to you appears large to him and may allow you to concede less than you were otherwise wiling to do. Try to assess how your opponent ranks the concessions you are willing to make. If he wants a concession that you would make willingly, make it reluctantly. He will value it more.

19. Prepare Strategies For Impasse.

Impasse is often a failure of energy, information or creativity. Work with your mediator to develop a going-forward plan when things bog down. Is it time for a break? A meal? A walk around the block? A cooling-off and thinking-about- options time before reconvening? Do you want your mediator to make a mediator's proposal for resolution?

20. Always Remember the Non-Monetary Extras.

Money damages are the currency of settlement. However, sometimes it takes something extra to close the deal. In a medical malpractice case, how about an oversight committee to review and recommend procedural changes? How about out-placement in a wrongful termination claim? In a purchase-supply case, how about future widget sales at a discounted price? In a wrongful death case, how about a scholarship in the decedent's name? In a suit against an airline, how about frequent flier miles or first-class upgrades?

And now, since you have been so patient and have read all 20, a 21st tip:

21. Be Patient, Keep Faith.

Remember that resolution takes time. A "failed" mediation sheds greater light on the real obstacles to settlement. Often, the mediation begins the discussion that leads to settlement – in the next week or the next month.

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MEDIATION AND ARBITRATION PANELS

- American Arbitration Association, *Commercial and Employment Panels*
- Distinguished Neutral, Commercial, Franchise, Employment Panels and National Panel, *CPR International Institute for Conflict Prevention and Resolution; Florence (Italy) International Mediation Center*
- Mediator and Arbitrator, *American Health Lawyers Association*
- Panelist, *National Academy of Distinguished Neutrals; ADROptions*
- Arbitrator & Mediator, *USDC, Eastern District PA*
- Arbitrator & Mediator, *Financial Industry Regulatory Authority [FINRA]*
- Mediator, *US Bankruptcy Court for the District of Delaware*
- Judge Pro Tem, *Commerce Court, Philadelphia Court of Common Pleas*
- Mediator, *United States Federal Circuit Court of Appeals & US International Trade Commission*
- Mediator, *Singapore Mediation Centre & US-China Business Conciliation Ctr, CCPIT Beijing*
- Mediator, *Business & Technology Case Management Program, State Courts of Maryland*
- Mediator, *Equal Employment Opportunity Commission*
- Mediator, *Philadelphia Human Relations Commission*
- Panelist, *Mediation and Arbitration Center, Montgomery County, PA*
- Mediator, *Superior Courts of New Jersey; U.S. District Court for the Eastern District of Pennsylvania*
- Special Discovery Master & Referee Reliance Liquidation, *Commonwealth Court of PA*
- Neutral, *JAMS* [co-founded Philadelphia office of JAMS, 2004-2006]
- Mediator & Arbitrator, *Class Action Appeals Committee, Prudential Policyholders ADR Remediation Plan*
- Arbitrator, *9/11 Victims' Compensation Fund;* Arbitrator & Mediator, *2012 Hurricane Sandy Claims*
- Arbitrator, *USA Track and Field Olympic Trials, Doping* Grievances *Panel, 1998*
- Mediator, *New York Metropolitan Transit Authority, 1992*

PROFESSIONAL CERTIFICATIONS, APPOINTMENTS, MEMBERSHIPS & AWARDS

- Sir Francis Bacon Award bestowed by Pennsylvania Bar Association in May 2016 for Excellence in Mediation
- Member, *National Academy of Distinguished Neutrals*
- Chair, *Philadelphia Bar ADR Committee*, 2011
- Certified Mediator, *International Mediation Institute* & Chair, *IMI Independent Standards Commission*
- Member, Academy of Advanced Practitioners, *Association of Conflict Resolvers*
- Fellow, *Chartered Institute of Arbitrators* [FCIarb]
- Member, *Academy of Court Appointed Masters*
- Distinguished Fellow and Former Board Member, *International Academy of Mediators*
  Member [2000-2010], *American College of Civil Trial Mediators*
- Member, *College of Commercial Arbitrators*
- Fellow, *Claims and Litigation Management Alliance*
- Hearing Examiner, *Los Angeles Board of Police Commissioners*
- Member, *American Bar Association Section of Dispute Resolution; Arbitration & Mediation Committees*
- Best Lawyers in America, ADR, 2006 - 2017; PA SuperLawyer in ADR 2005 - 2017
- Member, PA Bar (active), Idaho Bar (active), California Bar (inactive)

COMMUNITY SERVICE

Regional Board Chair, ANTI-DEFAMATION LEAGUE
Commissioner LOWER MERION TOWNSHIP HISTORICAL COMMISSION, 2000-2013
Mediator Pro Bono, ARTS + BUSINESS COUNCIL OF PHILADELPHIA
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Judge Pro Tem & Settlement Master, Philadelphia Court of Common Pleas

UNIVERSITY TEACHING

Adjunct Professor ADR, *Cornell Law School 1999-present;* Guest Lecturer, *University of Pennsylvania Law School*, *Wharton School of Business*, *Beasley School of Law*, *Temple University*, *Dickinson School of Law (Penn State University), Rutgers Law (Camden)*

ARTICLES [partial list]

Columnist, *On Professional Practice*, ABA ADR Section ***Dispute Resolution*** Magazine, 2016 – present; Book Review, "Inside Out: How Conflict Professionals Can Use Self-Reflection to Help Their Clients", Gary Friedman, Dispute Resolution Magazine, Summer 2015; Book Review, "Anatomy of a Mediation", James Freund, Dispute Resolution Magazine, Summer 2013; Book Review, "Blind Spots", M. Bazerman and A. Tenbrunsel, 2012, *IAM Review;* Book Review, *"Bargaining With the Devil" by R. Mnookin, 2010, IAM Review;* "Mediators Alert: Now, Certification Goes Global", *Alternatives*, March 2008; "When the Neutral's Dilemma Hits: Routine Problems, and the Not-So-Routine Repercussions of Common Arbitration Conflicts," *Alternatives, May 2007;* "ADR vs. The Bench: Why Are Neutrality Standards Different?" *Alternatives, April 2007;* "Mediation in the Media", *Alternatives, 2005;* "Think Outside the Box: Use Mediation Proactively," *Corporate Counsel Magazine, January 2005*

TRIAL LAWYER EXPERIENCE

Litigation Of Counsel, *Bazelon, Less and Feldman* (Philadelphia); Partner, *Meserve, Mumper & Hughes* (Los Angeles); Litigation Partner, *Lande Rolston & Meyer* [Beverly Hills]

EDUCATION

BARNARD COLLEGE, B.A.; CORNELL LAW SCHOOL, J.D., 1974, E.D.P. CAREY WRITING AWARD; MOOT COURT BOARD

On Professional Practice

New Sequences, Techniques, and Approaches for Commercial Mediation

Guided Choice and Mixed Modes Mediation

By Judith Meyer and Ty Holt

In this issue's "On Professional Practice," two of our contributors examine how the early involvement of a mediator creates the most nuanced result for the parties and how mixing the techniques of mediation and arbitration can produce a more satisfactory resolution. Ty Holt and Judith Meyer believe that professional responsibility principles require understanding of these techniques.

"A rose is a rose is a rose" Gertrude Stein famously wrote in 1913, poetically evoking the commonplace notion that a thing is what it is. Mediation is mediation. Arbitration is arbitration. However, mediation often takes place just before the parties start to climb the courthouse steps, after months or years of discovery and numerous depositions, motions to compel, motions for sanctions, and motions for partial or full summary judgment. Every stone has been overturned. Every e-mail has been exhumed and examined. Then the case settles in mediation.

But can professional neutrals use their skills to intervene at other stages of the process and in other ways? Would mediator involvement benefit the parties from the time the issue is joined? When an answer is filed? When the parties have asserted claims and cross-claims?

Advocates of two new approaches, Guided Choice Mediation and Mixed Modes, believe the answer to all these questions is yes. Guided Choice, which was formulated by Paul Lurie, a former contributor to this column, in cooperation with mediation colleagues and corporate clients of mediation, uses the mediator in ways that shape the process of the mediated dispute, not just its final resolution.[1] Mixed Modes was formulated by the International Task Force on Mixed Mode Dispute Resolution, a joint initiative of the International Mediation Institute, the College of Commercial Arbitrators, and the Straus Institute for Dispute Resolution at Pepperdine Law School. Mixed Modes endorses exactly what its name implies: it toggles among mediation, arbitration, and court intervention, often running simultaneously on three parallel tracks. Both Guided Choice Mediation and Mixed Modes are ways of steering parties efficiently, and with the laser-focus and precision of surgery, to a mutually satisfying end.

Consider, for example, a case in which the parties in mediation came up with a resolution that would work, except that one party insisted that the contractual clause waiving consequential damages was unenforceable and therefore the resolution based on his decision-tree analysis was far too pricey. Rather than opining that the waiver clause was enforceable, the mediator in that case did something different. She suggested that if the mediation did not resolve all matters, the parties could take the single issue of the validity of the damage-waiver clause to the appointed arbitrator waiting in the wings. The parties (to her surprise) agreed and teed up that one legal issue for arbitral resolution. The arbitrator agreed to resolve the issue and after hearing the dispute, ruled the consequential damage-waiver clause enforceable. The case returned to the mediator after the single-issue arbitration and quickly ended with an agreement. The mediator learned, after the fact, that referring an issue or issues to an arbitrator is one of the techniques of Mixed Modes

What is different about the conventional mediator's role in Guided Choice? Mediators play an early and proactive role. They are invited by the parties to involve themselves early in the dispute — at the very beginning of litigation — to hold informal conversations with parties, counsel, and their experts, distilling from those conversations suggestions for the exchange of just enough information so that the parties can make a rational decision about resolution and the terms of settlement. The parties agree, with the direction of the mediator, on what information is essential to a risk analysis and an informed business decision regarding what is at stake. Discovery becomes focused and limited. The mediator, with the parties and counsel, selects the representatives on each side who are best able to evaluate risk, negotiate with each other without hot-button or emotionally invested issues derailing productive conversation, and see the forest without becoming distracted by the number and diversity of the trees. The mediator works to identify issues or people that can lead to impasse or stalemate and suggests work-arounds.

The mediator also works with the parties and counsel to create an agreed-upon menu of essential questions for experts, should experts be identified, and the experts, when they respond to these questions, are able to do so in a confidential, collaborative setting, with the result that the parties and counsel engage in a discourse focusing on practical and workable solutions. In traditional litigation, litigants pay experts to offer opinions on sometimes extreme and party-driven conclusions. In Guided Choice Mediation, experts collaborate and come to a working solution the conflicting parties can endorse. Experts, after all, are usually experts in solving problems, not only in proving that the opinion of another expert is wrong. Guided Choice Mediation can include nonbinding evaluation by the mediator on issues of fact and law, or, if the parties allow, some limited arbitration to determine hotly disputed legal claims such as the above-referenced waiver of consequential damages clause. (Note the crossover with Mixed Modes.) For some experienced mediators, the tools expounded by Guided Choice Mediation may simply seem common sense.

Here are two real-world examples of how some of our most creative mediators have used Guided Choice Mediation:

- A general contractor was in dispute with a large US city, and the case went to mediation. The GC had installed windows in a historic City Hall that were now leaking. The GC, who had a very large outstanding bill, expressed unenthusiastic willingness to do limited repairs. After the city's expert responded that the GC's promises were inadequate, the mediator, strategizing and worrying about impasse, suggested the city and the general contractor hire an expert to weigh in on the scope of needed repairs. The mediator's suggestion foresaw two realities — the political process would not allow the city to accept a negotiated number lower than that suggested by its own expert, but both sides could and probably would consider a neutral expert opinion. The upshot was that the neutral expert persuaded the parties to accept a sound solution to stop the leakages at a lower cost than the city had originally demanded.
- At a well-known university, a young man died of alcohol poisoning during fraternity pledge week. The university attempted to settle the family's wrongful death lawsuit unsuccessfully, and the parties agreed to mediate. Assessing the needs of the family and the desire of the university to settle, the mediator suggested the mediation take place at a location of the family's choosing and that the president of the university — who until that point had not been involved in the negotiations — attend. The mediation took place in the family's home state, far from the university, with the president at the table. The president offered the family a heartfelt apology, a $1.25 million scholarship in the young man's memory, and $4.75 million, an amount that could have been awarded by a jury but probably would not have been accepted by the family without the personal involvement of the university president. The mediator's suggestions — holding the mediation in the family's own state and requiring the president to be there — set the stage for settlement. The president's presence, his

> apparently sincere distress about a tragedy that never should have happened on his watch, and an offer that acknowledged the pain of the family and the risk the university faced at trial, allowed the family to back away from its anger and begin the difficult process of healing.

(For more examples of Guided Choice Mediation possibilities, check out the webinar sponsored by the American Arbitration Association.[2])

Practitioners who use Mixed Mode processes explore the interplay among mediation, evaluation, and arbitration in commercial disputes. They look at all the dispute resolution processes available to parties — mediation, nonbinding early neutral evaluation, mediator proposals, mediators becoming arbitrators, arbitrators becoming mediators, arbitrators setting the stage for settlement, and all kinds of other creative interactions. They take all the dispute resolution tools available to parties and counsel and mix and match those most appropriate to the issue that needs to be resolved. Their processes are wholly fluid and flexible, truly "fitting the forum to the fuss."

Professor Thomas Stipanowich at Pepperdine University School of Law and Veronique Fraser, Pepperdine Scholar in Residence, have imagined various scenarios involving the interplay between mediators and adjudicators, such as mediators not just mediating the substantive dispute but bringing their facilitative skills to process management. When mediation fails to resolve all the issues in a dispute, a mediator may suggest arbitration of unresolved legal issues — the interpretation of a contract clause, the applicability of a consumer fraud statute with triple damages to the facts alleged, or the viability of a punitive damage claim.

Or what about a business-partnership dispute in which arbitration can decide the issues only in a way that leaves both parties with a resolution that works for neither one and results in the crippling of their business venture? Mixed Modes allows the arbitrator to suggest mediation as a better process to: (a) preserve the value of their intellectual property, or (b) keep a business venture alive but prevent legal issues from being decided in arbitration in a business-damaging way.

The London-based mediation institution CEDR, which developed procedures for facilitating settlement in the context of arbitration, has sketched out an arbitration-to-mediation process. In 2009, CEDR rules envisioned, "the Arbitral Tribunal may, if it considers it helpful to do so, where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation, or chair settlement meetings attended by party representatives at which terms of settlement may be negotiated." This would be unorthodox practice in the United States.

Another possibility: arbitrators frequently come to preliminary views on issues in dispute. Should they ever provide a draft or oral version of the tribunal's award to promote the opportunity of a party-driven settlement? Often arbitrators wish to signal to parties their thinking or the direction in which they are heading, to give the parties an opportunity to craft a resolution that better fits their needs and ultimate goals. This is not the practice in the United States. But might it be considered?

When parties find themselves in litigation, arbitration, or mediation, it's important to remember that these are default options (or in the case of ADR, pre-selected options) that may not fit their needs at the moment. Consider what happens in the world of medicine. Before a patient suffers an injury or gets sick, no doctor decides whether the best treatment would be medication, physical therapy, surgery, or hospice. Only after the injury, in consultation with the patient, does the physician evaluate, adapt, and try options. Shouldn't this be our approach to conflicts, too?

Ultimately it is the parties' needs that ADR is committed to serve. The whole point of ADR is to take commercial and other disputes out of the "what cause of action do these facts fit?" litigation paradigm and move them into the "what do the parties need to do to reach a resolution that serves their interests?" realm.

This is a messy and *ad hoc* process. It does not follow traditional rules. But keep in mind that the traditional rules of litigation were adopted in medieval and renaissance England to keep parties from resorting to private justice, where power trumped right. It is crucial that we acknowledge that the rule of law keeps

civil societies civil. Acceptance of the legitimacy of law prevents chaos.

While acknowledging the rules — and being grateful for them — Mixed Modes invents and deploys processes in unfamiliar ways. Mixed Modes imagines the combining of processes, *e.g.*, start with an early neutral evaluation, and then process the dispute into mediation; begin the arbitration, but with a mediator in the wings; if issues arise in arbitration that the arbitrator senses are better decided by negotiation, send those issues to the mediator, the default being that if the parties cannot settle, the arbitrator will resolve the issues; on construction projects, appoint a Dispute Resolution Board that can settle disputes in real time, subject to a party later contesting the resolution in an arbitration or in court; let a court work with a mediator on an agenda of issues raised by the parties, the default being that if the parties cannot agree on certain issues, the court will rule on each one.

Mixed Modes and Guided Choice are two fairly recently popularized brand names for approaches to dispute resolution that when applied to mediation represent additional tools for use by commercial mediators. While we highly recommend that the reader consider using Mixed Modes and Guided Choice Mediation in appropriate circumstances, we note that experienced and forward-thinking practitioners have been using these kinds of mixed or hybrid techniques, and other variations, for many years. Our recognition of colleagues who advocate for the techniques and procedures that characterize Guided Choice Mediation and Mixed Modes is in no way meant to ignore or downplay the work of other colleagues who have applied similar approaches without attaching names to them.

ADR allows the parties to create their own creative, bespoke processes for resolution, and Guided Choice Mediation and Mixed Modes allow even more nuanced choices in ADR. While operating always in the shadow of the law, these cutting-edge philosophies allow parties to landscape their paths to the most mutually beneficial resolution they can reach and to illuminate each area of those paths with the appropriate lighting for the appropriate amount of time. In honoring the individual nature of each dispute, they give that dispute the respect and creativity it deserves.

Endnotes

1 For more information, go to www.gcdisputeresolution.com.

2 View the examples at https://www.aaau.org/courses/using-guided-choice-to-increase-satisfaction-with-the-value-of-mediators/15prw042/.

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Judith Meyer, *who has served as a mediator and arbitrator for more than 25 years, resolves commercial mediations and arbitrations involving contract, environmental, employment, construction, tort and personal injury, professional liability, business and commercial, employment, environmental, intellectual property, and insurance disputes. She taught negotiation, mediation, and arbitration at Cornell Law School. She can be reached at judith@judithmeyer.com or www.judithmeyer.com.*