ADR UPDATE

Photos by: Christine Jegan

Mediation is thriving. Cheaper than trial preparation, the parties maintain control over the resolution, mediation's luster has increased over the years. How does an attorney most effectively utilize this popular ADR process? What happens at the end of the day if a settlement hasn't been reached? Gathered to discuss these issues were **Guy Kornblum** of Guy Kornblum & Associates; Retired Superior Court **Judge Richard A. Hodge,** mediator and arbitrator with ADR Services; **Zela G. Claiborne,** mediator and arbitrator with the American Arbitration Association (AAA) and International Centre for Dispute Resolution (ICDR); **Robert A. Murray,** mediator with Arbitration and Mediation Center; and **Cathy Yanni,** mediator and special master with JAMS, The Resolution Experts.

MODERATOR: Let's start with how a lawyer should prepare his or her client for mediation.

YANNI: Many clients, even sophisticated clients, have the view that trial is the only vehicle for resolving their case. I tell clients 98 percent of all cases settle: the issue is when to settle, not if it's going to settle.

KORNBLUM: As an attorney who represents clients in mediation, one of the most important things for me is to assess how a client feels about settling their case. Ninety-nine times out of a hundred she or he says 'I really want to settle.' If a client is resistant to the process of mediation or settlement, I'm less likely to take the case than somebody who is enthusiastic. I explain that that doesn't necessarily mean the case is going to get resolved at mediation but that we're going to make an attempt and we're going to go as soon as we possibly can.
I explain that the attempt to mediate is not a sign of weakness, it's a sign of strength. You take cases to mediation when you feel confident with your case. Almost every time we meet after that, we talk about where we are in the case, whether the case can be evaluated, whether we're at a point to make the overture to the other side, prepare a demand letter, make phone calls, whatever it may be to get the case to mediation. Before the mediation takes place, and I do this two, three weeks ahead of time, I sit down with my client and start to bring everything together, including the financial planning that goes with it. I bring in financial planners who can talk to the client about what the economic resolution might mean. I spend as much time getting a client ready for mediation as I do preparing them to testify in trial-- maybe more.

JUDGE HODGE: That's not standard practice. The problem we have as mediators is that lawyers do not follow that protocol and they do not prepare their clients and they do not go through the steps you've just

outlined. You indicated that you would be hesitant to take a case where the client didn't want to settle. We get a large proportion of cases where the clients come in not wanting to settle. They come in wanting to vet, to be heard, to try the case even though it's a mediation. One of the first things you do as a mediator is to try to do the spade work that Guy does which seldom gets done by lawyers.

CLAIBORNE: Mediation is a very dynamic process. It's a process where one side will learn about the points of view of the other participants and perhaps change views on what it would take to settle the case. In preparing a client for mediation, it's very important for a range of settlement numbers not to be set in stone. Remain flexible during the course of the mediation to hear what can be learned from the other side and the mediator.

MURRAY: Attorneys and clients should be prepared on substance, of course, but also on the nuances of the case, to be aware of potential hurdles, how to handle negative information, disappointment, and how to be creative in moving toward resolution. Clients should have realistic expectations.

JUDGE HODGE: One of the standard ways of doing mediation is a plaintiff asks for an absurdly high amount of money. Then the defendant offers an absurdly low amount and then you work toward the middle, which drives me crazy. I spend 30 percent of every mediation trying to avoid that. And here's my question to Guy as the advocate: when you come into the mediation, do you know within 20 percent of where you will ultimately go to settle a case or is it figured out during the course of the mediation?

KORNBLUM: It's usually the former. But there are cases when you go to mediation, and find out something you really didn't appreciate, understand or know, and that may change your evaluation of the case. In most cases, though, if you follow the process that I'm talking about and you work the case up well, you've got a pretty good understanding where that case may go. I may not tell the client exactly that range because I want to see how they respond to the process and how they respond during the day. I don't want them conditioned to a number because then they tend to fix on a number and it's hard to work with them. If it's a big case and they're stuck at X and you've got X minus $25K and you know that's all you can get that day, I can't let a client walk out of that room without really seriously considering that number.

MURRAY: I often see people come into mediations after spending six months, a year or more in litigation. They've usually been through a deposition and other adversarial litigation experiences. That's their frame of reference. Their attorneys often don't prepare them for mediation, which is an entirely different culture, to discuss resolution, to be mindful of the value in resolution, and appreciate they are not just "caving in." Many lay litigants, even some institutional litigants, often have difficulty making the shift to mediation.

CLAIBORNE: I joke that I facilitate in the morning and evaluate in the afternoon. In caucus, I can be very helpful to the lawyers because I can talk to their clients about the way I see the case. Later, the lawyers often say to me, 'I've been trying to say that to my client for the last month and he hasn't heard it until you said it.' There's a trust that builds up between the participants and the mediator that's very important.

MODERATOR: As a step in preparation, to what extent should lawyers talk to opposing counsel and the mediator prior to mediation?

JUDGE HODGE: Mediation is a process by which a mediator talks to both sides. It's not like an arbitration. There's nothing wrong with saying

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to the mediator prior to mediation, 'Listen I've got a problem here. My client has unrealistic expectations and I would appreciate it if you would address those in a certain way.'

CLAIBORNE: I get a lot of calls like that in advance of a particularly difficult mediation. Or I reach out to the lawyers and call them. If I call one lawyer I make sure I call all the lawyers. Sometimes they'll exchange briefs and then send me a confidential email or a side letter explaining the difficulties. When I see a real problem that's reflected in the briefs, I call the lawyers and ask open-ended questions: 'What's your view of this case? What are the obstacles to settlement? What do you think would be the best approach here?' I learn a lot that way. I don't necessarily take the opinion of one over another lawyer, but at least I know how they're all seeing the case. It's good preparation.

MURRAY: The lawyers definitely should talk to each other. Depending on the issues, tenor, and complexities of the case, and assuming I have received briefs sufficiently ahead of time, I will contact the lawyers, if necessary, to discuss specifics and approaches to the mediation.

YANNI: I try to call the lawyers prior to every mediation. I encourage the lawyers to speak to each other about what they want to accomplish during the day. Co-defendants should work on resolving their disputes prior to the mediation session.

KORNBLUM: Often I will send a demand letter and then at the end of the letter say, 'This is our demand, we're willing to mediate, and also discuss a limited discovery plan to get to a plateau where we can feel comfortable in evaluating the case.' If I'm a lawyer and I think I can

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just drop my case in a mediator's lap, never talk to anybody, give them a 3-page brief and the mediator will get me some money, that's crazy.

JUDGE HODGE: And yet that's the standard model.

KORNBLUM: I often don't have control over what the defense does, but I give them a 50 pound package with three things: A brief that runs 35-50 pages; exhibits, a private letter with additional attachments, and a DVD if we've got deposition transcripts, witness interviews. Sometimes the defense doesn't even look at the stuff. I know a couple mediators that didn't look at it.

MURRAY: When do you get that package to the other side?

KORNBLUM: Initially we were doing whatever the mediator said. Then I realized that wasn't enough time for everybody. Now with email we offer to email it 10 to 14 days ahead of time.

MURRAY: There's nothing worse than sitting in the mediation and counsel either hasn't presented the package or brings something new on the day of the mediation and the other side feels blind-sided or "sand-bagged," and is either irate or just won't react to it. The mediation starts off on the wrong foot. Mediation by surprise or sabotage doesn't work. In addition to private litigants needing complete information, my experience is that businesses, insurance companies, and governmental agencies need time to review and evaluate their risk through managers, committees, and boards.

CLAIBORNE: Often, the lawyers don't pay much attention to what the other side has said. They bring along decision makers who haven't read the briefs and who haven't really been educated on the problem. This is one of the reasons I always encourage the lawyers to give a good opening statement.

MODERATOR: Do all of you use opening statements? If not, what do you do?

KORNBLUM: I don't like opening statements at all. They build tension and create an adversarial environment. The only exception is where you have something like you're talking about. Then I might privately go into the room without my clients or anybody else and give a very low-key informational-type presentation. But I am flexible. I will do what I believe, or am convinced to believe by the mediator or the other side will work. We seek to give it our very best shot and opportunity for resolution. If it does not work, we have tried and fulfilled what I believe is our responsibility to our client to try for that mediated resolution.

JUDGE HODGE: I have one cardinal rule in mediation: there are no rules. In many cases an opening statement is absolutely required and useful. I also have a three strikes rule. Strike one is if the mediation is court-ordered and the parties aren't enthusiastic about being there. Strike two, if the person with the money or authority is not at the table. If he's on standby in Minneapolis, that's not the same thing. And strike three, if they've not allotted enough time for the magnitude of the case. They schedule a half day for something that's going to take a day and a half to two. And those three strikes are pretty deadly coupling with four, five and six strikes, like not preparing, not doing a good brief, not laying the groundwork with your client and so on.

CLAIBORNE: A joint session, including opening statements, helps me figure out the underlying goals of the parties. I become educated about the personalities, what they need and want, and what would be a really good settlement.

MURRAY: I meet separately with the parties and counsel before a joint session to introduce myself and begin establishing trust. I explain the process of the joint session, that I'm going to ask some questions and it's not a time for opening statements. I don't want people pounding on the table, it's lost on me. Interestingly, I'm seeing more and more attorneys who don't want to have joint sessions at all and want to move directly to private caucus. But joint sessions help to set a tone and bring me up to speed on the issues and subtleties. I like to observe the interplay between the parties and counsel.

YANNI: I almost never have a joint session. I always call people ahead of time and ask for a heads-up about any special issues and what are the atmospherics of the people who are coming to the mediation. Once they arrive, I often meet with the lawyers and their clients and talk about what kind of process they are looking for; do they want to have a joint session; did they bring PowerPoint; did they exchange the briefs? In employment cases, I almost never hold a joint session. In big business or commercial cases, where people bring their experts and PowerPoints and both sides want to put on a presentation, I allow for that.

MODERATOR: Who do you like to see present at the mediation?

CLAIBORNE: I need the decision makers present. But sometimes lawyers bring too many people and a "group think" develops. They become inflexible and unable to think about creative solutions because the group has locked itself into a way of looking at the case. My preference is to work with two or three of the decision makers and their lawyers.

KORNBLUM: On the plaintiff's side, it's a matter of comfort and the kind of case. If it's a business case obviously you've got two partners who are making a decision, and you want to assess whether they're on the

same page and have the same view of the case. With injured clients or victims or wrongful death plaintiffs, that's a whole different thing. Then you have to find out who are the relatives that will make them feel comfortable going through the process and maybe verify the decision. Whoever it is, that person has to be brought into the process at an early stage. Maybe not the first day you sign the case up, but once you start to think about mediation. Maybe you can establish a good relationship and they don't need anybody. You can also think about bringing your experts or consultants.

JUDGE HODGE: One of my first questions is, 'Are you nervous?' If they say 'Yes,' I say 'Look, there's no need to be nervous. Nothing bad can happen today. If we settle it, fine; if we don't, you have a fine lawyer and that's what we've got our courts for.'

CLAIBORNE: At the outset, I spend a lot of time talking with the parties during the first caucus just to make sure they feel comfortable with me so they can talk about the real problems of the case and that the process is going to be a fair, transparent, above board, and they won't be forced into doing anything that they don't want to do.

JUDGE HODGE: What do you do to guarantee that the decision maker and the person with the money are at the table?

KORNBLUM: I call the mediator in advance and ask the mediator to get them there.

JUDGE HODGE: We don't have the power to order people there.

KORNBLUM: If it's a scheduling issue, we reschedule. If it's an interest issue then I guess it's a bust and we don't spend the money. We don't mediate.

MURRAY: When practical, I prefer to have the true decision makers and those with a stake in the outcome present, be it the claims representative, a manager, vice-president, lien-holder, adjacent landowner or spouse. It is simply too easy to say "no" over the telephone.

MODERATOR: As the process moves into negotiations, what should lawyers keep in mind to make sure it goes smoothly?

YANNI: Have a strategy. Understand how the process is going to work, explain that to your client. The negotiation piece of the mediation should be thought out. When do you want to make your moves? How do you see the ultimate value of the case? Where are you willing to give and take? Is there stuff other than money? Have that all figured out ahead of time.

KORNBLUM: A very important part of this is preparing the client on the economics of a trial versus settlement. I project out the costs of trial in dollars and cents and present this to my client on paper. So we spend $50,000 to $75,000 bucks getting to the plateau where we can look at whether we ought to mediate. Now we're looking at the remaining part of the litigation through trial, through appeal, the time value of money, and we're looking at $200,000 in costs that come out of the recovery. So when you're talking about the net dollars at the end of the day, you're talking about having money now rather then the hope of money later. Once you put those things on paper all of a sudden a light bulb goes off. The client should get it, and they do.

CLAIBORNE: My background is as a trial lawyer, so I, too, talk about the obstacles associated with trial: what the cost is going to be, how long it is going to take, what kinds of motions they might lose if they're getting ready for trial. I do all that and then, toward the end of the mediation, the client can make an informed decision: What do I really want to do?

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JUDGE HODGE: A mediator is at a tremendous advantage if they've already mediated with somebody. You know someone's style, because people's styles are similar case in and case out. It's a tremendous advantage because then you know how the process is going to go.

CLAIBORNE: After mediating a thousand cases, we get pretty good at reading people too. We watch the style and we can read what's going on and figure out what might make sense for that person.

MURRAY: All of this goes back to the attorneys being prepared and understanding their case. Not only should the client conceptually understand risk analysis but comprehend what factors go into that analysis and what ultimately comes out the other end as good decision-making and economics. This facilitates more productive negotiations.

CLAIBORNE: Often the parties change their view of what a good settlement would be based on what they hear during the course of the mediation. There's only so much advance preparation you can do. Until you hear what the other side has to say, and until you really size up the decision makers on the other side, it's not always possible to figure out what the best settlement would be. That's why I always question it when mediators tell me, 'Well, I read the briefs and figured out that the case ought to settle somewhere between here and here.'

MURRAY: There's no question attorneys, clients, and the mediator must listen to each other, remain flexible and be able and willing to process what goes on in the mediation. The parties and counsel are going to have trouble doing that if they haven't come in with a clear and

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realistic understanding of the case, of where they want to go, and the value in obtaining certainty through a settlement.

YANNI: Flexibility is the key word in mediation. It's the key word for the mediator, it's the key word for the lawyers and for the clients.

CLAIBORNE: Because we have to live with uncertainty.

JUDGE HODGE: This is one of my themes. I tell participants, 'You have two choices. You can settle against certainty or you can settle against uncertainty. You can do a tremendous amount of discovery at great expense to make sure everything is in your favor. But when you do that, you may find out that it's just the opposite.' The element of uncertainty is an important negotiating tool for the mediator.

CLAIBORNE: Isn't that why business people like mediation? They can maintain control over the outcome of the case. They don't really want to turn resolution of the case over to a third party-- a judge, a jury, or an arbitrator-- because they're not sure what's going to happen. In mediation they can decide what makes sense for them and their business.

YANNI: Business people negotiate all the time. Some of these people who come to us negotiate for a living. You have to say to them 'I know you negotiate all the time and you're tearing your hair out because of the way we do this process, but it's a very different set of circumstances than negotiating a license agreement.'

MODERATOR: How is negotiation in the mediation context different?

YANNI: It has a much more uneven flow to it. It's not quite as cut and dry. Because we're dealing with people's personalities, maybe we're dealing with an ongoing relationship, or patching up a past relationship. If it's an employment case about termination, it's a completely different arena and far more emotional.

CLAIBORNE: In a business case, the parties often are interested in maintaining a business relationship. They've been in litigation, they've spent a lot of money, and there's a lot of anger. A lot of what I do is work with them in negotiations to help preserve some sort of relationship and come up with something that makes business sense.

MURRAY: Mediation negotiation is more subtle than negotiations in adversarial litigation. Mediators can be most effective keeping the parties focused on the economic benefits of risk assessment and resolution. In litigation, there is typically a winner and a loser, whereas mediation is an empowering process. It is truly a win-win situation. It's an ongoing interactive process that provides clients an opportunity to resolve their dispute. You can't overemphasize the value to parties of being part of the decision and not leaving the fate of their case to someone else.

JUDGE HODGE: More than once I've had a powerful executive who was at odds with the lawyer in the process. When all else has failed, I put the two executives on the opposite side in a room by themselves and let them fight it out. It's amazing how often that's worked.

CLAIBORNE: I do that too, but I stay in the room so if a fight breaks out I'm there to break it up. I assure the lawyers I'm not standing between the lawyer and the client. I say to the lawyers, 'They're going to talk, they need to talk and look each other in the eye and have a conversation, but I'm not pushing them into any kind of settlement before they have a chance to confer with you.' That way I show respect to the lawyers and make sure they don't feel excluded.

MURRAY: Partnership, business, family trust matters, and neighbor disputes often become very emotionally charged and full of blame. Some people simply refuse to be in the same room. Those cases present their own challenges but can be settled. Sometimes, when the parties are "stuck" I suggest they talk directly with each other. Timing of this caucus is crucial. I always check with the lawyers first but have found this to be most effective when the mediator is present.

YANNI: I do a lot of mass tort pharmaceutical cases, and that's a whole different model of mediation. In those cases we don't ever see the defense litigation team. Instead there's a national settlement team and a local settlement team. They're fed information by yet a third group of lawyers who are the litigators. The settlement team is sent to settle the case. That's a really different dynamic than any of the other cases I do because the whole goal is to get it resolved. They're settling cases all over the country and have a notion of what the parity is in a case in New Jersey versus a case in Florida versus a case in California.

MODERATOR: Are those cases resolved quicker?

YANNI: Not necessarily because you still have a plaintiff with his or her individual injury or we're settling a bunch at that time. In the pharmaceutical arena, I settle cases all over the country so I get a feel for how people mediate in different parts of the country and how they do it different places and what's good or bad.
The other interesting thing about pharmaceutical cases is that the settlement amounts are not confidential. So the lawyers know what the levels of injuries are, the damages associated with those injuries, and the monetary awards.

MURRAY: How do these professional settlers approach the mediation different from the litigators?

YANNI: They're much calmer. They're litigation lawyers who now do a lot of settlement work. Their instructions from headquarters are to get these cases settled.

MURRAY: I want to meet more of those folks.

MODERATOR: With this national view, how would you describe the Bay Area in terms of the professions' mediation skills?

YANNI: Mediation was founded in the Bay Area, so in many ways, we're way ahead of the curve. In the mass tort area it is a little different because those lawyers are used to negotiating. I do employment cases in other parts of the country and, in general, the sophistication level of the lawyers in California is much higher because those of us who have been practicing for 25 or 30 years, mediation is just part of what we all do. That's not true if you veer out side of the Bay Area. Especially on the East Coast, it's much newer.

KORNBLUM: One of the big influences on mediation has been the level of activity of the court system in managing cases. You walk into the first case management conference, and the first, second or third item on the agenda is the question: 'Have you talked about mediating the case?'

YANNI: Mediation or some sort of ADR is statutory in California, Florida and Texas.

MURRAY: My sense is that the skills of advocates and mediators in the Bay Area are progressive and improving all the time. Courts set up mediation programs. Sonoma County just put one into play. The Court can now order limited-size cases to mediation with a panel of Court approved mediators.

MODERATOR: Let's talk about post mediation follow-up. What happens if the case doesn't settle at the end of the day? What do you do?

MURRAY: It depends on how the mediation session ended and whether there was an exit strategy. If there was an exit strategy, which I always encourage, I follow up with emails, telephone calls, another session, whatever they need to keep talking. Sometimes people need more time to move to a point of agreement, particularly if it's a case where they've only been mediating for three or four hours and it needed more time.

KORNBLUM: There are two things a mediator needs to do. If there's a joint session, the mediator should show his or her enthusiasm for trying to reach a resolution. That would be one really good reason to have a joint session even if it's five minutes. Something like, 'I just want to tell you I'm really excited about being here and my sleeves are rolled up and my tie is loosened and I want to get this case done. At the end of the day if the case hasn't settled, this is not the end of the process. I want to continue that process. I'm going to call you in a week or here's what you need to do.' Then the mediator should give the lawyers their assignments and schedule a conference call in 10 days. I don't want my client going out of the room thinking the next step is the trial door.

CLAIBORNE: Most of the cases that I mediate settle. Clients need to understand that because it has a positive psychological impact. With that knowledge, they expect that we're going to go through these steps and at the end of the day we're going to write our memorandum of understanding based on the agreements that we've reached. If the case doesn't settle at the first session, we develop a plan for continuing the process.

YANNI: I always make sure there's a structure to what's going to happen next. I tell people I'm tenacious, I stay with my cases, I give people my cell phone number, I have a Blackberry, you can always reach me. Then I set up dates. Here's when we're going to have a status conference, you need to get an expert, you need to exchange certain information. Then I contact people so the process keeps moving. Sometimes I ask each side if they'd like a mediator's proposal, which is my view of three or four different points and why the case should settle, not just a single number. I give people 48 hours to decide.

Christine Jegan

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MURRAY: At the beginning, I tell people I'm the eternal optimist. Ninety-five percent of cases—in federal court it's 98 percent—eventually settle. It sets a tone that this is going to be a productive session and we're probably going to get somewhere. Persistent follow-up and pestering by the mediator is appropriate and helpful.

JUDGE HODGE: There's one school of thought that says there's a real premium on settling the case on the day of the mediation even if the parties are exceptionally pressured. I really am ambivalent about that. I don't want to wake up the next morning and feel that I'm going to have a litigant wake up at the same time and say, 'What did that mediator do to me?' I've had cases that absolutely broke apart and didn't settle on the day of the mediation. Then I've written a letter to counsel outlining exactly what the decision of the judge and jury would be if it ever got there. That has an interesting effect on people.

MURRAY: I always explain to the parties, 'This is your decision. This is your case, with all due respect to your fine lawyers, it's not their decision and it's not my decision.' That way, at the end of the day, the participants are more comfortable with the process and will continue to

think in terms of settlement. When the parties and counsel are looking for assistance in moving to settlement and everyone is on board, I will make a proposal at a number or range that I believe has the best chance of settling the case.

CLAIBORNE: Sometimes in private I will say, 'Based on everything I've heard today, a good settlement range for this case is—' and give a range of numbers. I tell them it's based on what I know about the players, the facts of the case, the law, what it's going to cost to go forward, and what I see as obstacles heading toward trial. I prefer this over a mediator's proposal.

JUDGE HODGE: A mediator's proposal usually comes up not at my suggestion but at the lawyers' suggestion. If the lawyers suggest it and if in fact there has been a body of information that's been developed that gives you a really good idea, I don't mean about what the value of the case is, but where the parties are, then a mediator's proposal shouldn't be too far off from where it should settle.

KORNBLUM: I tell my clients nothing happens until 2:30 in the afternoon. And generally that's pretty true. You start the softening process, and the mediator earns all his or her money in the last 30 minutes.

MODERATOR: I'd like to end this discussion on your projections for ADR for the future.

MURRAY: On the technical level there's going to be more online ADR, with videoconferencing and the advancements in software. There is no substitute for face-to-face dialogue but with an increasingly complex and technological society and its dependence on computers, online ADR will grow in the future. As far as expanding mediation to other types of disputes, there's collaborative law, primarily in family law. Sonoma County has been using this for quite some time. Moving collaborative law into the civil litigated cases has been slow at best. It may work in family estate trust disputes or in some types of real estate, business or partnership cases depending on the configuration of the parties. I don't see collaborative law as adaptable in an insurance matter. Mediation is going to become a standard of care issue for lawyers as we see more of a demand by the Courts and the public. The debate will continue over protecting confidentiality in the mediation process balanced against the necessity to protect the rights of clients in mediation.

KORNBLUM: It's going to replace a lot of the things we've used in the past. The trial judges are going to send their cases out to mediators' extended annex programs or practice programs. The larger cases have to be settled. They're too risky and too expensive to try so the pressure is going to be the on the litigants to resolve cases. There's a great quote, 'Discourage litigation. Persuade your neighbors to compromise whenever you can, and point out to them how the nominal winner is often the real loser with the fees, expenses and waste of time. As a peacemaker, the lawyer has the superior opportunity of being a good man. There will be plenty of business.' Abraham Lincoln.
We're going to see the day where the ethical rules are going to put us in a position where we almost have to mediate our cases. There's going be a case where the client will sue the lawyer for malpractice for failing to mediate. So that's a little warning to lawyers out there they better pay attention to this process and participate and learn how to use it.

CLAIBORNE: I agree that mediation will grow over time for a lot of reasons. Business people like to have control over the outcome of the dispute and mediation allows that. It's confidential by statute in California; there are a lot of people who don't want their disputes to be out in the public realm and therefore they'll choose mediation. It's also a "low-risk" process because it just takes a day or two, it doesn't cost all that much money compared to trial preparation and it's a way to cut down the cost of discovery and the cost of having employees in a company tied up in litigation over a long period of time. It just makes sense to give it a try.
The biggest growth area in mediation and arbitration will be in the international area. I'm seeing increasing numbers of international disputes. In the past, those have gone to arbitration. Now they are starting to go to mediation as well.

JUDGE HODGE: What we have seen is the development of a private judiciary. So we have a private and a public judiciary now on a parallel course and not always intersecting where they should. I see future legislation addressing this. The Moncharsch case was one of the worst cases ever decided by the California Supreme Court. This case holds that an error of law apparent on the face of an arbitration award that causes manifest injustice is not subject to judicial review. To me that's a frightening concept that an arbitrator can come up with decisions so beyond the pale, that fly in the face of justice and fairness and due process and yet still stands. In my opinion, the Supreme Court simply let that situation exist, largely for administrative convenience.
By the same token, in mediation we've got the Foxgate v. Bramalea case where Judge Smith over in Marin County had the situation where his instructions were not followed, the experts did not come to the mediation as required, and he reported back to the trial judge that this had happened. The California Supreme Court held that the confidentiality of mediation is so sacrosanct that the mediator couldn't even tell the trial judge about this flouting of his own reference and his own rules. We can expect that it will be addressed.
My concern is the private sector will become overregulated. Yet we're going to have to address the balance between the private and the public judiciary. The public system of justice would fall of its own weight were it not for private judging. I know I resolve more cases as a private mediator then I ever did as a judge, and I worked very hard as a judge.

YANNI: In the future, we'll do more class action mediations, including consumer, securities, and certainly more in the mass tort arena. It's going to become a fact of life everywhere. I also agree in the international area, both in Europe and also in Asia, there's just going to be more mediation as American law firms and lawyers spread out into those markets. I had a case last week involving the Philippines, Guam and Saipan. It's just going to become more of a tool that lawyers use all over the world.

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***

ZELA G. CLAIBORNE specializes in the resolution of complex business, commercial, intellectual property, construction, and real estate matters. She has been a full-time neutral since 1998. She has mediated over 1,000 cases, including multi-party disputes ranging in value up to several millions of dollars, with a very high settlement rate. Also, she frequently arbitrates cases, as chair, panel member, or sole arbitrator. Although based in San Francisco area, she often travels to handle cases and has successfully handled mediations/conciliations as well as arbitrations of several international matters. Before starting her full time ADR practice, she was a general partner at a large San Francisco law firm where she specialized in complex litigation and ADR. She frequently speaks and writes on ADR topics and teaches in training programs for both mediators and arbitrators. She received her J.D. in 1982 from the University of California, Berkeley (Boalt Hall). For further information, see *www.zclaiborne.com.*

ZELA G. CLAIBORNE
Mediator & Arbitrator

HON. RICHARD HODGE retired from the Alameda County Superior Court in 2001 after 20 years of distinguished judicial service. In addition to presiding over civil trials and settlement conferences, Judge Hodge also served several years as law and motion judge. He was recognized as Trial Judge of the Year by the Alameda-Contra Costa Trial Lawyers Association and in 1994 was named California's Superior Court Judge of the Year by the California Trial Lawyer's Association.

In the past 6 years, Judge Hodge has mediated or arbitrated over 1,600 cases. He is currently arbitrating 11 separate nationwide or statewide class actions. Judge Hodge's ADR practice includes cases involving personal injury, class actions, employment, premises liability, product defects, environmental, real estate and commercial contract matters. In 2006 and 2007, Judge Hodge was named one of The Daily Journal's Top Neutrals.

Judge Hodge is currently working as a full time neutral with ADR Services, Inc. *www.adrservices.org.*

ADR SERVICES, INC.

GUY O. KORNBLUM is the principal in Guy Kornblum & Associates, with offices in San Francisco, California. The firm's practice focuses on representing plaintiffs, claimants, policyholders and victims of tortious and contractual wrongs in insurance bad faith, medical and legal malpractice, personal injury, wrongful death, commercial and real estate litigation and actions involving punitive damages claims. Mr. Kornblum has specialized as a trial and appellate lawyer for 40 years. He has handled over 3000 litigated matters to conclusion and has several million dollar plus cases to his credit, including one of the largest settlements for a A Golden Years client in a personal injury case. While concentrating in the torts and insurance field, he has handled a wide variety of cases from complex insurance, personal injury and wrongful death cases, as well as wrongful termination actions, real estate and commercial litigation, to medical and legal malpractice claims and cases involving insurance bad faith. He has several leading appellate court cases in California and before the Arizona Supreme Court.

Guy O. Kornblum Certified Civil Trial Advocate, National Board of Trial AdvocacyLife Member, Multi-Million Dollar Advocates Forum Member, International Society of Primerus Law FirmsCharter Fellow, Litigation Counsel of America Trial Lawyer Honorary *www.kornblumlaw.com*

GUY KORNBLUM & ASSOCIATES
ATTORNEYS

ROBERT MURRAY is a mediator and the Director and co-founder of the Arbitration and Mediation Center (AMC), a provider of ADR services based in Santa Rosa. AMC also has conference facilities in Larkspur. The Center provides a panel of highly experienced and trained neutrals who are all practicing attorneys.

Mr. Murray, an attorney since 1976, specialized for 25 years in civil litigation and since 2002, has focused his practice exclusively on providing mediation and other ADR services.

Mr. Murray has mediated over 2,000 civil matters. He emphasizes patience, preparation & persistence as keys to successful mediation. His approach is flexible, employing a blend of facilitative and evaluative styles depending on the matter and the needs and desires of the parties and counsel. Disputes are brought to him pre-litigation and through litigation up to trial and appeal. He is on the ADR panels in Sonoma, Solano, Marin, The First District Appellate Court, the Mendocino County Retirement Association and the Kaiser Permanente Arbitration Program. For further information, see *www.amcadr.com*

Arbitration AND Mediation Center

CATHERINE A. YANNI, ESQ., a full-time neutral with JAMS based in San Francisco, is frequently called upon to resolve disputes throughout the country. Since joining JAMS in 1998, Ms. Yanni's practice has included mediation, special master/discovery referee work, and class action settlement administration. Ms. Yanni has extensive experience in designing and implementing the post-settlement process.

Ms. Yanni's substantive knowledge of class action and mass tort cases, her focused attention to detail, and her persistent follow up are the keys to her high settlement rate. Recently, she resolved or adjudicated disputes involving: Baycol; Phenylpropanolamine; Mifeprex (RU-486); Zyprexa; and silicon gel breast implants. In addition to pharmaceutical mass torts and consumer class actions, Ms. Yanni is skilled in resolving emotionally charged employment disputes. She has successfully mediated and designed claims processes for a variety of high profile employment matters, including harassment, wrongful termination, retaliation, and wage and hour class actions. *www.jamsadr.com.*

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