

BUSINESS

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ENTREPRENEURS

The PEACEMAKERS

More beefs ending up in mediation as firms try to avoid long, costly trials

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CHRONICLE SENIOR WRITER

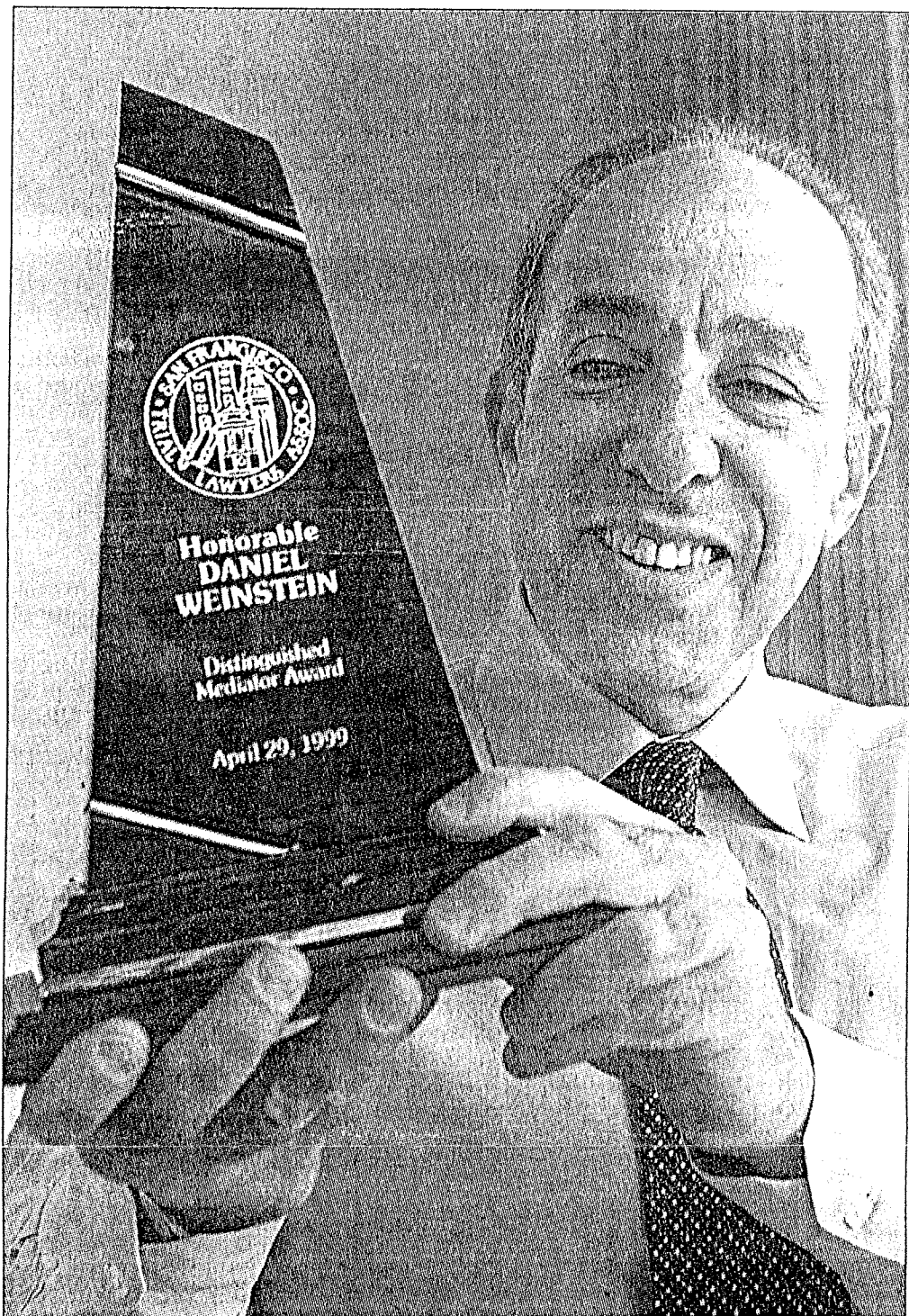
When former San Francisco Superior Court Judge Daniel Weinstein left the bench a decade ago for a new career in alternative dispute resolution, he said a lot of people didn't know the difference between mediation and meditation.

Today they do. And Weinstein is at the top of his new profession after successfully mediating settlements worth a total of about \$1 billion last year. They included the \$187.5 million settlement of the giant class-action lawsuit against Bank of America over its handling of California municipal bond funds.

Mediation and arbitration are on the rise as courts become increasingly clogged and companies, government agencies and families realize they can save time, money and their nerves by reaching a settlement outside the courtroom.

State and federal courts in Northern California now require that parties to civil litigation first go through some type of alternative dispute resolution or ADR.

And many companies stipulate in contracts that if a disagreement arises,



MICHAEL MALONEY / The Chronicle

Daniel Weinstein, a former San Francisco judge, was honored as mediator of the year.

ENTREPRENEURS ▼ INSIDE

IPO Calendar

Four newly issued stocks had big first-day gains — one more than tripled **B2**

Grow a Business

How S.F.'s living wage proposal would impact small businesses **B3**

Firms Using Mediation To Avoid Costly Trials

► PEACEMAKERS

From Page B1

customers or business partners must agree to mediation or arbitration.

A study by Cornell University and PricewaterhouseCoopers two years ago found that 88 percent of the top 1,000 U.S. companies have used mediation, where parties try to reach compromise through an independent agent. Seventy-nine percent used arbitration, where parties agree to present their cases to a private judge or panel and live by the decision.

Taking advantage of this trend, a growing number of judges and lawyers with an entrepreneurial spirit are starting or joining mediation firms.

Weinstein exemplifies the new breed of legal negotiator. For the past decade, he has been a lead mediator for JAMS/Endispute, one of the nation's leading ADR firms. More than 90 percent of the cases he has mediated have been settled out of court.

Weinstein was recently named along with two European financial experts to a panel to mediate the \$15 billion transfer of Bosnian government-owned assets to its Croat, Muslim and Serb citizens. And last Thursday, he received the San Francisco Trial Lawyers Association's first annual Distinguished Mediator Award.

During his previous 11 years as a municipal and superior court judge in San Francisco, Weinstein said he most enjoyed handling settlements rather than presiding over long trials.

Weinstein decided to leave the bench in 1989, when the courts were backed up with asbestos cases and plaintiffs and defendants were looking for a quicker way out.

"Everyone wanted a new product — a different way to get cases resolved quickly," he said.

ADR not only promises shorter time to resolution at a much lower cost, but confidentiality and finality since there usually are no appeals. The process also focuses more on getting results than following formal procedures, which is appealing to entrepreneurial types.

One of Weinstein's biggest mediations has been the BofA case.

There, the state of California and

ADR/AT-A-GLANCE

In response to soaring litigation costs and an overloaded legal system, alternative dispute resolution has taken off in the past decade.

ADR refers to various techniques to resolve disputes without a conventional court trial. It can be conducted in any way to which the parties agree — from casual discussion around a conference table to a private court trial.

COMMON TECHNIQUES

■ **Mediation** — A neutral mediator meets with all sides and shuttles between them until they agree on a resolution. The technique works best where the parties are willing to talk and reach a compromise without determining who is right or wrong.

■ **Arbitration** — An independent expert or panel, acting much like a judge, rules on the facts presented by both sides. Decisions typically are final and binding.

THE BENEFITS OF ADR

■ **Saves time.** Civil cases typically take from two to five years to get to court. The average ADR case can be resolved in a few hours or days.

■ **Saves money.** Mediators and arbitrators can cost \$150 to \$500 an hour, or up to \$7,500 a day. That, however, is a lot less than a court trial and lengthy pretrial motions and discovery. ADR often saves clients more than 60 percent of traditional

litigation costs.

■ **Flexibility.** ADR can be conducted any way the parties agree, allowing innovative solutions better suited to their needs.

■ **Control.** Parties have more control because they can choose the mediator/arbitrator and set the time and place for meetings.

■ **Preserves relationships.** Speedy, collaborative procedures can preserve important business relationships, such as between suppliers and buyers.

■ **Confidentiality.** Proceedings and results are generally not part of the public record.

■ **Closure.** ADR circumvents appeals that often follow a court trial. Moreover, the settlement agreement is binding and arbitration awards usually cannot be appealed.

Source: JAMS/Endispute, Chronicle research

nearly 300 municipal agencies charged that between 1977 and 1992, the bank diverted to its own account hundreds of millions of dollars of unclaimed bond payments.

Weinstein said all sides "were getting exhausted by the gargantuan size of the litigation and the prospects that gathering data, trial and appeals would go on for years." In addition, NationsBank recently had agreed to buy BofA and wanted a clean slate.

Weinstein was chosen because he was acceptable to all sides in the dispute. These included the defendant, Bank of America; plaintiffs, the state of California and the city of San Francisco, which represented thousands of municipal bond issuers; and former BofA employee Pat Stull, who filed the class-action suit.

While Weinstein dealt with the legal issues, two other independent and unbiased experts approved by all sides were hired to analyze the numbers: University of California at Berkeley Economics Professor Dan-

iel McFadden and UC Davis Management Professor Michael Maher.

McFadden said Weinstein explained that "the first job in mediation is to get the parties to change their thinking from 'I'm right, you're wrong'" to an understanding of the other side's position and the odds of losing.

After the two professors spent about a week gathering and evaluating evidence, Weinstein figured it could take two or three months of mediation to reach a settlement. Instead, he was able to resolve the dispute after two long days last November.

The first day was for presentations, which involved so many experts and attorneys from all sides that they needed a conference room at the Union Square Hyatt. The next day, Weinstein put the different parties in separate rooms at JAMS/Endispute's 11th floor offices in Embarcadero Center No. 2 and shuttled between them.

"Weinstein was helpful on several levels," said San Francisco Chief Trial Deputy Pat Mahoney, who attended the marathon sessions with City Attorney Louise Renne. "He brought in independent experts for the complex analysis of damages. He understood the issues and the interests of each party. And he had a sense of humor, which created an environment where mediation could move forward."

For example, at about 6 p.m. on the second day, with the parties still far apart on a dollar settlement, Mahoney recalls that Weinstein referred to himself as "a rug merchant" and he would be happy to convey any price although he doubted it was the best price to make a sale.

Around 11 p.m., with Renne missing a San Francisco opera performance for the higher financial drama, the \$187.5 million deal with BofA, the state and cities was struck.

McFadden came away impressed not only with Weinstein's skill at "humoring, cajoling, and bullying" the participants but also the mediation process. "It promotes truth finding by giving each party an opportunity to gain perspective on the

RESOURCES

■ **American Arbitration Association.** The nonprofit organization, with 36 offices nationwide, specializes in mediation, arbitration and other voluntary dispute resolution procedures. San Francisco office: (415) 981-3901. Web site: www.adr.org.

■ **JAMS/Endispute.** Formed in 1994 through the merger of the two largest private alternative dispute resolution providers in the United States, the company serves corporate, government and individual clients around the world with 350 private judges, mediators and arbitrators. San Francisco office: (415) 675-7670. Web site: www.jams-endispute.com.

■ **Bar Association of San Francisco.** The group provides mediation services and referrals to experienced attorney mediators. Phone: (415) 989-1616. Web Site: www.sfbar.org

Source: Chronicle Research

merits of its own case and obviously avoids the risks of trial judgments," he said.

But to be successful, McFadden observes certain necessary preconditions. Namely, each side needs to be predisposed to settle and have sufficient data so neutral experts can evaluate the strengths and weaknesses.

As the BofA case was ending, Weinstein, the son of a rabbi, was one of three persons appointed by the Privatization Monitoring Commission to oversee the privatization of Bosnia-Herzegovina's economic assets as part of the Dayton Peace Accord.

With 60 percent of the population displaced since 1991 and ethnic rivalries running rife inside Bosnia and neighboring Yugoslav states, Weinstein said the issues couldn't be more complex.

But he is excited by the challenge even though the pay is far below the usual \$7,500 per diem he and other top neutrals receive for helping defuse legal powder kegs.

In addition to BofA and Bosnia, Weinstein has handled consumer class-action cases involving credit cards and life insurance; personal injury and medical claims cases including contaminated blood products; and environmental cases such as current contamination claims at San Francisco International Airport.

He also has mediated intellectual property cases involving Apple, Motorola, Intel and Hewlett-Packard.

But you don't have to be a big company to benefit from ADR. The nation's oldest and largest ADR firm, the American Arbitration Association, has about 18,000 part-time mediators and arbitrators who dealt with 95,000 cases last year.

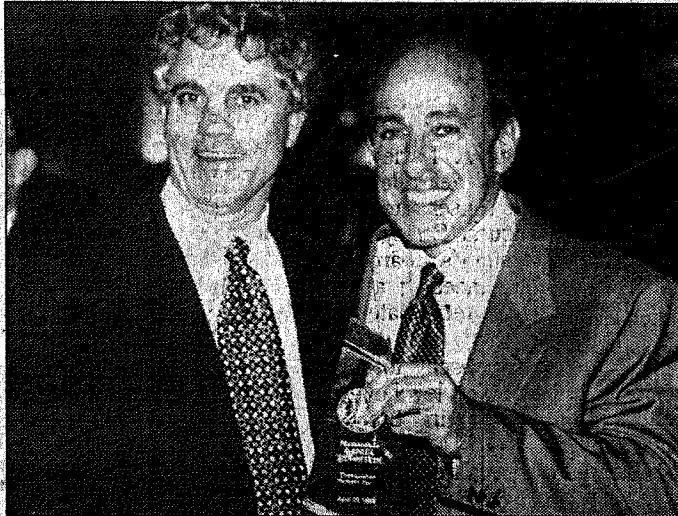
For mediation cases, the filing fee is \$150 per party, and the hourly charge is \$190 to \$450 an hour, according to Stephen Van Liere, regional vice president of AAA's San Francisco office. For arbitration, the filing fee is \$500 for settlements up to \$10,000. The fee is \$7,000 for cases involving \$1 million to \$5 million.

At JAMS/Endispute, which has about 30 retired judges and five lawyers in its San Francisco office, the hourly rate is \$300 to \$600. The daily charge ranges from \$2,500 to \$7,500 depending on the case and the seniority of the mediators.

In addition to the national ADR firms, a number of smaller specialists are listed online and in the Yellow Pages that deal with business, family and public interest conflicts.

The San Francisco Bar Association also makes referrals. Its Civil Mediation Panel of 40 specialists charges a \$100 administration fee plus \$150 to \$250 an hour.

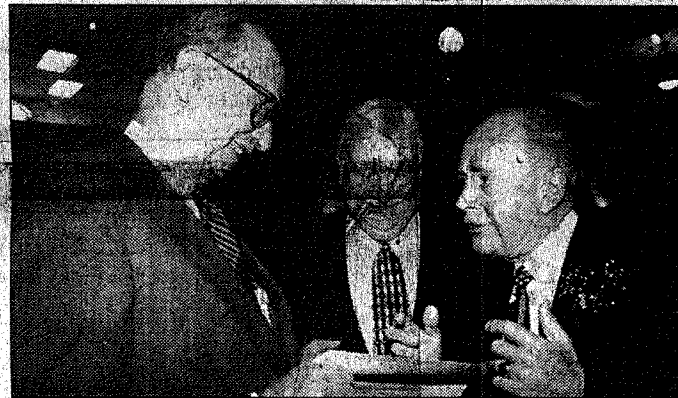
S.F. Trial Bar Singles Out Achievers



Photos by S. TODD ROGERS/Special to the Daily Journal



HONOREES — Judge Daniel Weinstein, right in top left photo, receives the San Francisco Trial Lawyers Association's "Distinguished Mediator" award from Jerry Spolter. Madelyn Chaber, above, of Wartnick Chaber Harowitz Smith & Tigerman was chosen "Trial Lawyer of the Year." Other recipients included Albert Abramson, right in bottom right, who was honored with the "Lifetime Achievement" award. Abramson, a past president of the SFTLA, is shown speaking with former Sen. Quentin Kopp, left, and Justice Daniel Hanlon, center.



The San Francisco Trial Lawyers Association has honored a few of the city's best and brightest in the legal community. Madelyn Chaber, of Wartnick Chaber Harowitz Smith & Tigerman, and Judge Daniel Weinstein were among the recipients at last week's awards ceremony.

Chaber was chosen Trial Lawyer of the Year for her work in getting the biggest damage award ever against a tobacco company. She won \$51.5 million, against Philip Morris Cos. for her client, a former smoker with inoperable lung cancer. The amount was later reduced to \$26.5 million.

Chaber called the prize "roses on the icing on the cake" that was the verdict and the public's response to it. Now she says she has about three years of appeals to anticipate.

"It's the kind of result we want to recognize and encourage in lawyers," said SFTLA President Timothy Tietjen. "To not back away from Goliath but go forward — that's how change is accomplished."

The Distinguished Mediator award went to Weinstein, who is vice chairman and senior judicial officer of JAMS/Endispute. This is the first year the SFTLA made this award. "We've seen the whole process go from where people thought mediation was meditation, to now,

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where in California, people almost by reflex try [mediation] before they go to court and litigate," Weinstein said. "This award is a recognition that mediation has become so important to trial lawyers, who at first resisted it... now see it as an effective tool."

Other honorees were Albert Abramson of Abramson & Smith and Vincent McLorg of San Francisco's McGlynn, McLorg & Ritchie.

■ Abramson, 72, a past SFTLA president, was recognized with the Lifetime Achievement award.

"I told them it sounded kind of terminal," said a joking Abramson, who still handles cases in personal injury, specializing in airplane crash litigation.

In 1972, he was mentioned in the Guinness Book of World Records for the a verdict of \$13 million, the largest award at the time. The case involved a couple who were in a Lake Tahoe plane crash in which the husband lost his legs and his wife was killed.

Abramson said he was able to prove the housewife was worth \$1.2 million by showing she was a nurse and a teacher. The verdict was later reduced to \$3.5 million.

"There's a lot more unnecessary paperwork and foolish forms [now]," said Abramson, who started practicing law in 1955. "There's a lot of time wasted on these forms and no substance [gained]. Most lawyers have learned how to artfully dodge giving accurate information. When I started, you could take one deposition and try the case by the seat of your pants. The trials were 2-3 days in length."

fairness and ethical conduct.

"To be honored by my opponents for having integrity is amazing," said McLorg, an insurance defense attorney and second lieutenant in the Vietnam war who received a Purple Heart and a Bronze Star for valor.

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When Daniel Weinstein is not busy being recognized for his craft, he is busy traversing the world spreading the word on mediation.

Weinstein was chosen by the U.S. State Department as the U.S. representative to Bosnia and is a member of a three-member commission to oversee the privatization of \$15 billion of Bosnian government-owned assets.

The commission met for the third time a few weeks ago in Brussels.

"The instability in the area and all the increase in ethnic rivalry could have been cause for us to have given up our task in Bosnia, but [people] there seemed to redouble their effort to try to make Bosnia work because of war in the nearby areas," he said. "We're on course with the effort."

His experience overseas has proven to Weinstein that mediation techniques work effectively in any kind of dispute.

"You're still dealing with human emotions of greed, jealousy, pride and principle mixed in. The focus may not be as much money as it is political gain.

"We see how important the methods and processes are to resolve human conflicts in political as well as economic disputes."

Weinstein also has initiated a program to train Bosnian residents, from judges and lawyers to union bosses, in the art of mediation. JAMS is subsidizing the program.

"What we are finding in the international world is that effective skills in negotiation or mediation are very helpful in resolving political as well as economic issues," said Weinstein. "What we are trying to do is to begin to expose those techniques to political and economic communities. We want them to see that there's a method other than warfare or traditional legal methods — that have been as awful for them over there as they have been here in terms of getting civil disputes resolved," he said. "It doesn't mean that everybody will lay down their guns and sit around mediating happily, but it can help."

"I wish we had more of that before we got to this point [in Kosovo]. You can't just talk with [Slobodan] Milosevic. But who knows whether the meetings with Albanians and Serbs were conducted with all the skills of mediation? Where there's bitter rivalries and lots of violence, it's a tough order. It doesn't mean that a mediator could sit down and get this solved in one day. It's just that there are techniques that solve disputes that seem otherwise unsolvable."