Afternoon Keynote: ADR in New York

Remarks by the Honorable Stephen Crane

MR. PASSIDOMO: Good afternoon. It's with great pleasure that I introduce our afternoon keynote speaker who has a unique perspective on this afternoon's subject. With us this afternoon is the Honorable Stephen Crane. Judge Crane was the former Administrative Judge in the New York Supreme Court, also an Associate Justice with the Appellate Division in the Second Department, and Judge Crane currently is with the JAMS Dispute Resolution organization. So I turn it over to Judge Crane. Thank you.

JUDGE CRANE: Thank you Dean Passidomo. I am a historian, you see. I'm also a bird named Crane. As such, I'm going to give you a bird's-eye view of the history of court-annexed mediation as one form of alternative dispute resolution. In the Commercial Division of the Supreme Court, at least in New York County, as background, you're probably familiar with the experiment for commercial parts, —that in 1993 the Supreme Court created the Commercial Division—as well as the Commercial Courts Task Force chaired by Bob Haig and Leo Milonas where the ultimate fruits of all these efforts was the creation on November 6, 1995, of the Commercial Division of the Supreme Court in New York and Monroe Counties.

I had the privilege and honor along with Bea Shainswit, Ira Gammerman, Herman Cahn, Walter Schackman who's here. I had lunch with him. I hope he's still here. There he is. And for Rochester, do you remember Rochester, Walter? Tom Stander, to be assigned to this newly created Commercial Division at its

very inception. Chief Judge Judith Kaye, Chief Administrative Judge Leo Milonas and Administrative Judge Stanley Ostrau made the announcement of this innovation the following Monday, November 13, 1995, in the then - recently restored magnificent rotunda at 60 Centre Street.

The Commercial Division was not only devoted to the notion that business disputes required efficient, speedy and inexpensive resolution in New York County and State, a world capital of commercial banking and securities activity, it was also dedicated to the concept that assigning particular judges to the administration and resolution of this caseload would create confidence in the business community that its litigation was being handled, not just by random judges, but by jurists knowledgeable of its culture and needs who would become much like Delaware's chancellors: Experts in commercial and corporate litigation.

These ideas were implemented by removing commercial cases from the mix of other cases pending in the New York Supreme Court, by establishing a separate clerk's office to administer its inventory, by locating us judges in a single cluster on the second floor of 60 Centre Street. You know, Walter, I can't remember my courtroom's number anymore, it's been that long. And by investing us with the most advanced technological tools that the court system had at its command.

Another basic initiative of the Commercial Division, court-annexed alternative dispute resolution, was a handmaiden to promote the underlying principles of efficient, speedy and inexpensive resolution of commercial disputes.

Not long after, in July 1996, I was appointed the successor to Stan Ostrau as Administrative Judge in Civil Term Supreme Court New York County, and I accepted this assignment on the proviso that I could retain my Commercial Division part, albeit on a reduced basis. And so I did, for the next five years, until the governor designated me to the Appellate Division.

I want to share with you my insights from my experiences in this dual capacity as a Commercial Division Judge and as Administrative Judge, at least as they relate to ADR. As I do this, allow me to digress for two purposes.

I want to mention the struggle we had with the definition of a commercial case and to describe the concept of mediation,

the ADR method of choice, although not to the exclusion of neutral evaluation or even arbitration. I saw [Justice] Lenny Austin at lunch and I think he took up the cudgels more recently on the definition of a commercial case. It's a work in progress [as] we used to say.

Early on, in taking cases into my commercial part, I came across one matrimonial case. Can you believe it? Not for anything but I successfully evaded assignment to a matrimonial part all the years I served in the civil side of Supreme Court, and, of course, received none when I was in criminal term. How, you might ask, did a matrimonial lawsuit get assigned to the Commercial Division?

Some might argue that aspects of a divorce action such as an equitable distribution of the value of the sole proprietorship or partnership interest of one of the spouses in a, perhaps, law or medical practice, these might take on the characteristics of a business dispute, much as a law firm dissolution proceeding in the valuation of its assets takes on the aura of a divorce action. Yet we had specialty parts for divorce actions and it just wasn't right to inject such a case into the Commercial Division.

The case arrived there because some wiseguy who filed the RJI[1] ticked off the box designating the case commercial. As Administrative Judge, in consultation with the Commercial Division Advisory Committee, I promulgated a definition of what is considered to be a commercial case belonging in the Commercial Division.

You might remember another aspect of this definition: The amount in controversy. Most of us accepted cases of, I guess it was $100,000 at the time, maybe 75, I don't remember. But our beloved colleague, Ira Gammerman, set the bar higher, at $125,000. What this means is that he expelled lesser valued cases, as was his right under the protocols governing the Commercial Division. There was good reason for this protocol, which I understand has been abused by some commercial judges over the years.

The good reason is that we did not want to swamp this new experiment with cases that barely qualified as business disputes worthy of the Commercial Division. To avoid the abuse

1. Request for Judicial Intervention.

of this protocol, we not only codified the definition of a commercial case, but also adopted rules whereby an administrative appeal could be taken from a determination of a commercial judge to retain or expel a case or, indeed, to reassign a case that the RJI had directed to a non-Commercial Division part.

The second diversion I would like to take is to consider "What is mediation?" I think we probably all are sophisticated enough here to understand it, but let me explain what I conceive it to be. It is, or at least it should be, a consensual method of settling a dispute where the parties voluntarily agree to participate and reach agreement without coercion. There's coercion and there's coercion. Court-annexed mediation out of the Commercial Division, of course, has some coercion because the judge can require the parties to engage in the process up to two times during the course of the litigation. In a typical mediation, the mediator, also a neutral who is governed by a set of ethical precepts, conducts a pre-mediation conference call with the parties in order to get a handle on the nature of the dispute and the history, if any, of prior settlement efforts. In this telephone conference call, the mediator may set a schedule for the filing of a written pre-mediation statement and secure the parties' preference as to whether they will serve their statements on each other or submit them under the mantle of confidentiality to the mediator only. It is also the opportunity to make doubly sure that someone on each side knowledgeable of the dispute and authorized to settle will be at the mediation session. That's vital.

Then comes the mediation itself. Usually, the mediator will conduct a joint session where parties stake out their positions and the clients can express their views and vent their emotions or business concerns. There follow the break-out sessions—separate caucuses in which the mediator obtains information, confidential or to be shared with the adversary, as well as the demands and offers of settlement. The mediator acts as a facilitator and coach, reality-checker and sometimes an evaluator. The process is confidential and nothing said can be used for or against any party if the litigation should resume, or, indeed, in any other lawsuit, much like settlement negotiations are generally protected. But in a mediation, this confidentiality also acts as a lubricant to the process, enabling the parties to

inform the mediator of weaknesses and strengths, even though the mediator may be sworn to secrecy from sharing this information with the other side. Apropos of this, I commend you to take a look at Standard V of the ADR Program Standards of Conduct for Mediators.[2] It's also to be found as Standard V of the Model Standards of Conduct for Mediators, promulgated in September of 2005 by the American Arbitration Association, the ABA, and the Association For Conflict Resolution. Just as an incidental, JAMS itself has Mediators Ethics Guidelines. And to confuse you a little, that's Rule 1V of the JAMS Guidelines. And finally, mediators must insure that the settlement is clearly understood by all parties.

As a commercial judge, I engaged in settlement talks virtually every time a case appeared before me. I think I was non-coercive and my settlement rate was very credible. As I look back on this activity, preceding my own training in mediation, I think my approach was the facilitative one that I now use as a mediator. In any event, one technique that I found to be extremely effective in securing settlements was the firm trial date. I usually adopted a trial date in the preliminary conference order.

I would tell the parties that the date was immutable because to adjourn a trial would have a domino effect on my trial schedule, pushing later calendared cases into the future and depriving the parties in those cases of the reliability and predictability of their prospective trial dates. So, I would tell the attorneys that there would be no trial adjournments short of death and that I wasn't sure about death either. Predictably, I would get a request for adjournment just before the pretrial conference.

When the application would be denied, I would get a call, perhaps two or three days later informing me that the case had been settled. So, I really did not enjoy that many trials of commercial cases. In any event, before becoming a commercial judge, I had an experience with a case involving a failed merger and a complaint seeking $80 million — that's when $80 million

2. *See* American Arbitration Association, *Model Standards of Conduct for Mediators* (2004), http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.

meant something — with a counterclaim for $40 million. Since I was going to be trying the case non-jury, I sent it for settlement negotiations to my colleague, Burton Sherman. He was a great settler, but on this one he sent it back with the sad message that it did not settle because both sides had incurred over $1 million in legal expenses. Ultimately, I tried this case. It took about three weeks and I rendered my decision, with the permission of the parties, from the bench right after the close of the evidence. I dismissed both the complaint and the counterclaim. Only the lawyers made out on that one.

In the Commercial Division, then, I had the intuition that to send a case to court-annexed mediation at the very earliest date would maximize the potential for settlement with a pot of money still undiminished by litigation costs. This intuition was reinforced when Steve Hochman urged us to send cases even before discovery. He correctly demonstrated that the mediator can handle necessary information exchange to make more meaningful the parties' assessment of their litigation risks during the mediation.

Of course, there were advocates who had either not experienced mediation or who had adverse experiences with it. One advocate, Professor Sheila Birnbaum, representing MetLife, resisted my reference to mediation. She said the case could not ever be settled. After Herculean efforts by the mediator—I wasn't supposed to know who it was, but he is sitting right here, so I will mention his name, Steve Hochman—the case came back to me settled and Sheila was in shock. I understand that she has become quite a proponent for mediation today.

Another case springs to mind. I was hearing oral argument of a preliminary injunction motion incidental to a dissolution proceeding of a partnership that had about $400 billion in assets. They were office buildings on both the east and west coasts. When the attorneys concluded their arguments, I observed that they had agreed on about 70% of the issues and that they might benefit by building on that agreement by going to mediation. I suggested that because of the amount of money involved, perhaps their clients would invest more confidence in the mediation process if, instead of using our pro bono panel, they paid for it, and they agreed to go to JAMS and the case

settled. I was relieved of a very onerous litigation. Carolyn, you know about that.

When the Commercial Division started in 1995, we compiled a list of mediators from the list maintained by the District Court for the Southern District of New York which had a similar program in effect. We sort of cadged it wholesale, and we at first established rules that the mediators would not be compensated by the parties. Actually, this was a reflection of the sensitivity we had to mandating the parties to engage in a process outside the courts that they would have to pay for. Since my time, this protocol has changed to require only that the first four hours of mediation be supplied pro bono. If the parties choose to continue, they must compensate the mediator. I think there is a $300 cap per hour on that program. At the beginning, I'm not sure what qualifications for the mediators we imposed, although there may have been adopted minimum training requirements for our pro bono mediators in the discipline of mediation and in the substantive areas in which they hold themselves out as competent to mediate. When I was the administrative judge, an offer came along by Simeon Baum and Steve Hochman to conduct a 24-credit course in basic mediation techniques. I don't know how I set aside the time, but I signed up for it. And included among us students were members of the Commercial Division panel, but also the neutrals in the Appellate Division who were tasked with trying to settle appeals.

Meanwhile, we had a committee that was involved in crafting ethical rules governing our mediators as well as ethical rules for arbitrators and neutral evaluators. And involved in that effort were — I can tell you who they are because they are scattered throughout this conference:

Mark Alcott, Simeon Baum, David Botwinik, David Brainin, William Dallas, Judge Mike Dontzin, Claire Gutekunst, Steve Hochman, you are everywhere, Steve. That's great. Steve Hoffman, Alan Raylesberg, Honorable Kathleen Roberts, Marvin Schwartz, Judge Elizabeth Stong who you are going to hear from later today, Irene Warshauer, and one of my colleagues now at JAMS, John Wilkinson. In the year 2000, they succeeded in writing the ethical standards that are in effect today.

I think you've heard on a hit and miss basis the bird's eye view of this bird who is still flying — who is now a mediator at

JAMS — about the history, as he remembers it, of court-annexed mediation in the Commercial Division. The lesson I have to leave with you is contained on this lapel pin that someone gave to me at a conference in 1979.

It says: "Mediate. Don't litigate."