INTRODUCTION

The Asian-Pacific Law and Policy Journal (APLPJ) hosted a conference on International Alternative Dispute Resolution (ADR) entitled, “New Paradigms in Conflict Resolution: Dispute Resolution in the International Environment,” at the East-West Center, April 10-12, 2002. Over fifty ADR professionals from fourteen countries came to share their experiences, learn from each other, and work together to develop new techniques and skills in the emerging field of International ADR. Some were interested in learning how to develop or expand domestic ADR programs in their country, some to learn the nuances of inter-cultural disputes, and all to connect with other ADR professionals. A list of the attendees is available at the end of the International ADR Conference Mediation Simulation and Panel Discussion materials.

Using techniques inspired by the work of Professor Jim Dator of the Hawaii Research Center for Future Studies, APLPJ developed a conference unlike most scholarly conferences. Combining “executive training” and “partnering” approaches, the participants used a realistic simulation of a complex international business and trade dispute involving private businesses and government departments from different countries, to launch discussions among the participants on model international dispute resolution systems and skills training. Rather than having a series of pre-prepared papers read to the attendees, this conference briefly introduced concepts to the entire group, and then, broke the participants into four small working groups to discuss ADR in the international environment, co-facilitated by two experienced mediators/facilitators, one from the U.S. and one from outside the U.S. For the purpose of encouraging frank and open discussion, none of these sessions were recorded. At the end of each working group session, the entire group would reassemble and report back what was discussed in each small group. In addition, several small workshops were held to present cutting edge techniques in partnering, the use of technology in dispute resolution, the use of ADR in Japan, developing ADR programs in the Asian-Pacific Region, and a comparison of arbitration systems. Papers from these presenters are being prepared and hopefully will be available in a future issue.

The most exciting aspect of the conference was the depth of experience represented, and the way the participants openly pushed and challenged each other to explore their subtle biases and patterns of conduct.
Available in this issue of the APLPJ are transcripts from the two general participation outlets of the conference: a mediation simulation/discussion and the closing moderated question and answer/discussion lead by senior members of the U.S. Federal Mediation and Conciliation Service. We believe that whether you are new to ADR or an experienced practitioner, you will find these presentations both interesting and valuable.

K. Bartlett Durand, Jr.
International ADR Conference Director
Mediation Simulation Hypothetical

SHANGHAI VEHICLE ACCIDENT SIMULATION

History

The following companies formed the Travel Rentals International joint venture (“TRI”) for rentals of motor vehicles and tour drivers in China:

U.S. Automotive Manufacturing (“USAM”), a U.S. company that manufactures and sells motor vehicles;
Australia Shipping Company (“ASC”), an Australian company that provides shipping for international trade;
British Automotive Servicing Enterprise (“BASE”), a British company that provides motor vehicle maintenance and repair services internationally;
Japan Excursion Travel Services (“JETS”), a Japanese company that markets and provides air, sea, hotel, auto rental and other travel services for customers internationally; and
China Excursion Rental Tours (“CERT”), a private Chinese company that has branches throughout China that rent vehicles and provide tour drivers.

The TRI joint venture entered into a contract with the China Ministry of Tourism (“CMT”) for the marketing, advertising, rental and servicing of motor vehicles and tour drivers in China. Under the contract, the Shanghai branch of CERT rents vehicles and provides tour drivers in the Shanghai area. The joint venture agreement and the vehicle and tour driver rental contracts all have clauses that require the parties to first mediate (conciliate) any disputes among them, and then arbitrate any issues that are not settled by mediation.

Last July 1, there was a serious accident in Shanghai. In a sudden heavy storm, a road flooded and a TRI rental car’s brakes failed. The car went out of control and crashed into a wall, killing a French passenger and a Thai passenger. The passengers had arranged the rental through TRI. The car was manufactured by USAM, shipped to China by ASC, maintained and serviced by BASE, and marketed and booked with JETS, through CMT, and the car and driver were rented and picked up from CERT.

The families of the passengers filed lawsuits against all the above companies (TRI, USAM, ASC, BASE, JETS and CERT) and CMT (collectively called “defendants”). After some negotiations, two agreements were reached: (1) all the defendants agreed to mediate the
disputes among themselves to determine their respective shares of liability (if any) for the accident; and (2) the passengers’ claims against the defendants, and any remaining issues among defendants, will be decided in a binding arbitration.

For the convenience of all parties, they agreed to mediate the disputes among the defendants first, to hold the mediation and arbitration in Honolulu, Hawaii, and to authorize the arbitrators to award reasonable attorney’s fees and costs in the arbitration.

The parties also agreed to apply, as the developing Lex Mercatoria (world-wide commercial law), the following principles of law: (1) negligence or defective product must be proven by a preponderance of the evidence (more likely true than not true); (2) the claimant’s damages are reduced by the percentage of the claimant’s negligence, if any; and (3) the percentage of liability will be determined for each defendant, and each defendant will pay that percentage of the total damages.

Factual Information on Claims and Defenses

Investigation, testing and simulations of the accident by the parties and their experts have developed the following information known by all parties:

1. The victims’ experts have developed the following opinions:
   - The accident was caused by failure of the car’s brakes;
   - The brake failure was caused by (a) flooding of the brake linings and/or (b) leaking of the brake fluid line;
   - The brake fluid line was damaged, either in manufacture, shipping, servicing or in the accident;
   - The brakes were defectively manufactured by USAM, and fail about 50% of the time in such foreseeable road flooding conditions when the water level reaches the middle of the wheel or higher;
   - The brakes were negligently maintained and serviced by BASE, which serviced the car one week before the accident, found low brake fluid, and refilled the brake fluid, but did not check or repair or replace the brake fluid line;
   - The brake fluid line may have been damaged in shipping by ASC;
   - No defendant gave any warning about any brake defect, brake line damage or leak, or possible brake failure
The SERT driver was not properly trained for driving in such road flooding conditions, and he was negligent, speeding and intoxicated at the time of the accident.

2. Collectively, the defendants claim:
   • The brakes and brake fluid line were not defectively manufactured, were not negligently manufactured or serviced, were not damaged in manufacture, shipping or servicing and were in proper working condition at the time of the accident;
   • The accident was caused by a sudden and unforeseeable storm that was an “act of God,” and the law does not impose any liability for “acts of God;”
   • The passengers had been buying alcoholic drinks for themselves and the driver at lunch one hour before the accident; all had blood alcohol levels above the limit considered legally intoxicated at the time; and the passengers assumed the risk of an intoxicated driver when they gave the driver alcohol at lunch; and
   • Although the passengers’ total economic damages (medical, funeral and burial expenses and net expected remaining lifetime earnings) are estimated at $1 million US Dollars (USD), and the passengers’ total non-economic damages (pain, suffering, loss of enjoyment of life, etc.) are estimated at $4 million (USD), assumptions used in those estimates are inaccurate and unrealistic and the actual damages are significantly lower.

3. Individually, the defendants have claims against each other, and each defendant has its own expert witness who would testify that one or more other defendants are responsible for the accident. Under the TRI joint venture agreement, each joint venturer is responsible for paying its share of any liability for this accident, and its same share of any attorneys’ fees and costs of TRI for the claims against TRI.

Simulated Mediation and Arbitration Proceedings

On Thursday, April 11th, the claims among the defendants will be mediated to determine the percentage of liability of each defendant. The claimants are not part of this mediation. For the mediation, the defendants have divided into two natural groups, based upon their legal position: one group is the “product” defendants who were in some way legally responsible for the car’s brakes – USAM, BASE and ASC; the other group
is the “driver” defendants who were in some way legally responsible for the driver – JETS, CMT and CERT. For the mediation, there will be one representative and one attorney for the “product” group and one representative and one attorney for the “driver” group.

On Friday, April 12th, the wrongful death claims of the passengers’ families against all the defendants will be arbitrated. For the arbitration, there will be only one representative and one attorney for the claimants, and only one representative and one attorney for all the defendants.

[Written by Chuck Crumpton, with assistance from John Barkai, David Day, and Bruce Barnes].
MEDIATION SIMULATION

JOHN BARKAI:  -- [The mediator for the] group this afternoon will be David Day, who is off on your left. David is a lawyer in Honolulu very active in the ADR community, with skill in the international arbitration and mediation field. He has taught, practiced, he has worked in the Philippines. He worked with a large San Francisco law firm. He is on the CIETAC panel of arbitrators, the Singapore Arbitration Center panel of arbitrators, and David will really be staging this.

Also with us today, who you've met in the introductions yesterday will be Roy Tjioe. Roy will be playing a role in this. Roy, as you may remember from yesterday, is -- he's a lawyer in Goodsill Anderson & Quinn, the largest law firm in Honolulu. He is active as a mediator and arbitrator, and he's active in the local chapter of the American Association of Conflict Resolution.

MR. DAY:  Well, good afternoon. This is quite a conference. I remember about twelve ago, we had a discussion here in Honolulu about w[ith] some of the APEC leaders about possibly having an ADR conference. This was in 1990 and I was trying to explain the context and the value of ADR to the business executives and how it would work for promoting business and economic cooperation in the Asian Pacific region. So here we are twelve years later and we got it, finally, which is great.

What we're going to do this afternoon is show you some bits and pieces of a cross-border international mediation, and recognize that this field is in its very infancy. There are very few international mediators in the private sector worldwide. You do see the term "international mediation" used in connection with some governmental disputes, but recognize that typically, like the Israeli-Palestinian dispute, that the mediator in that context typically comes from a country with some significant firepower, like the United States, and that's really called power mediation, so that that is really not what we're talking about here, with the ability to withhold aid or give money or use military might in order to solve a dispute.

So what we're going to do here is in the commercial, business context. One of the biggest challenges in this type of guided negotiation or facilitation, if you will, is the impact of culture. And so just to illustrate this, when I got this simulation -- I kind of want to show you. What I did was: I started to kind of diagram out this TRI joint venture mediation, and so -- who were the participants going to be?

And so we've got Mr. Tjioe here, and he's going to represent these two entities. One is a China entity, and the other is a Japan entity. And then you've got Mr. Barkai, and he's going to represent three Western entities.
Correct? Got you with me on this? Hello? Everybody is awake? Okay.

And so the communication is difficult enough in a domestic discussion, where everybody is speaking the same language and -- so that they're able to communicate back and forth better. But what happens if you picture this in an international context is -- effectively what happens is: You get the overlay of -- culture is kind of like a lens, and the best way I can explain this is that -- that if you've ever worn these tinted glasses and -- you put the tinted glasses on, and after a little while, you don't realize that anything looks any different, right? You see -- and the same thing with sunglasses sometimes. You don't notice it. And so that we all wear these tinted glasses, and that is our culture.

Only the trouble is: It's -- we very rarely get a chance to take off the glasses. And so what happens is: The ability to communicate is impaired by an individual's culture, and so what happens is that the communication gets reflected or refracted in different ways.

And so what's going to happen here is -- You'll see this -- is that through the use of a third party, what we're going to do is see if the mediator can attempt to assist these parties in communicating and working a deal so that they'll be able to put something together. Make sense? Real simple. We'll keep it real simple.

Now, here are the ground rules. We're going to do some freeze frames. We'll ask you to, you know, stay with us on this, now, because we're going to maybe back up and replay something again, and there may be some opportunities for you to look at some things that were done and maybe say to yourself, "Well, jeez, could I do that differently?" And so just stay with us on this.

So that the stage setting will be that the mediator -- I'm in my office and -- I have an office which is here and a conference room which is up here, and so what's going to happen is that I've talked to both of these gentlemen before to arrange to set up this mediation.

Now, the context of the mediation is this, is that there's an arbitration decision that this joint venture is to pay $250,000 by way of damages for the debt of these individuals, the French and the Thai. 250,000. And so what's happening now is that this liability is going to be -- have to be resolved between the Western group and the Asian group.

Now, the business context of what's going on is even more significant because the very survival of this joint venture depends upon the ability of these two parties to resolve how this money is going to get paid. Okay?

So with that as a foundation, you know, I -- seems to me I think I hear Mr. Barkai coming right now.

MR. BARKAI: Mr. Day? John Barkai.
MR. DAY: What a beginning, huh?

MR. BARKAI: I appreciate you --

MR. DAY: Glad to meet you.

MR. BARKAI: Thank you. Glad to be here. I can really only spend probably about a day and a half; I'm a busy guy. Our main office is in Detroit, where we do our manufacturing, and I'm going out to see our other office in Sydney that does a lot of our work in this joint venture.

MR. DAY: So which hotel are you staying at?

MR. BARKAI: Me? I'm at the Hilton. I always like to stay at the Hilton, the Hilton Hawaiian Village, when I'm here in town.

MR. DAY: Great, great. Okay. In fact, I think I hear Mr. Tjioe.

MR. TJIOE: Are you Mr. Day?

MR. DAY: Yes, Mr. Tjioe. Glad to meet you. Glad to meet you. How are you? We talked on the phone, right.

MR. TJIOE: Yes, I think so.

MR. DAY: Good. Mr. Tjioe, I'd like you to meet Mr. Barkai. Have you two met before?

MR. TJIOE: I don't think so.

MR. BARKAI: No. I haven't.

MR. TJIOE: Mr. Barkai?

MR. BARKAI: Yes. John Barkai.

MR. TJIOE: Where is Mr. Jones?

MR. BARKAI: Mr. Jones?

MR. TJIOE: Yes, Mr. Jones from the joint venture. I'm dealing with Mr. Jones.

MR. BARKAI: I'm sorry. I'm John Barkai; I represent the various
parties in the joint venture. They're actually at the hotel. We didn't think it was necessary for them to be here at the moment.

MR. TJIOE: You are lawyer?

MR. BARKAI: That's right, yes, of course.

MR. TJIOE: Mr. Day, I'm not lawyer. Why is Mr. Barkai here as a lawyer? I am used to talking with Mr. Jones.

MR. BARKAI: I'm sorry. We just -- we just didn't think that that would be necessary right now, but I -- at some other -- and actually, as a -- you know, we want to start off with a good relationship, so we gave a little bit of thought, and last time I was in -- well, we have this little gift for you. Go ahead and -- I -- I think the custom is: I also explain it to you as I give it to you. And so the last time I was in Korea, I had an opportunity to pick up this very nice Russian stacking doll, and I thought it would be something that you might appreciate.

MR. TJIOE: Well, I'm Chinese. I'm not Russian, Mr. Barkai.

MR. BARKAI: Yes.

MR. TJIOE: I don't know why you giving me this kind of gift. This is not --

MR. BARKAI: We thought we were right.

MR. TJIOE: In any case, I am here to do business, okay? I am here to negotiate.

MR. BARKAI: Yes, right. That's what we're doing.

MR. TJIOE: Do you have authority to negotiate with me today?

MR. BARKAI: Of course I have authority. Yes.

MR. TJIOE: Of course I have authority. I'm the executive director of the Shanghai Excursion Tour Company.

MR. BARKAI: Okay. Okay. Well, Mr. Day, I think that's why we're here.

MR. DAY: All set?
MR. BARKAI: Yeah.

MR. DAY: Do you have just -- the two of you, do you have some kind of business cards?

MR. BARKAI: Oh, certainly.

MR. TJIOE: I think so. Mr. Barkai.

MR. BARKAI: Yes. All right. Could you -- could you pronounce your name again, please.

MR. TJIOE: Tjioe Li An.

MR. BARKAI: Mr. An? Mr. An.

MR. TJIOE: No, no. Mr. Tjioe. Tjioe is my name. Tjioe Li An.

MR. BARKAI: This says Tjioe Li An. Mr. An.

MR. TJIOE: Mr. Barkai, you don't understand Chinese people. Tjioe is my last name. Just call me Mr. Tjioe.

MR. BARKAI: That's interesting. Okay. Mr. Tjioe. In case we do need some other negotiation, could you give me your direct line in case I need to --

MR. TJIOE: Sorry? Direct line?

MR. BARKAI: Yes. Cell phone, mobile. Got a number in case we need to --

MR. TJIOE: Well, maybe you can call my office if you need to call me direct.

MR. BARKAI: Just office. I'll just write in "office" on the card here for later. I'll call you. Okay.

MR. DAY: Okay? Shall we retire to the conference room and let this get under way?

MR. TJIOE: Well, okay. See what happen.

MR. DAY: On the way to the conference room, the following
private discussions take place.

So Mr. Barkai, if I can join you here.

MR. BARKAI: Okay. What's he about? I just -- I don't know. You think we're going to get anywhere? He seems kind of unsophisticated for this venture.

MR. DAY: Well, he is the senior executive for this group and --

MR. BARKAI: Well --

MR. DAY: I mean, are you really that bothered that his lawyer is not here? Does that really bother you?

MR. BARKAI: Well, I -- I'm just afraid we're not going to be able to work out any of the details of this. I mean, I'm sure he's going to turn back and try and check out things with his lawyer to see whether he can sign but -- you know, I'm -- we want to make this work so let's go ahead. If you think this can work, let's try it.

MR. DAY: Let me get you to recognize one thing that's happened here that's really significant.

MR. BARKAI: Okay.

MR. DAY: And that is that they have sent a very senior executive to help resolve this problem --

MR. BARKAI: Right.

MR. DAY: -- which underscores how important they realize these negotiations are and that in the Asian context, in some countries, like China, you don't always get a lawyer for negotiations, right?

MR. BARKAI: Yes.

MR. DAY: And I realize that --

MR. BARKAI: Yeah, that's -- yeah.

MR. DAY: Did you have that experience with the --

MR. BARKAI: I really wasn't the person who went out there to negotiate. I mean, the parties really negotiated and they faxed back to me
some documents, I reviewed them, and then we decided we -- they would go ahead with it.

MR. DAY: Okay. So looks to me like you've got the person with some authority to deal with you --

MR. BARKAI: Yeah, yeah.

MR. DAY: --which is great.

MR. BARKAI: Okay. Sounds good.

MR. DAY: I'll meet you at the conference room.

MR. BARKAI: Okay.

MR. DAY: Now let me go to this mike over here. So Mr. Tjioe, are you comfortable with this before we get under way?

MR. TJIJOE: I'm not sure, Mr. Day. This is very insulting, if I may say so, because Mr. Barkai, he's a lawyer, and how can I negotiate with a lawyer? I need to talk business with businessman. I'm businessman.

MR. DAY: I understand that.

MR. TJIJOE: So -- but you are mediator. I'm relying on you to tell me what to do because we want to reach agreement today.

MR. DAY: Okay. Okay. Mr. Tjioe, let me explain that typically when the Americans are going to negotiate a deal as -- and when they're very serious about it, oftentimes they don't send their business executives. They send lawyers instead. And so I think you might see this as a great opportunity; that this man has the authority to put the deal together, and that's why they sent him. And it underscores the significance of these negotiations for the Americans. In their culture they use lawyers to do the negotiating frequently, and I recognize that in China that's not often the case.

MR. TJIJOE: Well, I will have to take your word for it, Mr. Day, because for me, when they send a lawyer to me, it means litigation. And I want to negotiate, but I will take your word and see what happen.

MR. DAY: Okay. Let's see if we can't work out something, all right? I'll meet you in the conference room. Let's go. Okay. Let's take a
look at this problem and see, explore -- see if we can explore some kind of options to see where we might go.

Mr. Barkai, what is your position with respect to this arbitration award?

MR. BARKAI: Well, it seems pretty clear to me. I mean, we think the arbitration award itself is pretty outrageous in the amount of damages and that we're not sure that even with -- our understanding of this would be culturally appropriate, but I think we're stuck with that at the moment.

And so we're here to figure out how we're going to divide up these shares. And it's -- we want to do something that's fair, and it seems to -- only fair to us that -- when you look at the joint venture contract, you see there are five parties to it. We share equally in the profits, and so it seems very clear to us that we should share equally in the liability. So we think we would just divide this up by the number of parties and we take an equal split. Fair to us.

MR. DAY: Okay. That would mean everybody --

MR. BARKAI: $50,000.

MR. TJIOE: 50,000.

MR. BARKAI: 50,000, right. Yes.

MR. DAY: Mr. Tjioe, what's your view of this?

MR. TJIOE: Well, Mr. Barkai is already being unreasonable because the evidence is very clear this product was defective and nothing to do with the driver, Chinese driver. So if we are going to be talking about dividing this arbitration award, obviously Mr. Barkai's clients must pay all of it, and I don't think that the driver group should pay anything. So that's our position.

MR. DAY: Zero?

MR. TJIOE: Yeah, of course.

MR. DAY: Zero, okay. 250,000 split equally?

MR. BARKAI: Right. Yeah.

MR. DAY: Zero. All right. I tell you what. One of the great
benefits of a mediation is an opportunity for us to work privately together, so why don't -- Mr. Tjoe, if you would excuse me, what I'm going to do is meet with Mr. Barkai, and then I'm going to come back and meet with you, and we'll see where we go with this.

MR. TJIOE: Okay.

MR. DAY: Okay? So if you'll maybe just have a cup of coffee, I'll come to see you in a second.

MR. DAY: Well --

MR. BARKAI: Yeah?

MR. DAY: So what do you think?

MR. BARKAI: I don't know. I think this is going to be -- this is going to be very hard. And I think we need to speak up to make sure that everybody can hear even though it's a private caucus.

MR. DAY: That sounds like a good idea.

MR. BARKAI: Sounds like a good idea.

MR. DAY: I hadn't thought of that.

MR. BARKAI: Yeah. But I — do you mind if I take my coat off?

MR. DAY: No. Go ahead. That's probably a good idea.

MR. BARKAI: I think it's hot in here. It is hot in here, you know. Yeah. I'm just not used to being in this climate. And I don't know why -- why they would go with something like this. I mean, it's just -- it's pretty clear. That's the way our contract was. I mean, they -- we didn't want to talk about -- as I understand it, the -- when they negotiated this deal, they didn't talk about any of the possible contingencies. I mean, if I had written this joint venture agreement, it would be a lot thicker than that. We would have figured out what would happen in these kinds of situations and be ready for it, but we don't have that, so I guess there are some things that need to be worked out.

MR. DAY: Okay. Do you have any suggestions?

MR. BARKAI: Not particularly here, I mean, I made my
suggestion. I think 50/50/50/50/50 split is essentially the way it goes. It's fair, right? Don't you think so?

MR. DAY: Well, you know, I'm not going to express my opinion here at this point in time because I haven't had a chance to learn very much about this matter.

MR. BARKAI: Okay.

MR. DAY: But I mean --

MR. BARKAI: And we've -- and, you know, we got a lot of a expert -- we've sent you ahead of time in our pre-mediation statement that information from the experts. There's no problem with the brakes. I mean, the problem really was with the driver, I mean, and I -- we're actually -- we're being pretty lenient in this situation. It's really the driver's fault, and they should be paying, I think, the majority of the damages here. There's been no indication that there's any real problem with the brakes, and we're just -- we're just being generous here, and I think they've got to do their share and be fair.

MR. DAY: Okay. I want to talk to Mr. Tjioe for a few minutes and kind of find out what's behind his position, but let me ask you: Where do you go in this whole situation if we don't resolve this mediation today? What's the impact on your client?

MR. BARKAI: Well, I mean, I'm -- I'm afraid that it's real possible the joint venture may collapse. That's not where we want to go, but we don't want to do business with people who are not going to be fair. And we're in the beginning stages of this. We're just getting ready to start turning a profit. But if they're going to start showing us that they're not willing to handle their responsibility, we don't want to go any further. You know, we see great opportunities in going further in their country, but we can't go where we can't go.

MR. DAY: All right. So let me have a brief chat with Mr. Tjioe.

MR. BARKAI: Sure.

MR. DAY: Help yourself to some coffee, and I'll come join you in a second.

MR. BARKAI: Okay. Good luck.
MR. DAY: By the way, there's plenty of cream and sugar so --

MR. BARKAI: Okay. Thanks.

MR. DAY: Have at it.

MR. DAY: Well, Mr. Tjioe.

MR. TJIOE: Mr. Day, what did Mr. Barkai tell you?

MR. DAY: Basically he's given me some background context: how the joint venture was negotiated and how the deal was originally put together and his logic for how to divide up this 250,000. But I wanted to explore with you --

MR. TJIOE: But Mr. Day, did he give you his bottom line? What is his ultimate position? Because -- let's not waste time. We want to make a deal. What is his position? We have deal or no deal. What did he tell you?

MR. DAY: He didn't give me his bottom line and I don't think I have his bottom line yet.

So let me ask you this: What is the reason why -- even though the joint venture says that each party is to share equally in the profits, what's your rationale as to why you're unwilling to contribute anything towards the resolution of this matter?

MR. TJIOE: Well, Mr. Day, the joint venture agreement, first of all, is a negotiation document, okay? In China we maybe put down our agreement into paper, but these kind of situation is unusual, and we don't feel necessarily bound by this document.

And the evidence in this case is very strong that obviously the product was defective. And as you already know if you read the paper, the expert already say that this kind of brake system has a 50 percent chance of failure in weather conditions involving flooding. So if they know that and they still provide us with this kind of vehicle, to me obviously they should bear all the responsibility.

There is no evidence indicating that the driver, his conduct have anything to do with the accident. Why I have to pay anything? I don't understand.

MR. DAY: How does this drinking -- this -- of the driver, how does that impact the accident? Does this --
MR. TJIOE: No impact because the people who buy the drink for the driver are the people who are killed. So -- and also even if he was drinking, no indication that his drinking have anything to do with the accident. It was flooding and there was very bad weather conditions, so that was the cause of the accident, and I have seen nothing to the contrary.

MR. DAY: Okay. Mr. Tjioe, let me ask you a couple questions here. What is -- just so I can understand the context here. What is the ownership? Who owns your company?

MR. TJIOE: Well, I am the director of the -- you mean the Shanghai Excursion Tour?

MR. DAY: That's correct.

MR. TJIOE: Well, I am a part owner. I am a part owner of the company, and of course we have connection to other partners, including Chinese government, so that -- that is basically the ownership.

MR. DAY: Chinese government?

MR. TJIOE: Yes. I mean, this is normal in China.

MR. DAY: Can you be more specific?

MR. TJIOE: I'm sorry. What do you mean?

MR. DAY: Well, I mean -- this is, of course -- this part of the discussion I'd like to keep confidential, I'm not going to share with Mr. Barkai, but what agency or ministry of the Chinese government is your partner?

MR. TJIOE: Well, why do I have to tell you this?

MR. DAY: You don't.

MR. TJIOE: Oh. Well, anyway, that's all, you know, I'm -- I want to say. We have some connection with Chinese government. So SIC.

MR. DAY: Is there anything that the government involvement in the ownership of your company does in terms of this settlement?

MR. TJIOE: Well, basically --
MR. DAY: How would it impact the settlement at all?

MR. TJIOE: Well, if you are going to agree to keep this confidential, basically another reason for our position is that we don't have the money. We don't have the money to pay any settlement because a large percentage of our revenue goes to the Chinese government. So we cannot -- we cannot afford to pay.

Plus for any information about the Chinese government ownership or payment of any settlement to be publicized would be -- would be terrible. So we must avoid that situation. Do you understand?

MR. DAY: I understand. I understand.

MR. TJIOE: So it is my understanding, Mr. Day -- you are the mediator. I want you to advise me what to do, but of course I want your help in convincing Mr. Barkai to contribute more than obviously what he is saying he will contribute. Can you do that?

MR. DAY: Well, we can sure try. I'm not sure that I can get him to a position that you're going to be happy with, but we might as well try.

Let me see if I understand this, now. Because your company is part owned by the Chinese government and because of the potential public knowledge of this settlement, they cannot be seen as contributing anything towards the resolution of this $250,000 problem. Am I correct?

MR. TJIOE: Basically.

MR. DAY: Okay. What about -- and that's because the company has no cash flow because --

MR. TJIOE: Cash flow is an issue, and also the publicity. The -- for Chinese government to be seen as contributing to settlement is very embarrassing.

MR. DAY: Okay. Confidentially, now, how does your Japan client fit into this context?

MR. TJIOE: Well, Japan client, we have some tension, actually, because a lot of these vehicles are sent over by Japan companies to be used for sale in China, but they are actually used for taxis in Japan, and they are not in good condition.

However, in our group the Japanese company is willing to maybe contribute something, but in terms of our group as a whole, our position, of course, is that we don't want to contribute anything because the facts
are quite clear. There's no responsibility by the driver group.

MR. DAY: What happens if we don't solve this mediation today?

MR. TJIOE: Well, of course there's a risk that the joint venture will be broken but -- and of course if I -- if we can do it, I want to avoid that. But on the other hand, there are many companies who want to supply vehicles to China because of the big market over there. And if this joint venture break apart, we will lose substantial funds, but at the same time, I think maybe we can try to find other partner. So my preference, obviously, is to keep the joint venture, but if it doesn't stay together, then I think we will find some other way to do business.

MR. DAY: Okay. I tell you what. I want to meet with Mr. Barkai for a few minutes. If you would -- wouldn't mind, have some coffee. I'll come back and join you.

MR. TJIOE: You -- are you going to tell him what we discussed?

MR. DAY: No. I'm going to see if I can get him to change his position.

MR. TJIOE: Okay.

MR. DAY: But before I leave the room, let me ask you one thing: The possibility of a contribution by your Japan client, is that something I can disclose to Mr. Barkai if he's willing to concede and move off of his position?

MR. TJIOE: Well, it depend on how much he's willing to move, but so far I detect no movement.

MR. DAY: Okay. So for the time being, I'm going to hold that information all confidential, all right? And I'll come back and see you in a few minutes. All right.

MR. TJIOE: Okay.

MR. BARKAI: Okay. So --

MR. DAY: We're making progress.

MR. BARKAI: Good. What did he say?
MR. DAY: We're making progress.

MR. BARKAI: What did he say?

MR. DAY: I'm going to hold that confidential for a few minutes, here. But there is something I want to share with you, John, and --

MR. BARKAI: Okay.

MR. DAY: -- that is that I think that -- and just -- in just -- in talking with the two of you that if you're -- you're really serious about saving this joint venture.

MR. BARKAI: Of course. Of course.

MR. DAY: Then what's going to have to happen is -- what's going to have to happen is that there's going to need to be some movement on your part. You're going to have to put me in a position as a mediator where I can go back and I can show him that there's been some concession on the part of the -- on the Western group.

And so what does that mean? That means that -- that the initial position that you took of everybody share equally --

MR. BARKAI: Right.

MR. DAY: -- what -- what I think you have to appreciate is that dealing in country, they've got some other concerns that are different than someone who is, you know, remote. I mean, to you it's just dollars, right?

MR. BARKAI: It's dollars, yeah.

MR. DAY: It's dollars.

MR. BARKAI: Yeah, it's dollars.

MR. DAY: Okay. And they've got some other concerns there.

So in taking that $250,000 number, is there -- in trying to put something together, can you give me a different position to go back with? Because I see a way -- here is the thing. I see a way to make this thing work, but what I need from you is some help.

MR. BARKAI: Okay. Okay. Well, you know, in truth, David, we weren't necessarily on -- I'm going to call it our side in the product group, going to be dividing it up equally, but we were expecting to put in 150 of
the 250,000, and that means -- I mean, the U.S. manufacturer, which really is doing a lot of business, was going to put in a much more substantial share. The Australian shipper doesn't do that much business, and the -- and the British servicer doesn't do that much business. So really -- the American manufacturer is really going to carry this share.

But we're still kind of seeing 150,000. I don't -- I'm not quite sure what you're talking about.

MR. DAY: Well, what is your -- you know, your original position was 250,000 split five ways.

MR. BARKAI: Right. Yeah. Well, that's -- I mean, that's -- yeah, that's our position. That's what we're talking about. But we're going to divvy it up differently on our side, perhaps. But I mean, I've got to be able to show them some degree of fairness here. I mean, I don't understand what they're moving to, why -- why is it not fair that they contribute? Because they would be taking -- I mean, I'm sure they're going to be happy -- if we make millions of dollars, each one of those parties is going to say, "Give me twenty percent." So I -- I don't see how it's going to be fair.

MR. DAY: Okay. Freeze.

Let me ask all of you. We've got this problem set up for you now. If you would take one minute and get with the person that's closest to you and just have a discussion, maybe make some notes -- We'll come back to this later -- on what you might do to break this potential impasse here. So if you'll just take a minute and discuss that with the person sitting next to you, we'll resume here in a second. . . .

Put that down because we're going to come back to this later. So what we're going to do is press the "play" button on this videotape and continue, hopefully in mid-sentence here, where we left off, and we'll come back to this.

So Mr. Barkai, we were discussing this $250,000 proposal. You indicated the American manufacturer is willing to pick up the largest share, a large chunk of this.

MR. BARKAI: Yeah.

MR. DAY: I mean, what can we do to have something different here?

MR. BARKAI: Well, actually, it -- it is getting a little hot in here, David.
MR. DAY: I want to get down to brass tacks.

MR. BARKAI: Okay. Well, let's get down to it.

MR. DAY: Okay.

MR. BARKAI: You know, truthfully, what we're looking at is the long-term future here and -- you know, we look at the China market and we look at other Asian markets but -- you know, we would like to be in China, and then we can get into Vietnam and a number of other places kind of running this same joint venture or a variation of that.

And so it's true that the amount of money we're talking about, while it seems a bit outrageous for the damage here, is nothing that is going to really be in our way if we can take care of that. So we're willing to pick up a significant share of this damage.

MR. DAY: Like what? All of it?

MR. BARKAI: All of it would feel really unfair, but let's say the lion's share of that.

MR. DAY: So ninety percent of it?

MR. BARKAI: Maybe, yeah. Yeah. That's within the realm.

MR. DAY: Okay.

MR. BARKAI: But if we're going to do that -- I mean, it's simple tit for tat here. I mean, if we're going to be willing to do that, they've got to show us that they're willing to give us something. We're looking at long-term contract. We're looking at potential better deal with them. And right now I just -- you know, I feel like he's kind of digging in his heels and we're not going anywhere.

MR. DAY: All right. So what is this proposal now? You need --

MR. BARKAI: I haven't exactly made a proposal.

MR. DAY: All right.

MR. BARKAI: Long term. Okay. Well, we'd like to be --

MR. DAY: Ten years?
MR. BARKAI: Ten years. Yeah, yeah, ten years. And we'd like to do a little better with the deal that we've got right now. I mean, in term -- we're talking about equal splits on the percentage. In fact, I mean, as we went into this, they were saying, "China, China market. We're the ones who are getting you in here," and so they wanted a larger share rather than a five-way split. But we'd like to do a little better than twenty percent for each -- each of us on this side. We got sixty percent of it coming to our companies that I'm representing, and we'd like to see a little more than that.

MR. DAY: So you want them to kind of discount their profits?

MR. BARKAI: Yeah, yeah.

MR. DAY: Okay. So in exchange for that type of deal, you might be willing to pick up the lion's share of --

MR. BARKAI: Sure. I mean -- you know, it all depends on where this is going to go. Obviously if we actually do what we're hoping, which is some millions of dollars, then we're really not talking about much. But if we don't go much farther, then we're stuck.

MR. DAY: Okay. Great. Let me talk with Mr. Tjioe.

MR. BARKAI: Okay.

MR. DAY: Have some more coffee. I'll be right back.

MR. DAY: Okay. So I have got a great proposal for you. So you want to take some notes here? Let's do this. They're willing to do a long-term contract, and in exchange for that, what Mr. Barkai has offered is to pick up the lion's share of this 250,000, so he's --

MR. TJIOE: What does "lion's share" mean? 100 percent?

MR. DAY: He hasn't gone that far, but he's conceded -- you know, I think we could get a deal in the eighty to ninety percent range.

MR. TJIOE: Why we have to contribute anything?

MR. DAY: Because you are a joint venture party.

MR. TJIOE: But the accident is not our responsibility. We already talked about this.
MR. DAY: Well, I recognize that, but what the joint venture agreement provides is that the joint venture partners will share equally in the profits.

MR. TJIOE: Yes, but Mr. Day, Mr. Day, I already told you the joint venture agreement is just a negotiation document. That's all.

MR. DAY: Okay. Let's focus in on your Japan client. What about if we have the Japan client pick up the little piece of the settlement? You know, say 20,000.

MR. TJIOE: Mr. Day, look. This is my position. We will pay if we understand there is some responsibility. Even if the Japanese company is willing to contribute something, we must -- I must be able to tell them why they have to put in money. Now, there's no reason because the product is defective. The driver is not responsible. So no reason for any member of our group to pay anything.

MR. DAY: Well, what about this? Is there a long-term benefit to your group to having a new contract put together that goes out ten years? Is there some benefit to your group?

MR. TJIOE: Well, obviously the joint venture has some economic benefit, but unless we are able to negotiate something for mutual benefit, then obviously there's no reason, perhaps, to continue. I mean, in the beginning I mentioned, "Why is Mr. Jones not here?" I am used to dealing with Mr. Jones. I know if Mr. Jones is here today, I can negotiate with him, not Mr. Barkai. He is a lawyer.

MR. DAY: Mr. Barkai has the authority to put together a ten-year contract with your clients. Would that be of interest?

MR. TJIOE: Maybe. I have to think about it.

MR. DAY: I mean, it would make a lot of sense to me. You get a contract for ten years, pay very little for this settlement. Maybe what you do is --

MR. TJIOE: How much is "very little"?

MR. DAY: Well, I don't know. Do you want to try 20,000?

MR. TJIOE: 20,000? Mr. Day, in China, okay? When there is
accident and someone is killed, the damages are only maybe two to five thousand dollar. Why we have to pay 20,000? That's ridiculous.

MR. DAY: Okay. Let's freeze it.
We're going to now kind of get some reactions, see some things that were done here and kind of see where some of you are at.
Let me ask John Barkai. Do you want to take the lead on this?

MR. BARKAI: Sure. Okay.
Let's hear from -- some ideas, some reactions where we would go with this. So we're now trying to throw it open to talking about where we were before when we did the freeze frame, where you would go. Any suggestions from the group? Cherie?
I wonder whether it would work better -- yeah. If -- is it possible for you to move towards the mike? Yeah. And if somebody else would be willing to offer another idea afterwards, they could move towards the mike right now.

AUDIENCE MEMBER 1: Okay. So what we thought is that the Chinese are very concerned about confidentiality in terms of any kind of sharing with the settlement, and if it was offered early on, that might be an opportunity to open the potential for some negotiation.

MR. BARKAI: Okay. All right.

AUDIENCE MEMBER 2: We talked about there needed to be more of a pre-meeting, upstream understanding of who was going to be sent from each side, and that would have taken care of the initial misunderstanding and possibly might have allowed the Chinese delegation to feel more willing to be able to put more money on the table.
Also we thought that you ought -- all ought to explore what you did, integrated bargaining techniques, and come up with a BATNA on each side as to what was just -- best alternative to a negotiated agreement. Anyway, to come up with a BATNA for what each side would want, including -- you all came up with a long-term contract.
We also talked about perhaps there might be some discounts up to a sum of, you know, forty, sixty, eighty thousand dollars, whatever you agreed to, if they continued to buy your products.

AUDIENCE MEMBER 3: Okay. We just had some concerns just about basic mediation theory, about the idea of getting ground rules set, you know, getting clear understandings. We didn't think the mediator did any of that. We were kind of disappointed with the mediator because we thought there could be more -- you know, the mediator getting the parties
to -- negotiating with each of the parties to get some trust going and some faith in what the mediator is doing to help them, to assist them, and we thought that that hadn't occurred at all.

We thought that the parties weren't committed to the process at all so there wasn't really -- it was sort of a futile process at this point because it wasn't mediation at this point, hadn't reached that level, because there was -- I guess we hadn't got the initial commitment to proceed, we thought.

MR. BARKAI: So if you were going to do this again or do it for real in someplace where we're going to be working on this, you'd do a lot more in terms of preparation. This looked much more like, probably, what we'd see in Honolulu as a community mediation, where the parties come together with very little work with the mediator ahead of time. And a much larger international cross-cultural dispute, there would be a lot more prep work in this.

AUDIENCE MEMBER 4: We talked about mediation style and the fact that most of this had been done with shuttle diplomacy, and there's clearly a problem with trust between the two individuals. And our inclination would be maybe at this stage to start getting the two parties closer together, getting them to talk to each other as opposed to running between the two because they seem to be leaning too much on the mediator to share confidential information. It's about time for them to open up to each other as opposed to having the intermediary in between them.

MR. BARKAI: Would this mediation have stopped earlier, at this point, for many of you and we would have then had a different meeting at the hotel where we may be, where the clients would be, for example, and get everybody together? Maybe me, as the lawyer, out of the room for a while and having me standing by, would that be the -- more typical, I think.

AUDIENCE MEMBER 5: What we have discussed from our technical point of view are the mediator should obtain firm intention of the both parties to come to an agreement and by that, by expressing the intention, go forward. We have the -- just only one common ground, that the joint venture should survive, and so based on that, each -- the mediator should obtain the -- assurance from both side. And in that case, the mediator should not threaten the parties in order to create the trust for the mediator. That's what we discussed.

MR. BARKAI: Okay. Chuck?
AUDIENCE MEMBER 6: Just real quick. And I've got to credit Etsu Inaba for this one. She came up with it yesterday in our group session. Hasn't been mentioned. Tomorrow this same thing could happen because of another drunk driver, with perfect brakes. Nobody has paid any attention to anything preventive, and Etsu brought that up yesterday. I think it's critical. It is something that the Chinese participants could contribute: driver training, driver discipline, driver supervision, rules. And they should because the rest of the venture is going to want to know this isn't going to happen again tomorrow. It's non-monetary but it has huge value, and it also has significance to the business relationship.

Second, for me, doing a lot of insurance stuff, I know he's got insurance out there. The only question is: How big is his deductible? Is he going to eat it all, or is the insurance company going to pay it?

The Japanese contribution is relatively not a monetarily significant thing, but it may have some joint venture relational significance, so I think John's idea of getting the people involved back in the room addressing some of these questions on the relational sense and in the context of your excellent ideas about the long-term venture and maybe some -- if not across-the-board profit allocation changes, but maybe some conditional allocation questions.

MR. BARKAI: Okay.

AUDIENCE MEMBER 7: I just wanted to ask a question. Is it usual to decide the exact amount of the liability between defendants before the general amount decided to pay to the climate? So this is the first question. I think this is much of interest of defendants. You are all the defendants. So this is the first idea.

The second, I think perhaps the American side should take more -- take into more consideration of China market. China is a big market. And the China side must take -- much are taken, too. The good environment of -- as in -- attractive foreign investment. This is the mutual understanding or the mutual interest that the mediator should pay much attention to that. Okay.

MR. BARKAI: Let me maybe start with the first one and just say the reason you're seeing this as a arbitration followed by now the mediation part and then perhaps maybe tomorrow an arbitration part or -- we could discuss how that might work -- is trying to design something that we could present to you. We don't necessarily think this is the way it would have taken place. There's a possibility it would take place.

But there's been discussions in small group, particularly about the hybrid type of process, and it's no longer arbitration necessarily preceded by mediation. Sometime we go med-arb, sometimes we go arb-med-arb.
Who knows where we're going? But the world is changing a lot in the international field these days.

MR. DAY: I think we all ought to give a round of applause for the superb acting performance by Roy Tjioe.

MR. BARKAI: Yes.

MR. TJIOE: You know, I have one observation, is that playing the role of one of the parties, I found myself feeling like I could, if the negotiation did not work out, report back to my clients or the people I represent that Mr. Day didn't allow us to reach a settlement because I am relying on him to do this.

And although I have an interest in making sure that the investment climate is good for the future, I kind of feel at the same time that there are countries -- and this came up in our small group yesterday. There are countries who do not respect written agreements, so even if there is a judgment or an arbitration award or what-have-you, there is no downside for me to not reaching an agreement here today. And if we don't reach an agreement, let them try to enforce against us. You know, I can at least for my part, for my role, put the blame on Mr. Day or Mr. Barkai. So I thought that was interesting.

MR. BARKAI: Any other issues that you might want to bring up? We of course collapsed all this so we could present something to you in half an hour, forty-five minutes at the most, that you could then take apart and we could look at and we would think about how we would do it better in the future or you would do it better.

Dan?

AUDIENCE MEMBER 8: Yeah. Something that impressed us and -- as we discussed it, and that was the fact that David, you let -- and I know this was the performance thing. But when he said, "Well, the Chinese interest can't pay anything," we thought that needed to be addressed because that's like a party -- even though the Japanese party was still involved. But that's like a party saying, "I'm here to settle the case as long as I don't give up anything," and so we thought that needed to be addressed.

And principally we thought there needed to be a lot more information developed or facts developed, and there was a window of opportunity when Roy said, "Well, there's a fifty percent chance that the brakes failed because of the flood." Well, that's a concession that's a fifty percent chance that it didn't, either, and so there's some potential exposure there.
So we thought that that -- because it was so compressed, you didn't have the opportunity to develop or seek information that really needed to be sought to possibly bring this to a successful conclusion.

MR. DAY: Let me ask all of you for a reaction here. When John laid out or we kind of worked out this little general proposal, how many of you saw a -- right then and there a chink in the wall that some variation of that ultimately would resolve this dispute? Did anybody see that? A couple of you? Okay. When the mediator presented kind of the outlines of that simple proposal to Mr. Tjioe, did any of you notice how that went down? Chuck did, I know. One of you? Two of you? What did you observe, sir?

AN AUDIENCE MEMBER: (Inaudible.)

MR. DAY: Okay. So let's go to this proposal for a second, here, because what I -- I want to kind of illustrate something that's very, very subtle about culture, and so let me try it another way.

When I laid that kind of general context on Roy for this settlement, did any one of you pick up the way he received that? Was that smooth -- ask yourself. Was that smooth going for the mediator, laying out that proposal? Did you sense I was struggling with that? Why wasn't he receiving that? Why didn't he jump on that? Ten-year contract with a Western group? Get out of paying all this cash? Why didn't he jump on that?

Because we told you at the outset: Culture is very sophisticated, and sometimes it's like those tinted glasses and you don't even see it. The mediator in this context here made an unbelievable mistake, and it made that proposal -- well, hey. Roy, you explain it.

MR. TJIOE: Well, what I was trying to convey was that just by his disrespect -- it was a cumulative thing starting with the very beginning faux pas. Plus the fact that -- sort of the nail in the coffin is when he came back in and he was all casual. What I was trying to convey was that because of that, it colored my thinking and it colored my willingness to negotiate and even listen to him. And my feeling -- and I actually kind of felt that playing the role -- is that if he had been more respectful, I would have been more open or at least I would have communicated with him more openly towards the end of perhaps accepting that.

But because of that cultural insensitivity on the part of the mediator, I didn't really want to talk to him, but I felt like I had to because of the people I'm representing.

MR. BARKAI: Cultural insensitivity to me also relates to the
possibility of using the mediator as a cultural translator. And we like to get a mediator who is bi- or tri-cultural, if that's possible. I know Bruce Barnes -- and many of you may know that he certainly advocates using an international -- if I would get this right, Bruce. But in an international situation, using the co-mediator model, which is frequently used in community justice models, but to have a mediator from each culture, so rather than having one mediator, we'd have two: one who would probably be an American or an Anglo and one who would be a Chinese person.

We wonder what your reaction would be to how you bridge the cultural sensitivity. We're -- not just on whether to use one or two, but how do you handle those cross-cultural differences? Any lessons from experience or suggestion?

MR. DAY: We got -- from the horse's mouth.

AUDIENCE MEMBER 9: Let me come back on that again. So when Roy said, "I can go back to my client and blame it on the mediator," what -- you know, what I would suggest is going back to Chinese history and Chinese-American conflicts into something called joint conciliation, which is exactly that: where the Chinese side puts up one facilitator or one conciliator, and the American side puts up another. Then, of course, immediately he wouldn't have to be able to do that so easily.

In addition, he can go back and trash the mediator because this particular mediator has no particular face in the Chinese conception, whereas if the mediation party is composed of two, one of them who has probably been put up by CIETAC, then you have a whole different dynamic working and it's not going to be as easy for Roy to do those things. And then one of your conciliators has a face and, by extension, the face of the Chinese government is now involved in the success of saving this joint venture, which is a pretty good reframe, I think.

MR. DAY: Over here?

AUDIENCE MEMBER 10: It seems to me that the mediator had a sort of bias. When John said, you know, "This is the counterproposal," it was as though this is a, you know, great offer to the Chinese or the Asian party, and there's a sort of bias. "Why don't you buy it?" right? And we don't know exactly what the mentality of the other party was, you know, because the China market is a great opportunities. They may have better bargaining position with other companies or other things that might be in their mind. SO I think there was already a bias there because of the concession -- apparent concession offered by John.

And the way -- that was the reason, probably, why the way the offer was presented to Mr. Tjioe was already a little bit of, you know,
"Why don't you take it?" type of attitude. I think what is felt by Mr. Tjioe.

MR. DAY: A good point.

MR. BARKAI: I think part of the mediation style debate and dialogue is over facilitative mediation versus evaluative mediation; where the mediator tries to help versus the mediator offering a proposal. I'm curious if anybody has any reactions to whether you think a cross-cultural mediator, somebody involved in an international dispute, would be more likely to be more facilitative, more evaluative, or wouldn't even be thinking about those styles, but they would still be trying to bridge those gaps. I mean, what do you do when you get people from different cultures and you're trying to reach an agreement? Yes.

AUDIENCE MEMBER 11: We were discussing it but -- not in the room now, but we got to discuss about strategies. Like in the beginning, there was surprise that was expressed on both sides, but he was saying -- And I shared it -- sometimes people in the other parties feign surprise. So one of the things that a mediator -- an international mediator should try to do, probably, is try to determine, "Is this artificial surprise, or is this genuine surprise?" and start off from there and look at his own mediating strategy in the light of what may be obviously sophisticated strategies on both parties to get the most out of the situation because -- maybe it's not so much about anything else that was discussed before, but what is really relevant to the two people on the table, so what is relevant to them in coming to an agreement.

So like we were thinking, maybe what could have been done at this certain point -- This goes back to the hybrid thing -- is -- maybe what the mediator could have done -- because this is the mediator's dilemma, is -- it's a double dilemma. Is he going to think this is real surprise or artificial surprise? Is he going to continue with shuttle diplomacy or force them into a frank discussion?

And to try to have him plan his own mediating strategy, probably one thing: He could leave them alone in the room, then come back. That way they're forced to look at it squarely in terms of what is relevant to them in that particular discussion. So -- yeah.

AN AUDIENCE MEMBER: (Inaudible.)

MR. BARKAI: Okay. Any topic you would like to raise at this point, just feel free in raising it, but we're just trying to kind of tick off some of the ideas.

AUDIENCE MEMBER 12: I have a question. As a student, I get
the benefit of asking the really obvious questions.

Roy, I guess, maybe is -- you and David combined can answer this. How does language play in? It seems to me, as someone who speaks only one language, just an incredible -- what's the word I'm looking for? -- difficulty trying to negotiate in another language. And how do you, as the mediator, not speaking another language even fluently or at all, deal with that situation? So both ends. The client and it's the mediator. How do you deal with that?

MR. TJIOE: My own feeling is that prior to the mediation commencing, the mediator would find out if there are any language problems ahead of time, and if there was a need to arrange for an interpreter, that he arrange for a very competent interpreter to be present and have an opportunity to meet with the party to make sure they're comfortable with each other before even commencing with the mediation.

And I sort of assume for purposes of this role playing that Mr. Day understood that although I was not fluent in English, perhaps, that I had enough ability to speak in order to communicate without the need for an interpreter. We were actually going to play it out so that he couldn't understand me at all, but it just kind of didn't fall that way so --

MR. BARKAI: There's a number -- you may be following that. There's a number of people in this room who are here working with us and participating and not using their first language, and I wonder if you -- any of you would be willing to offer any comments about these -- this difficulty of trying to use what is sometimes the imposed international business language of English when that's not your first language and because of that the subtleties and nuances that at least American mediators talk about a lot in terms of working out and finding interests and figuring out how to craft these agreements are lost to some of the parties and sometimes the mediator. So maybe we'll just hang that out here.

AUDIENCE MEMBER 13: Notwithstanding the reasons why David may have chosen to caucus first with John on both occasions, I just wanted to ask Roy how that felt to you that both caucuses started with the other party.

MR. TJIOE: I had a mixed feeling about it. On one hand, I felt that it could be considered disrespectful for him to begin with the American side as opposed to me. On the other hand, what I read in the materials that I think Bruce prepared about Chinese parties, at least -- and I hope I got this right, Bruce -- is that they rely more on the mediator to tell them what to do. They're more used to being told what to do, and to that extent, I was trusting his judgment that by negotiating with Mr. Barkai
first that we'd have a better chance of reaching a resolution faster. So that's -- so I had a mixed feeling about it.

AUDIENCE MEMBER 14: Regarding the language problem, in my country also English is not the first language, of course. But what language is to be used in such situation, mediation or arbitration process, it depends mostly on the parties concerned. Basically the people would like to use the Bahasa, the Indonesian language. In arbitration, for instance, the law describes that the arbitration should be done in Indonesian language, but in practice either -- whatever language can be used interchangeably, you see. So most people, person who like to use the local language, but if they can -- if they master the English language, they also would like to use the language. Even Dutch are normally used between the old people if they have problems.

(TAPE BREAK.)

MR. BARKAI: -- the language and the interpretation, but simply we sometimes all hear the same things differently. And I do this to my classes. The people who know me know that I love to use stuffed animals to talk and stuff. This one is getting a little weak, but this is my little rooster, and it would say (Crows), and now -- I do this with international classes sometimes.

And what I know is -- at least in English, what we have just heard, if I'm trying to repeat it, it would be usually "cock-a-doodle-doo." That's what we say in English. But if you were saying that same thing, what a rooster says, in a different language -- I'm just going to try and do some tests.

What does a rooster say in Japanese?

AUDIENCE MEMBER 15: "Koh-keh-koh-koh."

MR. BARKAI: Carlos? In Spanish.

AN AUDIENCE MEMBER: (Inaudible.) Never thought about that.

MR. BARKAI: Mr. Umar, Indonesia?

AN AUDIENCE MEMBER: (Inaudible.)

MR. BARKAI: Gao Fei?

AN AUDIENCE MEMBER: (Inaudible.)
MR. BARKAI: Chuck, do you know how to say it in Vietnamese, by any chance?

AN AUDIENCE MEMBER: (Inaudible.)

MR. BARKAI: Any other languages that people could offer up to us?

AUDIENCE MEMBER 16: Essentially Vietnamese is different between the rooster and the chicken.

MR. BARKAI: Yes. Oh, yes.

AUDIENCE MEMBER 16: A chicken goes "boo-boo-boo-aahk" and the rooster goes "urk-urk urk-urk."

MR. BARKAI: To me it's just a cute little demonstration of what differences people hearing the same -- because I think the roosters around the world probably all say the same thing but -- I'm not really sure but --

MR. DAY: Let me just add on this the practical realities of some of the mediations that I've done within a cross-border context.

My language ability is limited to English and a few words in Tagalog, and that's about it. A few words in Japanese, a few words in Chinese, but that -- you know, I don't speak any other languages. And so there have been certain cross-border disputes that I've been asked to be involved in where I just felt that there was just too much use of translators, and I had to decline it because I just -- I wasn't comfortable with it.

But on the few that I have done where we've had a translator, you just have to recognize that that is a whole different aspect to the negotiations because it is so easy to have a miscommunication when you've got a translator involved, and you almost need a second translator to check the first translator to make sure that all the little language nuances are going down the way that you think they are. And so I would encourage you -- if you do get involved in that type of cross-border dispute resolution, whether it is in a negotiation context or in a mediation context, if you're going to have to have a translator, you'd better be really careful and make sure that you've got someone that everybody's comfortable with and -- so that you don't miss any of these subtleties.
And I want to come back to the point about prejudice or bias on the part of the mediator. That was excellent that you picked that up. I mean, we were trying ahead of time, as a faculty, to make sure we had enough things in here to make this interesting, some of them rather obvious and some of them a little more subtle, and she's absolutely right that there was some bias there the way that that was put together. Obviously it's difficult to do this under the crush of time and there are so many issues that you want to do and we're having so much fun here doing it that you get lost and -- where you're at.

But I think the thing that is most important to this is that if you -- in terms of getting a proceeding like this under way, no matter which side you're on and whether you're neutral or whether you are one of the parties, whether that's a business person or an advocate, a solicitor representing one of the sides, is to take the time in advance -- I mean, there's no substitute at all for preparation. Make sure that you understand who the parties are, who they're representing, and -- it's not a good idea to go into a proceeding and learn about, as an example, the Chinese culture while you're doing it. That's a bit late. And that's kind of the way I learned about some things: the school of hard knocks. And so, you know, I have made so many mistakes and so -- you just kind of kick yourself.

So to avoid doing that, what -- two tips here. Number one is: If at all possible, decline, as a neutral, getting involved in a dispute if you're not bicultural because -- or you're not able to walk that invisible line between those two cultures back and forth.

Now, in my personal situation on the Chinese side, my wife is Chinese, so I live with this culture every day. But appreciate this: Although my wife is Chinese, she is American-born Chinese seven generations deep. Now, for Gao Fei that sounds like an American. And so I use the term -- recognize there's the concept called the bleaching of the cultural roots. Pretty good, huh? If you were a gay hairstylist, you'd catch that one.

But -- so what happens is this, is that over time, whether someone is living in Singapore or Tokyo or San Francisco, their original ethnic roots become bleached out, if you will, by the context of the culture that they're living in over time, and of course over generations it goes completely.

So as an example, using the Chinese culture here in Hawaii, as of World War II the language in this state -- Gao Fei, you may not know this. The language in this state -- the Chinese language was eliminated, killed. Why? Because the Chinese families at that time did not want their children to face any type of racial prejudice and -- with the Caucasians confusing them as Japanese. And you can appreciate at the time of World War II, that was a fairly significant thing. So that our Supreme Court library -- Roy and I were talking about this the other day -- has a T-shirt
down there that was worn in the 1940's by schoolchildren here that says, "I am Chinese, not Japanese." So in my wife's family in the 1940's, the Cantonese was killed.

But there are certain traditions that survive, and so that -- as an example, we still celebrate the Red Egg Party, and that's the thirty-day celebration after a baby is born called the Red Egg Party. Seven generations that survived. The fireworks and all kinds of other things.

Well, even though we talk about this bleaching of the cultural roots in the United States, recognize that as the world is becoming more global and people are getting more and more, it is -- the cultural stereotypes that we are forced to deal with in some type of teaching or learning context, like we have right now, become very unrealistic, because Mr. Tjoe here could have gone to Stanford, and there are Americans that are starting to go to the National University of Singapore or to Tokyo University. And so as -- as we're seeing that, we're getting a more sophisticated, more global person, but there is still some ethnic root in there that is worth knowing about in a negotiating context.

I hope I'm making myself clear. So that as people become more cosmopolitan, as they travel more -- you know, it's increasingly unusual to see somebody, as an example, who is a -- what I would call a pure Filipino. Almost doesn't exist. Right? Almost doesn't exist because they've got relatives in Daly City. Correct? Am I right? Right? Or New York. Or they've been educated in the United States. And so that if you bear that in mind -- as time goes on, this is going to become even more subtle, and it'll be increasingly difficult to detect.

And I've noticed in -- the difference in the last ten years in cross-border disputes how much less -- this is the technical term here. How much less Chinesey some of the Chinese businessmen are becoming. It's become -- it's because they're out there traveling and they're becoming more multi-cultural.

Anybody else have anything they want to add? John?

AUDIENCE MEMBER 17: Having dealt with Russian culture -- All right? -- and being really intrigued and surprised by one of the elements here called myths and reality in cross-cultural deal-making, number three on there was time pressure and unlimited time. I was very struck by the cultural difference with Western thought, which -- we think very linearly, and how we're so much given to the time pressures of negotiations and getting a deal done, versus the Russian culture.

And I am asking about Asian culture, whether the concept of time is so much broader in scope in terms of not only relationships but the whole notion of time, because Americans, U.S., we don't go back very far. 200-plus years, and that's our culture. If we want to think of ourselves going back to our Northern European roots or other Latin countries,
wherever, in Europe, yeah, maybe we can associate with that, but we have a much shorter concept of time versus going to an Asian -- I believe Asian culture, where it's thousands of years. How does that affect in a very subtle but deep way an Asian negotiator?

MR. DAY: How does it affect an Asian negotiator?

AN AUDIENCE MEMBER: (Inaudible.)

MR. DAY: Well, one of the things we attempted to illustrate starting this mediation was the time constraint, with John Barkai just being in town for a few days, got to cut a deal and get out. And that is an American billable hour, hit the tarmac, click open the briefcase, get the deal done, click the briefcase back, get back on the plane.

MR. BARKAI: But Roy really trumped me on that issue because he wanted to move faster. And when I see Peter, it reminds me I spent some time in Hong Kong about ten years ago and taught there pre-1997, and I heard very frequently the sound that I would hear here, which is "Time is money, we're moving fast," and I'm not sure it was necessarily towards '97. But it might have been the culture, but people were thinking about that, too. So there's various pockets of that, too, in terms of the belief. Peter. Peter has got it.

AUDIENCE MEMBER 13: One observation I would like to make when people refer to Asian culture is to remind you that Asia stretches from the Urals to Japan. It has two-thirds of the world's population. The rest would be more appropriate to describe as a culture than to describe Asia as a culture. It just doesn't exist as a single culture. In my experience working with Japanese people and with Chinese people, the differences between them are as great as between any other groups of people, and the group -- the difference between any two individuals from one country is often very great, so I think these generalizations about Asia are very misplaced.

MR. BARKAI: I think maybe within your materials I just pointed out -- if I could just use this handout. But assuming there were 100 people in the world, looking back at populations, they would say there would be fifty-five Asians, twenty-one Europeans, nine Africans, eight South Americans, and seven North Americans. So if you are from North America, it gives you a sense of how small you are in terms of representing the population. And we in the United States who work with negotiations talk frequently about different styles, but yet when we look at countries and regions that are larger than ours, we tend to lump them.
But I think we often do that across borders. We have to generalize and simplify, and I think it's not a bad approach to go in assuming somebody from that culture may exhibit what we call the cultural stereotypes but be very sensitive and be able to quickly change your opinion to realize that they do have a Harvard MBA and they're probably more American than you are or vice versa.

MR. TJIOE: My observation was going to echo what Peter said because I've heard it said that the difference between Japanese and Americans in terms of decision making is that with Americans, it takes a very short time to make a decision and a very long time to implement the decision, whereas in Japanese culture it's just the opposite. And I actually think the Hong Kong, which is maybe what was driving my attitude, is more akin to the Americans than the Japanese in that respect. It's "Let's get the deal cut right away," you know. "Time is money."

MR. BARKAI: Mr. Maeda? I'm sorry. Pat was next. Thank you. Pat, Mr. Maeda, Mr. Suwada.

AUDIENCE MEMBER 18: No, just a quick one because what we do in AIM, for example, is: We have a negotiation-mediation case of a joint venture of China and the U.S., and the dispute has to do with valuation differences and forms and timing of payment.

I'd just like to share with you that what came out of the simulation of the students -- and these are executives, as well; they're mid-career. And usually what they end up doing is: They really strategize this thing. So like, for example, first round -- then there are these feigned surprises sometimes or --

But the second round they change the negotiators but the same mediator. And like for example, in this case, they -- the American side was valuing on the -- using a different accounting system and valuation system, and of course in China the system is different.

So they agree in the first round that, "Well, you know, we can learn from each other, so in the second round can we bring our technical people to teach each other the system and we can come to an agreement as to whether this method is right?" But meanwhile the other big guys, the principals, in an informal setting try to talk. And I've seen this twice. Twice.

So -- so you have this negotiation or mediation of sharing information about their valuation technique, and then there's a third round where it's as if that's not -- that was -- didn't take place at all, and they come to an agreement.
What am I saying? Here we have on this list Western, Asian myths and realities in cross-cultural deal-making and disputing. Maybe we can also look at common interests regardless of whether they're Western or Asian. And what I've seen is looking at technologies and markets and at capacity to learn together. Like what usually comes out of the mediation is: They realize, "We're in this for the longer haul. We're supposed to be partners."

I think the term used in China is -- And we've seen this also in APEC is -- I'm not sure if I'm pronouncing this right. Huzhu. Huzhu. H U Z H U, huzhu. I'm not sure if I'm pronouncing it right, but it means literally "working together." We have always been taught on the Western side that it's about gue tsee, or "connections." But what we've seen in mediation processes is: It's working together, really making real the partnership.

So to try to dispel myths and realities, we really look at, at least 2 areas of common interests, and that's technology and markets and how both sides can look at modes or modalities of working together, and that's brought into the mediation process. So that, I think, goes into the hybrids and how you strategize the mediation as some mixture of mediation and arbitration.

MR. BARKAI: Okay. Mr. Maeda?

AUDIENCE MEMBER 19: I come back and I agree with Mr. Peter Caldwell. The -- in 1960 and '61 I spent a year in the United States and the -- I found out the difference between Japanese and the United States is smaller between those who live in big cities, like Tokyo or New York, and small town in United States and Japan. Those -- the city people and the local people, the difference is much wider than American and Japanese even forty years ago.

And also the sense of timing, that depend on individual more. More on individual than culture. (Inaudible). This is very interesting, but this is for -- so to speak, useful at the school, and the mediator shouldn't depend on this kind of the -- just the general things. You have to know each party more individually, more in depth.

MR. BARKAI: Mr. Sawada?

AUDIENCE MEMBER 20: I fully agree to what Mr. Peter Caldwell had said, and I also agree with the remarks that have been made before from the podium that there is no such thing as pure Filipino and the world is getting smaller. I am in complete agreement with those remarks.

And look -- if I may, I would like to just say -- make a brief comment on this very interesting handout. And if I am permitted to make
a very candid remark, I think this table is interesting, but this type of --
dichotomy of stereotypes is totally futile and -- as a basis for training
arbitrators or mediators. And this table could be useful if the words
"Western" and "Asian," two words stricken out from the top and just leave
the rest.

And you may give this to somebody who would be -- who might
be in a position to evaluate the party A or B. In this third party's opinion
that -- is A direct or indirect, or does he prefer contract or a relationship?
So if you want to get some view of the parties A and B from the third party
X, then you may use this list and let the person evaluate and circle what he
thinks relevant as to the party he's evaluating.

But as material to -- well, this could -- this sort of thing I
remember was used some thirty years ago, when it was quite fashionable
to build some kind of stereotypes, but I think that time is now gone
because, as our Filipino colleagues have said, there is no longer a pure
Japanese, pure Chinese, pure Filipinos. Thank you.

MR. BARKAI: Let me just -- I might follow and just say: I hope
that this chart provoked some discussion. And I'm glad it did. It's never
been used in a class. I sat down this morning with a book on Chinese
negotiation in my own mind and typed it up at 6:00, so no one has ever
seen it, so I appreciate your reaction to it.

And we left off a number of other issues that I think are common
in cross-cultural negotiation. I mean, the difference -- they're implicit but
not direct here. The difference between individualist cultures and
collectivist cultures. We didn't mention anything about apology. So if
anybody would like to add some more topics to the list that I've been
keeping track of, that's good.

And I like the idea that Mr. Sawada had presented of using it as a
scale. I use the Meyers Briggs sometimes, and it's interesting to think
about how people fall on a different scale and we just take off the top and
we've got another set of dimensions.

Hussein?

AUDIENCE MEMBER 21: Just some little observation. I do
notice, actually, the purpose of this matrix, so to say, but it does mention
here that myths and realities, so myths has something to do with
mythology, I suppose.

I wonder whether this lesson Asian characters and so on at the first
place where it is not to be generalized, but also, if it is so, I think because
it is necessary; to some extent, we generalize things. That this is also
applicable, actually, to -- not only for Asians. It's more in the larger
context, Western and non-Western. That is my question. Here is --
perhaps here it is mentioned about, you know, unlimited time, earlier
non-task focus. I wonder why it is mentioned here banquets and sightseeing and so on, things like this, but I suppose this would be applied, actually, for a more general context, the Western and non-Western. Thank you.

MR. BARKAI: If you would look at a map -- and say we have the Asian and the Western focus. I have done some teaching in Helsinki, and my experience from Europeans -- And there's probably people in the room who have more experience with Europeans here -- is that you could take this Asian-Western focus that we have and rotate it ninety degrees, and it becomes more extreme. And therefore the Scandinavian countries, Germany, parts of what -- the former Russian republic tend to be much more extreme, even in the direct, supposedly Western culture, and southern Europe tends to be much more relationship focused. And it's kind of interesting because we keep thinking, kind of, the Americas, North America and somewhat South, versus Asia, but we see these traits all around the world.

MR. DAY: Gerry?

AUDIENCE MEMBER 22: A comment really not with regard to problems or disputes but with regard to negotiation.

I had an experience two weeks ago to accompany a client to Thailand to negotiate a long-term supply contract that would be mid eight figures. So it was pretty big and they decided to bring their lawyer along. And they were negotiating with a very sophisticated Thai company who has been selling around the world for a long time. And my experience was -- they of course now had to bring their lawyer along so -- this client was bringing their lawyer along, so they brought along a chap who had been to a Thai law school but had gotten an LLM from Cornell, so he had lived in America, spoken English to some degree, not the way we were.

But what was very interesting is: Neither side was very interested in letting the lawyers participate or trying to say what kinds of terms would be put into the contract. What I found to be my most useful service was when I began to see clients using idioms and the other side just being totally blank.

I can remember two were when my client talked about a situation that may cause a hiccups, and there was just a total inability -- and my client keeps going on, you know, about what's going to happen in that small little situation. And I guess the only purpose that I really served is to try to stop and explain what a hiccups was.

The other idiom that came out was the one that indicated that if a certain subcontractor, who would do trucking, would do something wrong, they'd be canned, and "canned" really had absolutely no communication to
the other side.

What -- the conclusion I come to is: Particularly if you're dealing with parties who have had some, if not a lot, of sophistication, there really is not much of a distinction between dealing with Asian and American parties or American-American or anyone else. It's really, you know, becoming a global world.

I decided I had to justify myself a little bit, so I asked the attorney on the other side, Does he want to put in Triple A rules or ICC rules? And his comment was, "We don't care. You can put in whatever you want because there's not going to be any disputes," and that was it.

So I guess bottom-lining, I'm saying, is -- I'm wondering until there really is a dispute how much value there is in trying to prepare for negotiations, particularly if you're talking about folks who have had some previous experiences.

MR. DAY: Roy, do you have any final comments here?

MR. TJIOE: What's interesting to me is that -- this conference intrigued me because it was going to teach me about issues relating to cultural sensibilities and sensitivities in international mediation and arbitration. And what I've learned and what I'm hearing is that it's very dangerous to over-generalize or stereotype about cultural differences and what is more important is the background of the specific individual that you are facilitating communications between, their own role in terms of whether or not they have authority to negotiate, and issues like that, but also what their personal background is, as being perhaps even more important than their cultural background. So that was a very interesting lesson for me to learn. Thank you.

MR. BARKAI: Two comments from me. When I teach my classes that are international -- have some international focus, I tend to focus more on the psychological differences rather than the international stereotypes, just as you folks do, but I also offer to you the words of an author that I find useful, and that's a woman named Deborah Tannen, who has done a lot of work with cross-cultural communication, particularly gender differences in communication.

And the way she describes it -- And I find it helpful to me -- is, she describes it in terms of not stereotypes but as patterns. And she says, "This is the female pattern of discussion, and this is the male pattern of discussion, and it's possible to find a male doing the female pattern and a female doing the male pattern."

Nonetheless, patterns are helpful because you get to recognize patterns. You go in probably expecting the male will exhibit the male pattern, but being able to change as you go into it, and so I think that while
other things may play a more prominent role and we want to realize there is the worldwide culture, I think we should not too quickly dismiss some of these differences because it does point out various differences. And my last point -- I just want to show you the book. And I think all of you came in more than this, but this is the book on cross-cultural awareness, and more of you came in more than cross-cultural aware to this level because the first part of this is blank. But we hope that during part of this conference, we begin to fill in some of the outline and you become -- at least have a black-and-white picture. And then throughout our discussion and in the future for all of us, we hope that we all learn to see this very rich pattern of differences and it's very colorful in our lives.

MR. DAY: There you have it.

(MEDIATION CONCLUDED)
PANEL DISCUSSION

MR. GIACOLONE: Good afternoon. How is everyone doing this afternoon? Good. Sleepy? Everybody ate well and now you're all sleepy.

My name is Rich Giacolone, and up here on the panel is John Wagner. We are both in the Federal Mediation and Conciliation Service, the United States government's largest mediation group, made up of some 300-plus employees.

Yesterday Cherie gave us some air time in talking about our agency and the establishment of our agency so I'm not going to go into any of that as far as background, but what I'd like to do very quickly is talk about our move into the international world and what we've done in the international world just to give you a basis of some of our understanding and our background again in the international dispute resolution community.

Cherie mentioned yesterday. We've been involved in the labor relations business for many, many years dating way back even prior to 1947 into the early 1900's with the roots of our agency being with the Department of Labor. In 1947 we were separated out and treated as a completely independent agency.

But the most important thing we're doing now for the context of this conference is our ADR work and our international work, and that really started in the early 70's. Our work in the domestic ADR arena was all about congressmen contacting our agency and saying, "Could you help us resolve some disputes" within government and between states and environmental cases, in water -- riparian disputes, issue of that nature, because of our reputation in the dispute resolution world and labor relations. So initially we were involved very heavily in ADR on a sporadic basis based on individual requests.

Now, how did we get in the international business? For a couple of reasons, one is: There are always international delegations coming to Washington, D.C., from all different areas within the international community: economic areas, the labor relations areas, and dispute resolution worlds.

Almost invariably every one of these groups like to spend a visit with FMCS to find out what we do to resolve disputes, and we had an international visitors' program where we literally hosted international groups almost every day in the national office. And these groups asked us about dispute resolution, and as they asked us about the things we do, we ended up getting follow-on questions, such as, "Could you take this information and bring it to our nation and talk about it?"

And we did. We went cross borders and talked about the things we were doing, and as we did more and more of that, they asked, "Would it be possible for you to help us with a systems design to set up our own mediation programs in both the labor relations world and maybe the ADR
world?" And we said, "Sure, we'd love to do that," and before you know it, our international work has grown tenfold the last five years.

We have -- we played a significant role in the establishment of the South African Mediation Service. We played a lesser role in some of the -- in the establishment of some of the mediation groups in Europe. We played a major role in the establishment of mediation groups in Panama, in El Salvador, and again, the list goes on and on and on.

Now, what we've done mostly is dispute systems design and capacity building, mostly in the labor-relations world, but in many cases they wanted more than that. They wanted to know: What could we do to tell them how to deal with disputes in the courts and other systems within governments? And we brought in subcontractors to help us with some of that work, and we've also helped set up some of those systems.

Now, our funding for all that work, for your information, comes from different sources, from the United States Agency for International Development, from groups like the International Labor Organization. We've been funded by individual governments to do some of the work for -- some various foundations have also given us funding to do this sort of work.

So it's -- we've kind of grown into the international work and really enjoyed doing it. We enjoy it for a number of reasons. Our mission talks about spreading the importance of dispute resolution worldwide, and we're excited about doing that everywhere we get a chance to do it, but it also gives our mediators, who we bring to these various nations, an opportunity to learn from those nations different systems, different ways of resolving problems, different problems that they may not experience here domestically. So it's a two-way street. We do an awful lot of learning ourselves when we're asked to come into different locations and do that type of work.

I don't want to drone on too much more about our agency. I do want to mention one very exciting program I was involved in, and that was working with the transition of the Panama Canal from U.S. hands to Panamanian hands, probably the largest transfer of assets from one country to another country in recent history, billions of dollars of assets, billions of dollars of equipment, building, and the Panama Canal from one government to another government. FMCS played a significant role in facilitating meetings between the government of Panama, the United States, the Panama Canal, and the labor unions, all heavily involved in the outcome of the transition of the Panama Canal.

My other significant accomplishment in Panama, the most significant international accomplishment I ever was involved in, was the fact that I met my lovely bride there, and I would like to point her out quickly in the audience. That's Mara Giacolone in the back of the room. She is my cultural diversity, my cultural sensitivity. I've learned an awful
lot from Mara. She is Panamanian and reminds me of that every day, and she is the most adaptable woman I ever met. And I learned a lot about cultural diversity and sensitivity from my lovely bride. She is the most adaptable woman I've ever met.

As a matter of fact, she told me the other day -- a true story. We were in an environment that was unique and I was frustrated by it, and she turned to me and said, "Honey, when in Rome, do as the Romanians do." She's still having problems with the English language, as you can tell, but -- things are going well.

What we want to do now is switch to the questions, and the very first question I saw here when I was flipping through was: "Please provide examples of mediation humor and/or jokes." Everybody wants a good joke. And I'll let you steal one I use in a lot of training programs. Let me stand up and do this a little bit, if you don't mind.

The way I set this joke up is -- and it's true. My department has ten people who travel all over the world and do international work, and one of my mediators was sentenced to death. And the death penalty was death by guillotine in this nation. In addition to one of my mediators, two other individuals were going to be put to death the same day: a military officer and a clergyman. And the way this country carried out the death penalty was to allow each individual to say some last words before being put to death.

So on that fateful day, first the military officer stepped forward, proud of his service to his country. Said, "I'm proud of what I've done. I've done nothing wrong. I served my country well. Put me to death." So the executioner led him to the guillotine. The executioner released the blade and the blade stopped twelve inches from his neck. The executioner said, "The All Powerful One has intervened. You may go."

The second individual who stepped to the guillotine, the clergyman, said, "I'm at peace with the All Powerful One. I am prepared to die." So he was led to the guillotine. The executioner released the blade. The blade stops six inches from his neck. The executioner said, "The All Powerful One has once again intervened. You may leave."

Then the FMCS mediator approached the guillotine and said, "You know, I think I can help you fix that thing."

And that's what mediation is all about: stepping in and helping fix even to your own demise. And that's the story I like to tell, and it hits home very well with mediation audiences. It's not a joke -- It's one of those groaners -- but it's a story you're welcome to steal if you want and adapt it for your own world.

John, why don't you grab another question and talk about it.

MR. WAGNER: Okay. We picked these questions up from the luncheon, and one which I think was -- has lots of application. It said,
"What method of ADR is more likely to result in a settlement, A, mediation; B, arbitration; or a combination, med-arb? And then lastly, why would that be?"

Well, I think in essence the question almost answers itself in many respects. It really does depend upon the parties. It really does depend upon the issues and the conflict involved. There's no one right answer or one right process to be implemented in settling a dispute when you pull it off the shelf and say, "All right. Here's your conflict," you pull off and say, "Mediation will absolutely settle this," or med-arb or arbitration. It really does depend upon: What is the outcome that the parties are looking for? What is it that they want as an end result?

Do they want to own the settlement themselves? In that case then mediation is appropriate. They want as much freedom by which to resolve their own dispute and fashion their settlement around their independence and freedom to do so.

However, on the other hand, if they recognize that they want to relinquish the right to continue to negotiate at some point and want an arbitrator to decide for them, then perhaps arbitration is appropriate.

And then on the other hand, the third example is med-arb. Perhaps the parties have fashioned a situation where they want to give it a try. They want to negotiate free from any impediments and they want to see if they can settle it with perhaps the assistance of a third-party neutral, being a mediator, and just in case, as a safety valve, they reach impasse, they're willing to invoke the services of an arbitrator. Now, it need not be someone separate. It could be the same person. However, med-arb, it may be appropriate at that point.

So I think it really does depend upon the parties, the situation, the complexity of the case. That's a real good mediator answer to this question, I think, because I -- I don't say that any one process fits all. Okay?

MR. GIACOLONE: Another question we have up here is, "What should the Asian Pacific region do in the next five years to best promote the growth and application of ADR in the region?"

Well, I don't claim to be an expert in the Asia-Pacific region, but I am in the business of marketing ADR domestically in the United States, and I can tell you what we've done at FMCS and what we do when we're asked to go into international settings and help establish ADR systems, and that is: Educate the potential users of the benefits of ADR.

The first element in any program we're involved in is education and spreading the word of the benefits of ADR. Any time we go into a large group who is very interested in an ADR system, we say, "The first thing we have to do is get with all of your employees or all of the potential customers and do training programs to explain the benefits of ADR, to
explain what ADR in fact is, because there are a lot of different versions of what ADR might be out there."

So we think it's crucial to start establishing a kind of a buy-in before you start delivering training in specific mediation techniques and setting up the system, because there are thousands and thousands of trained mediators, facilitators, arbitrators who in many cases are not getting much work because the culture or the environment wasn't prepared up front to give them the work. The benefits weren't there.

And what we're attempting to do is start very early, in the United States, especially, by exposing the benefits of ADR in our schools. Congress has given us an enormous amount of money to help promote schoolyard dispute resolution, and we think that's a great place to start. And I think the same kind of thing applies internationally. You start with our children. Show them the benefits of dispute resolution, and I think everything else will start to fall in place.

I'm kind of curious about your perspectives on the Asia-Pacific region. What do you think it will take? -- Somebody from an APEC perspective -- to get more interest in ADR in that region?

Well, I guess my answer is the valid answer.

John, want to catch another question?

AUDIENCE MEMBER 1: (Inaudible.) In Thailand now, they are using radio and TV advertising.

MR. GIACOLONE: Wow. That's true.

MR. WAGNER: That's wonderful.

MR. GIACOLONE: And these television ads are focusing on -- would you mind telling us a little bit about that? I think it would be great to hear about that.

AUDIENCE MEMBER 1: We used mass media more to advertise the ADR program. Actually like right now it's unprocessed; it's not finished yet. But we hire experts on public relations to help us promoting the awareness -- I mean to create the awareness among businessmen and also the stakeholders who involved in the cases that must come to the ADR.

We request for help from the government TV channel to broadcast a videotape of the seminar that we organize, and we also hire someone to make a videotape on advertisement, like we intend to interview the customer -- I mean the parties who already been through the ADR process and it come out good, and then we like to get their comments and propose their comments to the -- to other people. And we intend to do it through
radio, as well, and also within that -- only law journal is not enough. We believe that we can publish it in the financial journal or business journal that the businessmen really read it, or newspaper. Not the whole newspapers, but the newspaper that businessmen read it. I think it will be read through there so --

MR. GIACOLONE: It's excellent to use mass media and have the support of the government.

But unfortunately in the United States, what we tend to see -- and this is kind of an interesting twist. Mass media on occasion confuses the public about the distinctions between mediation and arbitration. I can tell you on a number of occasions I've seen on our popular television shows someone identified as a mediator. Matter of fact, I saw an episode sometime ago on Seinfeld, which was a very popular comedy, where one individual was identified as a mediator and he clearly acted as a decision maker-arbitrator, and the general public, that's all they know in many cases about mediation or arbitration. So we're pushing against, a lot of times, mass media and the misperceptions of what we do for a living.

Yes, sir?

MR. BARKAI: Let me follow on that.

There was a campaign in Hawaii to use these kinds of things, and I don't know if you guys have been involved in any such ones. I don't exactly remember what it said, but Bruce might remember or Jerry. They were doing one frame, oh, one and a half foot by two or three ads on buses for public transportation, and it wasn't focused as much on ADR as simply negotiation as a predecessor of that, and probably there was a four-letter word of "talk." "Got a problem with your landlord? Talk. Call the Hawaii State Bar Association."

The HSBA, Hawaii State Bar Association, developed a thirty-second public service announcement video, and the focus was -- I -- which I have a copy of in my office if anybody wants to see it at some time. But a focus of a woman starting to talk. You don't know what she's talking about. And she says, "This is one of the most powerful tools you can use to resolve a business dispute," and it focuses in on a table and says, "A negotiation table. Have a problem? Call the Hawaii State Bar Association." It either said call that but didn't imply lawyers but just said, "Sit down. Talk it out," and I think that was kind of the theme. I think we should probably -- it would be interesting to pull out some of the -- go out to HSBA and pull out some of the -- one, the framed posters and see what they put in again.

MR. GIACOLONE: I think we also need to pat Hawaii on the back for -- I think, if I'm not mistaken, this week has been -- this month is ADR month. Last year at the same time, our director was here, and he spoke on
a local television station about the benefits of ADR. And I can't tell you that -- I don't know of another state that has put together an ADR month, so Hawaii is kind of ahead of the power curve in the United States.

Question?

AUDIENCE MEMBER 2: Not a question, but just perhaps indicating where in America, perhaps we can take this idea of promotion a little too far with our endeavors of advertising.

A number of years ago, about four years ago, a professional organization called SPIDER held a seminar on marketing -- marketing your individual mediation practice, and there was a lady from an advertising agency in Hollywood who had gone through a very contentious divorce for a couple of years and then found her way into mediation, which resolved her problem in a couple of weeks. And so she then began producing some ads which she was willing to go out and sell.

I can describe one that I remember very well where the screen was divided into triangular thirds. On the left was a wife, on the right was a husband, and in the center was about a twelve-year old boy trying to do his homework. And the wife is yelling at the husband about how bad he is and the husband is yelling back at the wife how bad she is and you watch the kid as he tries more and more to do his homework until about twenty seconds into the spot, he takes his pencil, he smashes it down on the desk. The screen goes black and the words come out, "Don't let your child mediate your divorce. Call."

Just wondering whether we sometimes, particularly in our society, can push this a little too far.

MR. GIACOLONE: That's a very interesting point, and I think it -- you know, advertising for any profession in that -- you know, the same kind of argument about attorneys has come up in this nation about some of the ads that have gone out there and the benefits versus the down side of the advertisements.

Yes, sir?

AUDIENCE MEMBER 3: Responding to the request of the chair, I'd like to say a word about what we do in the -- to promote arbitration and ADR in the Pacific area. I -- the (Indistinguishable) yesterday I called attention to some of your experts of -- for the information of somebody who are not particularly informed of our -- the recent change at our organization.

I said that ADR now at my institution means a different thing as it did two years ago. We used the term "ADR" as an abbreviation of "alternative dispute resolution" before, but now it means "amicable dispute resolution." And we divided our staff into two and they said
administratively now there are two divisions. One is an arbitration. The other is ADR; that is mediation, conciliation, and all other dispute resolution mechanism other than arbitration.

Now, we have done very little in ADR in the -- in this new meaning, and eight years ago, when our institution was established, a few -- first to set -- ten cases or twelve cases, all mediation cases, and very little arbitration. But in the course of past eight years, it has become reversed, and last year we received nearly 600 cases of arbitration, application for arbitration, but four or five cases of mediation -- application for mediation and most of which were fairly soon afterwards withdrawn.

Now, in order to promote arbitration, what we do is to send the people to different conferences in Pacific Rim countries, that is, meetings of ADR or Chamber of Commerce. Or some were governmental associations.

And one example of which was a meeting at Bangladesh to which I went myself and to explain the international arbitration to the audience consisted of about 300 lawyers and businessmen and judges, and after that there were separate small meetings. There are so many questions from lawyers and governmental officials, and I was very happy to respond to those questions. So that was the international conference.

But we also have a number of agreements with arbitration institutions in Pacific countries where -- which provide for reciprocal offer of hearing rooms when they are necessary for arbitration proceedings and also for exchange of publications. And we send our quarterly bulletin and other materials to them, and we receive the newsletters and others. And also we quite welcome visits from -- of arbitrators and mediators from Pacific countries.

And that's the way we trying to keep in touch with arbitrators and mediators and to promote arbitration. Thank you.

MR. GIACOLONE: Thank you. Michael?

AUDIENCE MEMBER 4: This year is my thirty-year anniversary of being trained in mediation and ADR techniques and starting to work in the field, but even as recently as -- it was eighteen years ago, we still had people calling and asking when they -- when we had a mediation center, they'd call and ask for mediation services and was this the right place to call to learn how to meditate, and a lot of people didn't know the difference in the U.S.

I would say that today, the U.S. is much further along, but still a large number of people, the -- I would say the majority of the public in the United States still does not really understand what mediation is, much less what a mediator does. So we still have a lot more work to do here in this country, and I think that in this country we can probably learn from
Thailand and learn from Pacific Rim nations about what kind of things you might be doing that might be successful that we can do here, too.

The one thing that I've found to be quite successful is: I started to educate and market mediation, and I started doing that actively probably in about the mid 1980's. Was -- two things seemed to be very important: the comfort level of people who were stakeholders and information or -- information about interests for those who had to make a decision.

Now, if you, as a practitioner in a field related to dispute resolution, were concerned that engaging in mediation might not be in your best interest -- let's say you were a lawyer who felt like this might cause you to start losing money in your practice if your clients start to mediate resolutions rather than litigate solutions -- then you're not going to be a very strong proponent. And if you're not comfortable in the environment of mediation but you're a really comfortable litigator because you know those skills, you know those tools, then you're not going to be a very strong proponent of mediation.

So we found as -- and just using lawyers and judges as an example. When we helped increase their comfort level engaging in the process and when we helped them understand why it was in their best interest, why it really served them well, too, to support mediation, it made a tremendous difference and helped create a ground swell of support as opposed to very effective oppositional behavior.

So education about interests and comfort level we found to be very, very important and successful.

AUDIENCE MEMBER 5: Per Mr. Kennedy-Grant from New Zealand.

I know there are differences between countries. What I wanted to offer was a brief summary of what we did in New Zealand. Now, it may or may not be translatable, but if it is, it may be helpful.

In the late 80's, early 90's a group of us who had become convinced of the importance of adding to the litigation and arbitration streams of dispute resolution the option of -- principally of mediation, but more broadly of ADR as a whole, embarked upon a program -- And it was an entirely self-motivated, self-funded program -- to sell the idea of the benefits of mediation, of ADR, to the business community, which we did essentially by trying to encourage them -- by doing two things.

One, trying to encourage them to buy into the CDR dispute resolution undertaking concept, which involved businesses agreeing that before they went to litigation or arbitration in the event of having a dispute, they would at least explore the possibility of dealing with the dispute in a more amicable manner. They didn't bind themselves to it, but they undertook to consider it. That was accompanied, of course, with an attempt to demonstrate to them the benefits.
And then we also held seminars through the country to which selected business people and selected lawyers were invited. That really came to a head in 1991, when we brought Christopher Moore and Mary Margaret Golden of CDR Associates out from Denver to provide training, and that really was -- this is not my assessment; this is an assessment I have been given by others who were not committed, as I was, to it -- that that was in fact a turning point in the acceptance of -- in the growth, rather than the acceptance, of mediation in New Zealand. Since then it's been a matter of increasing use, increasing familiarity.

I should mention that there was entirely separately from that the activities of another organization, LEADR, which -- when originally constituted, that acronym stood for Lawyers Engaged in Alternative Dispute Resolution. It's an Australian organization which concentrated on the lawyers, a totally different approach, but of course equally -- equally valid, equally valuable. They have now, I think, appreciated that wisdom is not confined to lawyers and human understanding and ability as mediators is not confined to lawyers, so they've relabeled themselves as Leading Edge ADR but keeping the same acronym.

At the end of the day, certainly in the New Zealand experience -- whether it's translatable to ASEAN and other Asian Pacific countries I don't know. At the end of the day, in New Zealand, at least, it was a question of what individuals did who decided something had to be done and went out and did it.

MR. GIACOLONE: Very interesting points.

Another experience that we've seen in connection with the establishment of programs, programs that were well publicized -- Matter of fact, there are a few individuals in this room who spoke at a conference in Panama along with me, pretty much kicking off the establishment of their commercial mediation program -- was that they had everything there. They did the publicity. They did all of the appropriate groundwork to get businesses to accept the concept of mediation.

But then the next step is: You have to have qualified, neutral mediators who deliver a good, solid service. All you need is one or two disasters, one or two bad apples in that mediation roster, and all of a sudden, all of that work goes down the tubes. And I've seen that happen in a number of nations: where everything was put together properly -- They did all their hard work up front -- but not enough attention was focused on ethics for mediators, the rules for mediators on how they're to conduct themselves.

And I think a lot of folks kind of lose that part of the equation. They forget that that is so important. They just assume that's all going to fall in place. And just a warning to the wise out there that -- make sure you don't sell a program and then you can't deliver the goods with good solid
mediators who are following ethical standards and doing their job properly.

MR. WAGNER: Yes?

AUDIENCE MEMBER 6: Yarko Sochynsky, mediator-arbitrator from the San Francisco Bay area. I've practiced law for thirty years and now I'm a full-time mediator and arbitrator, and so I've seen it from both sides of the aisle.

And I think that there are a couple of impediments to the growth of mediation. A lot of it has been overcome in my community, but I think there's a lot of work that needs to be done in other parts of our country and also around the world.

The biggest impediment that I've seen in my experience is that lawyers are sometimes afraid of mediation, and they are in many cases the gatekeepers that can drive the decision of whether or not to mediate a dispute.

And one of the reasons that they're afraid of it is that lawyers are trained and taught to have -- to try to exert as much control as they can over the process and over the outcome, and they are trained in the rules of procedure and mastering the laws of evidence and learning how to present a case and to be an advocate. It's very difficult for someone who has built their career around that to take off that hat and to put on a negotiating hat and suddenly become a peacemaker.

Also mediation, as you may have seen, doesn't have many rules, and so lawyers, I think, sometimes feel uncomfortable in an environment where there are no rules, and they get the feeling that they don't have control over the process. The paradox, however, is that in litigation and in arbitration, a lawyer really doesn't have any control over the outcome. The control lies in the hands of somebody else who will decide whether you win or lose. In mediation, however, the client and the lawyer actually have full control over the outcome because they don't have to agree to a settlement if they don't feel comfortable doing so. So control is an important issue.

The other issue is one of educating the client. I think there are things that clients can do to encourage mediation, and one of those -- one of those aspects is education and understanding that mediation is actually a much better business investment for business people than is litigation.

In litigation you can spend a lot of money and keep spending money but not have anything at the end of the day. Whereas with mediation, you make a very small investment of money -- A one-day, two-day mediation doesn't cost all that much -- but the rate of return is very high because most mediations, as those of us who mediate cases know, do result in a settlement, and the result is a big payoff in saved money.
Also business people want to manage their risk. They want to know what their financial statement will look like two or three quarters from now and they don't like surprises, and mediation is a way of managing that risk and having some control over what your financial statement will look like three quarters from now, and so those are some points that I wanted to make.

But the most important one is -- in my experience is the fever of mediation. I think those of us who have been involved in this business and who have successfully been through mediations, either as a mediator or as a lawyer representing a client, know that at the end of a mediation, there is a feeling -- a very good feeling, usually, because the matter has been resolved and it's behind you and the problem has been solved. And I think we need to train lawyers to help guide their clients to that point so that they will have that feeling at the end.

MR. WAGNER: Thank you, Yarko.

Any other contributions before we go to the next question that was raised?

Okay. This is an interesting one. It's a short question, but it's loaded with generalities in many ways. I'd like to see if someone wouldn't mind identifying themselves as having asked this question because it really does depend. "To what extent is apology an important part of commercial mediation?"

Okay.

MR. BARKAI: (Inaudible) Apology is just one of the issues that's been written about a lot in American mediation these days, and there's all sorts of models for it. It kind of goes against some of the rules of evidence and there's some legislation, I believe in California, about apology and how to exclude apologies.

And I'm just curious. To what extent are people using it as a trade-off in other kinds of mediations? I know Bruce might have some ideas in terms of our, kind of, noncommercial mediation. But particularly, is it appearing at all in this? And there's a number of issues related to developing topics in the field of mediation and kind of moving the research area back to the practice or see if they're interplaying at all so --

MR. WAGNER: Now -- in terms of apologies between the parties? Among the parties? Because there's --

MR. BARKAI: Yeah.

MR. WAGNER: -- a number of ways in which apology does play an important role in mediation.
MR. BARKAI: Right. And maybe we could even rename that to say non-financial trade-offs. But apology is the one that would seem to be -- seem to have some inherent interest and appeal to people from non-American countries.

MR. WAGNER: One of the hallmarks of good mediation or a good ADR process is trust. We've talked about that for a few days now in terms of the parties trusting one another with issues which at times can really expose them and their interests and positions in a negotiations to something where they're taking a leap of faith with each other as they expose themselves in a negotiations. And at times many of these leaps of faith they're taking can brush up against this issue of offending.

And it -- in my eyes, in my experience, I think apology plays a very strong role in developing this trust among parties, particularly in multi-party negotiations where someone has offended a number of parties in the talks. The talks aren't going to go anywhere until after a caucus, it's been revealed that, "Oh, that's the interpretation that my comment or my proposal has raised?" And therefore, "I am willing to apologize." That goes a long way in sort of leveling the feelings and creating a calm and then perhaps the beginnings of the trust again in which the parties are willing to freely negotiate. So that's been my experience.

Now, I've also taken another look at this question. This question also applies to the mediator or the third party, in which case I can give you an example. I can recall a mediation one time in which I was mediating -- and of course the mediator is privy to a lot of information before, of course, it's necessarily released to other parties in which to bring them together.

I was in a separate caucus and I started to relay some information to one of the parties. Well, the attorney representing that party, I could see a very distraught look on his face. He started to get red in color. I could see he was getting angry. And I was right in the midst of relating this information. And I knew -- instinctively I knew something was amiss, something wasn't going correctly. And I said, "Oh, boy. What do I do?" I finished my little presentation.

And as soon as I paused, he launched into an attack on myself, and he began to berate me, as the mediator, for either -- and I can't -- this has been a while, but it -- berating me for some reason about releasing some information. Now, he's taking a while to do this. It may be going on for fifteen, twenty minutes, as I recall. It seemed like a year, but it was some time.

And you make a decision, as a third-party neutral. A, "Have I been totally clueless about what I just said? Do I deserve this berating on the part of the representative of this particular party?" Because you're
clueless. You don't know at this point. You have a number of options as a mediator, as a third party, to perhaps defend yourself. You can start to pick the flaws in that representative's statements as he berates you.

And so each one of us -- now, I'm not just saying that this is the answer. I'm just saying each one of us makes a decision, and if you've been there, you understand what I'm saying. You make a decision about how to handle this situation and still represent to all the parties involved in this conflict your continued usefulness. If you take it personally and you defend yourself to such a degree that you say, "No, you're wrong," you could in effect terminate your involvement in that mediation altogether. And then, of course, there are other options.

But the one I remember choosing was: I apologized. And going to your question, I apologized to him and his committee, and I said, "Perhaps it was a misunderstanding of the information I had received prior. It wasn't my intent to breach a confidence, but let's go on from here."

So I'll finish the story. And the end of the story was that the mediation and negotiations ended in success that night, and at the end of the evening, the attorney came to see me. He closed the door to my office and said, "Thank you very much." And it wasn't necessarily the apology. It was the fact that he didn't share the information with his particular team, his parties. He had been remiss in doing his work, but he understood that I could take the berating and the scolding, if you will, at the time and recover, and so I was able to continue to be of use to the parties.

So your question was a good one. I think apology continues to be a very key factor. Particularly, I think, it implies something else. It also applies to hurt feelings and pain that you may have or any one of us may cause either as a negotiator or as a third party, and I think a heartfelt apology is always very good.

MR. GIACOLONE: Very interesting question. A question that I had to deal with, to some degree, when the director of our agency asked me to lead our ADR and international department, and this question is: "How does one break into international ADR? How do you go about making a living at this? Well, that's really the question I was posed with. I had to basically deal with a department that had to be funded by outside sources, so we had to find a way to deal with working in the international arena. Good question.

Well, let me give you some history of what we went through. We had to decide what was international ADR and what part of international ADR we wanted to be involved in. There are three distinct categories that we got involved in.

One was international peace building. That's an international ADR function. That world is a pretty interesting world, and there are opportunities there. The way to get into that world is to deal with some of
the associations that have been created in the United States to deal with that. One major group to which we are a charter member is called ACRN, Applied Conflict Resolution Network. And they're on the Web -- they have their own Web site with the same name dot com. And what they do is -- it's a group of nongovernmental agencies all interested in international peace building that meet on a regular basis and share information about opportunities overseas to establish capacity building internationally.

Now, most of that work tends to be capacity building, training, not direct mediation. That's also the focus of a lot of what we do. We don't go cross borders and mediate. What we tend to do is: We go cross borders, work with clients who are interested in establishing their own capacity to do that work, and help them get there because we think that's the best way for nations to deal with their peace-building initiatives, is doing it from within.

The other area is the labor-relations world. There's a lot of work in the labor relations world internationally in dispute resolution. There's an awful lot of work. And the history in labor relations dispute resolution has been out there a lot longer than a lot of the peace-building initiatives and the commercial initiatives. Most of that work has been funded by ILO, and connections with the International Labor Organization help you work in that world. They continuously put out bids for work in that world, and you just need to get on the ILO Web site to see what's going on in that world.

The commercial world is all over the place. The commercial world is relatively new. There was a related question about commercial mediation and "How do you break into commercial mediation internationally, and is it its own unique business culture?" And I'd have to say yes, it is a unique culture. It's a unique world. The ABA in this nation plays a significant role and claims to have a number of certified mediators who do an awful lot of international work. Do you want to be affiliated with the ABA? That's another option to kind of break into the business if you're interested in getting into the business internationally. But there's not a lot of work in that world cross borders. Local people tend to handle most of that work.

So hopefully that helped whoever was interested in that question.

MR. WAGNER: Any other questions? Yes. Arko?

AUDIENCE MEMBER 6: -- another comment, and I guess I'm going to pose it as a challenge to the group. Can anyone tell me a reason why, if you have a business, you should not have a mediation provision in your contract that required the parties to mediate before anyone proceeded with a lawsuit?
ANOTHER AUDIENCE MEMBER: (Inaudible.)

AUDIENCE MEMBER 6: Okay. But how about contracts between two businesses? Any reason why you shouldn't?
My point is that it's really a very small investment to make sure your lawyer puts in a mediation clause in a contract either pre-arbitration or pre-going to court. It just gives the parties an opportunity to come together. Neither side has to convey any weakness. And they -- it requires them to come together and at least try to resolve it with the help of a mediator, and more often than not, that does result in a settlement.

MR. GIACOLONE: There was a question here that asked that, Would it be possible for each country representative to summarize in three minutes or less the future of ADR in his or her respective country, and I'm kind of interested in that myself. Would some of the APEC representatives maybe speak to that topic?
Carlos, I'm staring at you. And I want to generate, you know, discussion kind of around the room on this if possible. Could you give us the perspective on where Mexico is in ADR, where you think the future is there, and then maybe we'll move to another APEC nation.

MR. RODRIGUEZ: Well, my name is Carlos Rodriguez from Mexico.
I will say that what is happening in Mexico is that arbitration is growing very fast but not mediation. That is a problem. And what I think -- the reason is this, that because it's a matter of culture. It's a non-binding decision, so that -- i think that we prefer to go either to arbitration or litigation instead of going to -- to mediation. But I am very optimistic, and I think that mediation is going to be used, as well, in the future. I think that we are like the big brother in Latin America in the sense that we have used arbitration a lot during the last years, and in the future it looks to be much better.

MR. GIACOLONE: Thank you.
Who would like to go next representing their nation to talk about the future of ADR? Is there a representative from Indonesia who would be interested in doing that? He's gone.

MR. WAGNER: He's gone.

AUDIENCE MEMBER: (Inaudible).

MR. GIACOLONE: Please.
AUDIENCE MEMBER 7: So I'm from the Philippines. The impression I get is: We have more of mediation and conciliation than arbitration or litigation, although we're still a very litigious society. But when it comes to family businesses, family corporation disputes, as well as anything related to family matters, we have the barangay justice system so even criminal cases are mediated and conciliated at that level, so that it's gaining ground.

There are also more people who are more comfortable with alternative dispute resolution mechanism. There was a recent study that showed that teachers are seen as the most -- are the better mediators, for example, so we see more of that in the next few -- the next few years.

But the other thing is: There seems to be a trend for decriminalizing and de -- reducing things that are in the law and try to leave more of that for negotiation, for example.

MR. GIACOLONE: Thank you.

AUDIENCE MEMBER 7: What I'd like to add, though, is: We're seeing the beginnings of a lot of -- well, not a lot, of disputes in trade between governments. So, like, the Philippines was -- there was a U.S. versus Philippines case on pork and poultry, but there was also a Philippines versus Australia case on fruits. We're seeing that, and we're going all the way -- from negotiation all the way to WTO mechanisms, so the business sector is bothered by that, and that's why the business sector that does cross border work is really more interested in ADR across borders.

MR. GIACOLONE: It's really interesting. We had an opportunity when we spent some time in Brussels on a trip to Europe to speak with some representatives from the EU about dispute resolution, and the systems of dispute resolution in the EU tend to focus on arbitration. There's not a lot of mediation in the world -- in their world. And we talked about the possibility of mediation and there was keen interest, but not a lot of support with -- between all of the EU nations.

We have attempted -- you know, again, we're not shameless salesmen for mediation, but we think, you know, the concept of mediation, getting parties together and getting them to see the benefits of both sides reaching a negotiated settlement as opposed to a dictated settlement and arbitration as being a positive way of doing business.

We kind of see that as our -- as part of our mission with the benefit of what we've seen over the years and the positives associated with some of the ugliest monetary battles in the United States and the labor relations arena, where literally billions of dollars have been at stake between labor
and management. And disputes that literally could bring our nation to its knees have been settled amicably by using the mediation model that we use in the labor relations world. And we're doing all we can to kind of spread the good word.

We apparently have to take a short digital camera break, about thirty seconds, to put a new tape in.

(TAPE BREAK).

AUDIENCE MEMBER: -- people would otherwise have in their local courts. If they'd go to their local court, maybe they'd get a better deal than they would being silenced and not making a fuss through the ADR process. So it's a tough question, and I think it's an important one for the movement of -- you know, the ADR movement to be able to answer in terms of getting support generally for what we're doing.

MR. GIACOLONE: Very interesting question. I mean, what we -- as an organization, we're all about supporting the concept of collective bargaining, for example, in the United States, the balance of power between labor and management and the collective negotiation world.

We have been approached by organizations to help set up ADR systems in the non-unionized environment solely for the reason of keeping unions out of that environment, kind of the dark side, as we see it, in the collective bargaining equation. And we have to be cautious because half of our customers tend to come from the union side of the equation, the other half from the company side of the equation, so we tend to not do that work because of that very concern.

Our nation right now is going through a major battle in the employment law world on enforced arbitration agreements in connection with employment. An employee is signing on to a company saying, "I will, if I'm mistreated or I perceive to be mistreated in my firing, subject my case to binding arbitration," that tends to be more controlled by the company -- by the organization than by the individual, and there are some serious concerns, both from the National Academy of Arbitrators in handling those cases, to the courts in whether or not that's a valid, fair dispute resolution process.

Michael? Would you like to add to that?

AUDIENCE MEMBER 4: Let me you tell you two very quick real-life stories.

Story number one. A very large multi-national oil and chemical company at its largest refinery in the world had a labor dispute that lasted over forty years, and every year this dispute would rise up again, they'd go to arbitration, they would get a judgment from the arbitrator, and one part
or the other would disagree with the outcome and file all over again. And the arbitrator's decisions would seesaw back and forth year after year. Forty years of unresolved disputes through adjudication.

They contacted us and asked if we could help. Among many other things, we offered to mediate this dispute. It took about two to three months, not every day, but we were working on it for over two to three months and doing many other things in the workplace. But after two to three months, the parties came to a mutually agreeable solution to that issue and finally put it to rest through mediation, whereas an adjudicated process never was able to resolve it. And that refinery was at risk of being closed by the employer because of how bad the labor relationship got, and thousands of people would have been put out of work had they not resolved that single dispute that was tearing that place apart. So it's an example of where mediation actually empowered people and retained an effective organized work force whereas otherwise they would have shuttered that place.

Quick story number two. There was -- most of our mediation work is for private sector employers and unions, but we also do a lot of work with government agencies and the unions that represent those U.S. government agency employees, and this second story is about that.

Year after year this large government agency and this fairly large employees' union would have a dispute over overtime, and it was a disagreement about whether the statutes of the U.S. that require a certain level of pay for overtime were applied to these government employees. And year after year they would go to a mediator and settle their dispute only to have it come up again the year after because they never got a final decision about whether the statute really applied or not. And both parties thought they were doing the right thing because they were settling and they were working it out among each other.

But you know what? What it was doing was propagating additional disputes. And finally the mediator said, "You know what? I think you need to go to somebody else next year," because the mediator, being responsible and ethical, realized that they needed an adjudication to resolve that dispute.

In fact, they went to an arbitrator. The arbitrator ruled against the employer, and the employees got millions of dollars in back pay for, like, an eight-year back pay period. But you know what? The employer later told us that it served the employer's interest to have that adjudication because it finally put to rest that bitter, growing dispute.

I think the moral from these two stories is: It's not the tool that determines the value. It's whether wise people exercise wise judgment applying the right tool to the right job. And there's no inherent value in one process over another, but it's how you use them and when.
MR. WAGNER: There's an interesting question here that was raised. It says -- it really goes to our audience. "Has anyone attempted to mediate a dispute using two different languages? That is, one mediator speaks Thai to the Thai parties" -- let's say it's in Thailand -- "and the English mediator speaks to an Australian company." All right? So there we have a Thai and an English speaking, so it looks like it's co-mediation. "And what dangers/difficulty would you encounter?"

I have not been a party to dual languages, but I think someone has. So Chuck?

MR. CRUMPTON: I want to thank whoever gave me that question. What a great lead-in.

Actually, about six weeks ago I did my first bilingual mediation, co-mediation, a really tragic situation. A Vietnamese family here in Hawaii, very serious health problem for the son, who is a late teenager, medevac'd over to the mainland. In the hospital, in the surgery an unfortunate error was made that resulted in -- his heart stopped, no blood to the brain. That boy will be in a coma for the rest of his life. He will never come out of that.

The family has left Hawaii and moved to the place on the mainland to be close to him. They've given up everything: their work, their family, their friends here. And in that particular location, some of the laws relating to that kind of claim are different than other states and they're more limited.

So the family, originally from Vietnam, had not a good understanding of the English language, not a good understanding of the American legal system. They had some things that they'd read and thought about the American legal system that might have worked in other locations but not in that state.

And when we were contacted, they had been through a court settlement conference with a very experienced judge. They had been through a mediation with a very experienced mediator. And the parties' attorneys said, "We're not getting through to the family. Something is not working here. They're not moving. There's no back and forth. There's no exchange." And so they thought, "Let's find people who can communicate with the family in Vietnamese."

So my partner, who is Vietnamese, and I -- And I speak, read, and write Vietnamese -- went to the mainland and met with the family and the attorneys. And in that all-day session, we discovered -- and I was using both languages, my partner was using both languages as we went back and forth between the family and their cousins, who were helping, and the attorneys, who only spoke English.

We discovered that there was something really, really difficult for that family, because in order to try to settle that case, that would conclude
something that to them was -- that was inconsistent with their dedication to the life of their son; that even though he can't hear, he can't see, he can't speak, he can't -- scientifically he does not have many of the characteristics of life. But for that family, they have given up everything to maintain their connection to him. They spend every minute of every day with him, and their whole life is devoted to maintaining his connection to life. They are it for him. That is their role as his parents. That is their duty, that is their life. It's in their spirit. They can't do something inconsistent with that.

So only when we got to the point where we found a way to approach it that was designing something to help the family in the ways that he would want to help the family if he had been disabled in an accident, then we began to be able to approach it in a way that they could start to actually consider as something that they can consider as a future remedy that would be consistent with his devotion, his dedication to the family and to them. Would have never happened if we couldn't have done it in their language with them face to face.

And I would really, really strongly encourage in any situation where more than one language and culture are involved to seriously consider co-mediation of not necessarily even as little as two. Maybe even more than two mediators. I've done a bunch of co-mediation, and I really advocate them. They are used more extensively in other countries.

But remember: All we're really doing in mediation -- we're trying to find ways to understand how people see their choices because how they see them determines how they make them. And if we can assist in any way to broaden the way that they see those choices so that the way they make them may enable them to get past that dispute and back to the business of their lives, that's the best thing we can be part of. We're just part of a shared learning experience. That's all we're really doing. And if we can bring the language and cultural experience to that sharing and if it assists in that, that, too, is our responsibility, I think.

So that's my experience.

MR. GIACOLONE: Thank you, Chuck.

MR. CRUMPTON: The case did. Interestingly, we spent a full day. We didn't get there because there was no way that those people in one day were going to make that transition; they had been fighting that case for two years. We continued it, and finally, six weeks later, just about three or four days ago, the settlement was reached. Patience is an important virtue in mediation, as well.

MR. GIACOLONE: Very good.

Just to add just a very little bit on that topic. We do an awful lot of
work with translation overseas, mostly in training programs, and just another word to the wise out there. You have to be very cautious in who you select to do your interpretation work for you. One of the things you have to be very clear about is their knowledge of the subject area. There are terms in every world, be it the labor world, the commercial dispute world, the peace building world, that have very different meanings in different language. And the selection of your interpreter, if you're going to do a training program or even mediate, could make all the difference in the world because a faux pas could really truly cost you.

Also expressions we tend to use in our own native tongue don't always translate well internationally. You need to be very cautious in how you phrase things and say things.

Just to give you a quick example, we did a training program in an African nation that spoke English, but one of the trainers was -- one of my staff was using the term, "You need to think outside of the box," something Pat was talking about the other day. And this group from Nigeria came up to us after -- And they had this real perplexed look on their face the entire time -- and they said, "Where is this box and what are you talking about getting out of it?" They did not have a clue in their cultural context what this "working outside the box" is. And we all tend to get into our own comfort, our own kind of generalizations, our own -- use our own terms and our own expressions. You need to be very cautious working in an international setting that way. Again, just a short word to the wise on that.

Yeah. Having a number of interpreters also helps to help you through the process just in case there are some questions about the interpretation.

Another thing is: Work with them ahead of time. Make sure they know the topic. Make sure they know, you know, what you're going to be talking about. Give them some time to prepare.

Yes, sir? And then we --

AUDIENCE MEMBER 8: With regard to the interpreters, is it necessary for them to be taking their oath officially, to be sworn?

MR. GIACOLONE: To be sworn in?

AUDIENCE MEMBER: Yeah. Is it necessary?

MR. GIACOLONE: In an arbitration setting?

AUDIENCE MEMBER: In an arbitration setup or even in mediation.
MR. GIACOLONE: In mediation we -- it would be rare. I've never seen a circumstance where we swear people in during mediation.

In arbitration, in the labor arbitration world, the world we're involved in, most mediators will have -- I mean arbitrators will have the witnesses either affirm or swear to tell the truth, the whole truth, and nothing but the truth. So in practice that's what we see in the United States.

Is it truly necessary? I'm not sure in what context it would -- in labor mediation there is no process for anyone to be sent to jail for violating, you know, the principle of telling the truth. That's the down side. Yeah. I think it's better for somebody to raise their hand and say, "I'm going to tell the truth and I'm here to tell the truth and -- and I'm here because I want to be here to tell the truth." I mean, in all honesty it's -- you know, your value system -- you know, you shouldn't even have to be able to -- to swear that you're going to tell the truth if you're voluntarily participating in an exercise like mediation.

Yes, sir?

AUDIENCE MEMBER 3: I myself have done no case of pure conciliation or mediation, but I have done a number of hybrid cases in which -- partly causes of mediation.

Now, in the -- years ago, in my first such hybrid case, involving British and French, we were fortunate to have an excellent interpreter. Since we continue from morning until night, we had two interpreters and they took turns, and they were very fine interpreters indeed, but they are not familiar with the business practice or some legal aspects of French law or of British law.

So most of the time the statements of the disputing parties are translated by the professional interpreters — I was listening to them. But when it came to a rather delicate question of business practice or law, if I felt that I should intervene or when the parties asked for help, I -- well, spoke to the French parties in French and explaining the British custom and British law to them. And then I did the same for French party. And then when -- when I spoke only in French, then after that I gave a quick, brief rundown what I have said to the British party and I did the same for the French, and that went very well. So that's just a -- a piece of my experience.

MR. GIACOLONE: Excellent. I wish we were all as talented in you in the ability to learn languages. I've done my struggling in learning Spanish and a number of a languages when we work internationally. But that's wonderful. Obviously the most valuable mediators in the future -- you really want to work, well? -- become fluent in five languages and I guarantee you you'll be employed in the future.

Another question. "Something was mentioned on the first day about
on-line mediation, conciliation, arbitration in the E Bay case. Can we have more details about this experience? Has anyone else experienced something similar? What is the future of this mode of mediation/arbitration?"

I think it's only appropriate to look over at Michael, who is our technology czar, to maybe kick off this discussion and see if anyone else has also had experience in this world.

Michael?

AUDIENCE MEMBER 4: I think that it's important to distinguish the E Bay type experience from that which many of you might be engaged in. As most of you know, E Bay is a Web site through which people can buy and sell different goods and services, and as you might imagine, plenty of disputes can come up when they do a large volume of business.

There is a company named Square Trade that I believe is -- maybe still doing their dispute resolution? Are they? They're based out of the San Francisco Bay area, and I've had a chance to meet and talk with the president of the company at a conference in the Hague, I believe it was, when we were talking about cross border disputes at a conference there.

And they have a very interesting business, but it's a very narrow scope type of process that they refer to as ODR, or on-line dispute resolution. Its primary purpose is to resolve monetary disputes. It does not actually involve, in most cases, any kind of human contact between people, and oftentimes it's sort of a self-help process.

So there isn't really a trained neutral who is involved, as I understand, in most of their dispute resolution work so it's sort of a stretch to call it a mediated process. I think on-line dispute resolution may be -- or ODR may be an acronym that might be appropriate for them to be using, but it's sure a far cry from some of the other processes that we might know as ODR, or on-line dispute resolution.

Some of you who were in the workshop yesterday that I did saw some of the tools that you can use and that we are using today for on-line dispute resolution. We use some of these technology tools face to face in work that's purely on-line and from remote locations, and it's very distinguishable from what someone might be experiencing through E Bay, and so, I cringe every once in a while when even we refer to it as ODR, even though it is. It is an on-line dispute resolution set of techniques, methods, and tools. Yet it's very much based on the kind of human facilitated, mediated type processes that we do face to face simply conquering in more effective ways the barriers of time and space.

So I think it's very important as we examine this whole concept of ODR and where it's going what the tools are that people are bringing to bear, what the types of disputes are that people are trying to resolve. And just like I was expressing before about mediation versus arbitration versus
other tools, we need to bring to bear the right tool for the right job.

As you had said earlier, there are sometimes better tools than even any ADR process for some types of disputes, and as we examine the range of tools in ODR, everything from self-help at one end to something as complex as audio video data communication with real live humans at all points in the process and everything in between those two ends of the spectrum, it's important to apply the right tool to the right job.

I think Square Trade is the right thing for certain types of disputes. And the kind of tools that we can bring to bear are certainly more appropriate for some of the more complex, multi-party, ongoing relationship business relationship type of disputes.

MR. BARKAI: I haven't done any of this work, but I did spend some time -- and I don't know if anybody has in this room? Richard? Have you? No. Cynthia Alm, who is a lawyer in Hawaii, is one of the people who is doing this, and I was -- I talked to her over lunch so I'm going to give you a little bit of what I had learned from her.

She's an experienced mediator. She does a lot of work when she does an ODR mediation. She takes the parties' statements, she works with them, she reframes them, she sends them back, she edits them. From what I understand, it takes her an incredible amount of time to do each one, and she has done at least one that's international between somebody in Germany and somebody in the United States, but a very -- a very complex process.

And I think that's just important to -- to think about. I personally have not been interested in doing it. I think it's so time consuming that I'm not -- I am reluctant to get more involved. More than ten years ago, I used to have my students negotiate with students both in England at one point and Australia online, and just the time of sending messages back and forth and the missing parts of that, to build up the relationship, which we all think is important, at least part of that face-to-face thing just took forever, and so we dropped that, although some other schools and universities are still doing that.

We talked about ADR month. There is a cyber ADR week that the University of Massachusetts has. They had it recently. They have it at the end of February -- I think about the end of February. And they were focused particularly on ODR this year. Their sites are probably still up. I never went back into one of the many rooms that they had, but what they were trying to do is to get several ODR processes going where those of us who were interested could kind of tune back in and have an opportunity to look at the transcripts.

So for anybody who is interested in that, there's a lot of it out there to -- there's information, there's articles, there's books that are coming out now. It may be the future -- or it may be part of the future, but I'm unclear
how much.

MR. GIACOLONE: Yes?

AUDIENCE MEMBER: I just happened to do a research article on this earlier this year, and if anybody would like to read it, it's on Mediate.com, and so -- but I think that it is just a tool. It's one tool that can be used in mediation, and it lends itself to international mediation simply because of the time zone situation. You have people that are having -- that are in very disparate time zones that don't want to come to a neutral place or if -- for some reason, then it's a good tool to try for something of that type, a case of that type.

I think it's also important to know that it was used as a tool in the MicroSoft case. The first mediator, Judge Richard Posner, did almost all of his mediation ODR. He had one central meeting in Chicago at the very beginning, but then the whole rest of his four months on the case was spent on line between the parties. So it has been used in very large situations.

MR. GIACOLONE: Thank you.

MR. BARKAI: This reminds me. I don't know how much the -- anybody is doing documents-only arbitration. I'm -- I've never been involved in one, but when I was in Hong Kong, I remember talking to people there, particularly about shipping disputes, and the idea that people would -- because of disputes on how to handle goods that were currently on ships and things had to be decided quickly, that they -- what they could do was fax the documents, and my understanding is -- typically in the United States we seldom do documents-only type arbitrations. But they would fax the documents to an arbitrator who could make a decision about it, and it was not long after that, that I thought I'd try the e-mail stuff, which I didn't find working.

But Peter, can you say anything about that, about --

AUDIENCE MEMBER 9: Well, I have done some documents-only arbitration, but as John says, the majority of international arbitrations that are done on documents only are in shipping. I think probably eighty percent of the shipping arbitrations are done on documents only, and in most of these cases, there's very little oral evidence possible. They're to do with interpretation of the contracts rather than any real dispute about the facts. Whether a berth was ready at a particular time depends on certain rules and things like that. And they are normally handled simply by each party making its submission and the arbitrator issuing an award.

The other area in international arbitration, of course, that is quite
important -- And perhaps is something of an answer to the question about when mediation wouldn't be appropriate -- is that a lot of international arbitrations are debt collection exercises. Parties simply haven't paid and in many cases want to pay, but there may be insurance in place against them not paying, and until they have an award, they can't collect on that insurance. So the fact that they -- the debtor is doing nothing makes it virtually impossible to hold a hearing, and there may be very little point in holding a hearing, and usually the parties will not object to not holding a hearing because the debtor doesn't do anything and the claimant doesn't want the expense of a hearing, and so that kind of arbitration is frequently conducted effectively on documents only, and that's the ones I've done most of. So there are cases being done internationally where the parties never meet.

MR. GIACOLONE: Michael?

AUDIENCE MEMBER 4: In a large Midwestern U.S. city, there was an international labor union that had never before used FMCS, and in fact, it had been so long that our Chicago office -- that's a large Midwestern city -- concluded that they probably never would.

However, last year the -- this large multinational employer and a large international union discovered that we have these set of electronic tools called tags, and they decided that they now wanted to use us. And part of it is because the chief negotiator for the union was based in New York City and the chief negotiator for the employer was based out in the West Coast, and they'd otherwise have to spend virtually every week for the next few months in Chicago, and it wasn't really a good time of year to be in Chicago and they both had busy practices, a lot of other work.

They had some difficult situations going on in that local workplace that really caused the chief representatives of both parties to say, "You know what? We may be better off not being face to face. We may preserve our relationship more effectively if we don't encounter each other as much, at least at this negotiating table. And we can rebuild our relationship more effectively when we're not trying to negotiate a contract."

So they started off meeting face to face using some of our technology tools, using some of the tags tools. And then they spent the next couple weeks continuing to negotiate their agreement but doing it remotely with the chief negotiator for the company at his office in California, the chief negotiator for the union at his office in New York, the bargaining team for the employer at the employer's location in Chicago, the bargaining team for the union at the FMCS offices with the FMCS mediator, and a technology person for FMCS in his living room yet in another state helping manage the whole electronic process.
We got a letter -- actually, our director of our agency, Richard Burns, got a letter from the chief negotiator for this large multinational company after it was over saying that they accomplished more substantive work and formed a better foundation to rebuild a strong, constructive relationship during those two weeks when they were not physically with each other than had they been at the table with each other that year bargaining a contract.

So it's an example of where in appropriate circumstances, you use some powerful leading-edge tools and you have some really good, competent people helping manage it and some really, really competent people managing the relationships of the parties and the negotiations, and they can accomplish some things that maybe they couldn't even accomplish face to face. I think ODR has some amazing potential for the future and not just in labor-management relationships, but in many different kind of business contexts.

MR. GIACOLONE: Thank you, Michael.

I want to thank you all of you, the experts out there, for adding to this discussion. I hope it's been helpful.

I understand the next stage of the game is to do an evaluation of the process. They're going to play some evaluation music? I have some on the --

UNKNOWN PERSON: Maybe I'll sing.

First of all, a quick round of applause for the two gentlemen here.

(CONCLUSION)
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