

**TALKING POINTS FOR REMARKS AT ASIA-PACIFIC MEDIATION FORUM, JEJU ISLAND,
SOUTH KOREA, NOVEMBER 1, 2019**

I. INTRO

Thank you for that wonderful introduction. I am honored to be speaking to this distinguished room full of individuals who have devoted your time and energy to help people resolve problems big and small.

I have a special affinity for dispute resolution in the International Community based on my love of both world history and the many forms of dispute management and resolution worldwide.

II. SPECIAL RELATIONSHIP BETWEEN FMCS AND THE KOREAN INDUSTRIAL RELATIONS COMMUNITY

- While our nations are undoubtedly different in terms of politics, culture, geography, and a multitude of other ways, one cannot deny that history has joined our nations together and that the U.S.-South Korea relationship is indeed unique and special in the world.
- Nowhere is this special relationship more evident than in the close relationship that FMCS has had with the South Korean Industrial Relations community in a period now entering its third decade.
- Over the past twenty years, our institutional memory has counted at least 13 exchanges between FMCS and the South Korean Industrial Relations community, featuring, many of former Agency Leaders and key employees.
 - The signing of a contract and subsequent collaboration between FMCS and the KLEI to develop a preventive mediation program at the KLEI. In furtherance of that collaboration, the Asia-Pacific Mediation Forum's own Jan Sunoo traveled to Korea on behalf of FMCS to deliver a week's training on RBO, IBB and PIC;

- Commissioner Sunoo later returned to teach the first class of Korean labor mediators (National Labor Relations Commission) mediation skills based on FMCS model. This was during the IMF crisis when Korea was heavily in debt and frantically trying to repay the IMF debt. Many drastic labor cuts were implemented resulting in high level of labor disputes;
- Shortly thereafter, the Asia-Pacific Mediation Forum's own Chang Hee Won visited FMCS in Washington, on behalf of the KLEI, to study FMCS' Grants Program, which was reported to the Korean Ministry of Labor as a model for Korea;
- Shortly thereafter, FMCS signed a second Memorandum of Understanding to promote further cooperation between our two nations;
- Over the years, several KLEI delegations have met with FMCS mediators at their offices, and also attended various workshops offered by FMCS's Institute for Conflict Management;
- Inspired by these workshops at the FMCS Institute, the Korean Mediation and Arbitration Association was founded in Korea to promote the practice and use of mediation. For over a decade, the KAMA continues to provide trainings on negotiation and mediation.
- Indeed, for over 20 years, training programs on Conflict Management, Win-Win Collective Bargaining, Labor Dispute Mediation, and related subjects have been developed in Korea by adapting FMCS models and materials and applying them to the Korean Industrial Relations context.

III. WE ARE AT A MOMENT OF GREAT CHANGE IN BOTH OF OUR NATIONS

- As a career dispute resolution practitioner and neutral it is in my best interest to stay out of politics, which I fully intend to do here;
- What is relevant for our discussion today is that, politics aside, both of our nations are in the middle of a populist movement by both the left and the right, in response to frustration at the political establishment and also in response to the pressures of an economy that is changing at breakneck speed in response to both globalization and ongoing automation of work;

- In both of our nations, these populist pressures have manifested themselves in myriad calls for reform to improve the lot of the worker:
 - Pressures to dramatically increase the minimum wage and low wages in historically undercompensated sectors of the economy – *e.g.*,
 - The fight for \$15 an hour wages;
 - Since 2017, teachers have been openly revolting against subpar wages;
 - Supermarket workers around the country have been clamoring to make the jobs they perform conducive to a solid middle-class lifestyle;
 - With the backing of the California public sector unions, a bill introduced in the state legislature would allow self-employed child-care workers who serve subsidized families to collectively bargain with the state
 - Pressures to increase access to unionization and state protected, and in some cases internationally protected, formalization of workplace protections and benefits;
 - Pressures to significantly redistribute income and thereby reduce gaping inequality;
 - One major US presidential candidate has called for a monthly \$1,000 check mailed out to qualifying individuals as “Universal Basic Income.”
 - Pressures to protect people’s standard of living in the ongoing 4th Industrial Revolution;
 - Pressures to protect people’s dignity and respect in the workplace and beyond, *e.g.*,
 - The movement for more stringent policies to combat harassment and discrimination in the workplace;
 - Hotel workers mobilizing to keep housekeepers and other employees safe following too many instances of hotel guest misconduct.
 - Nationwide campaigns against forced arbitration in order to preserve a worker’s right to take discrimination claims to court;
 - Unions are attempting to organize gig workers, such as Uber and Lyft drivers, and pressuring states and municipalities to regulate them to give them the status and protections of employees.
 - In the U.S. state of Massachusetts, a group of employees formed a union to eliminate non-compete agreements in their employment contracts. It is called [Earn-Tee](#).
 - A recently enacted law in California, supported by a few candidates for President, makes it harder for companies to classify workers as

“independent contractors.” In direct conflict to current NLRB Decisions and guidance.

- A Democratic Senator has even introduced a bill in the U.S. Senate that would write a strict standard for classifying workers as independent contractors into national labor law.
- I understand that in Korea, there have been similar calls for reform to improve the lot and respect of the worker.

IV. SO, WHAT DOES A NATIONAL WORKPLACE DISPUTE RESOLUTION AGENCY DO IN THIS ENVIRONMENT?

- While I will direct my remarks to the American context, I encourage you to consider how they apply to institution building in Korea.

a. Rationale for Our Changes

- Without taking any position on whether unionization is a good or a bad thing, I think it is clear to everyone that our existing labor relations statute, has proven inadequate to address the needs of the modern workplace. The proof is in:
 - the proliferation of statutory protections to fill in the gaps of protection afforded by our preeminent labor statute, the National Labor Relations Act of 1935 (NLRA) and the 1947 Taft-Hartley Amendments;
 - a precipitously declining unionization rate in the United States, currently 6.5% in the private sector;
- The fact is, the terms of collectively bargained contract are longer than they used to be and there is much maintenance required to maintain that relationship and to use that relationship to remain competitive in a challenging environment marked by globalization, automation and intense competition from the other 94% of the American private sector workforce that is not unionized.
- The federal sector, for its part, has been trying to reform itself for at least the better part of three decades and needs the types of services that encourage employees and managers to collaborate to better deliver value to the American people, utilizing communications and conflict management skills to avoid distractions that detract from their abilities to fulfill their respective missions.

- In this environment, if the Federal Mediation & Conciliation limited itself to its traditional role of collective bargaining in the private sector, our agency would not only be inadequate to address the needs of the modern workplace, it would slowly wither away to nothing as the unionization rate got lower and lower. (Frankly, how much lower than 6.5% can it get?)
- To prove this, one need not only look to the future, one can look at the past.
 - For the better part of 5 decades, FMCS has provided highly demanded and highly critical services to help organizations manage their relationships and strengthen their collaboration in a highly competitive world marked by domestic and worldwide competition for both labor supply as well as demand for goods and goods and services. These are precisely the services that we have assisted the KLEI in adapting to the Korean context.
- For the future of FMCS, fortunately the U.S. Congress of the 1990s had the necessary foresight to anticipate an expanded role for FMCS to supplement its traditional labor relations role under the NLRA:
 - **Administrative Dispute Resolution Act of 1990** authorized FMCS to assist other federal agencies in resolving disputes arising out of grants, contracts, licenses, or other agency administrative actions, and to assist in the process of negotiated rulemaking.
 - **Administrative Dispute Resolution Act of 1996** calls upon FMCS to assist Federal, state, and local government entities in resolving disputes arising under their jurisdictions.

b. Changes to Our Organizational Structure and Strengthening of Agency Initiatives Outside of Traditional Collective Bargaining

- To the above ends, we have developed an ever-growing Office of Agency Initiatives Division that is dedicated to developing FMCS's work outside of its traditional Labor Relations function. It has three subcomponents:
 - Center for Conflict Management Education: Has a mission to provide training internally to our mediators, and to external professionals, in the ever-evolving art and science of Conflict Management;

- Office of Conflict Management and Prevention: Has a mission to provide a systems approach to managing and preventing conflict,
 - Office of Strategic Initiatives: To revamp our internal systems to enhance all of the above changes.
- After long being given scant attention in repeated FMCS administrations, my current leadership team is in the process of reforming our operations to their very core in order to meet the needs of the modern American workplace that we have been discussing. For example, we are increasing our efforts to:
 - Use FMCS mediators' extensive conflict resolution experience and skills to improve relationships and create the trust, respect and problem-solving skills essential for continued economic growth, increased job security, and greater efficiency;
 - Offer our expertise in new and different models of collective bargaining, including interest-based and affinity bargaining.
 - Build upon the specific Congressional mandate embodied in the Administrative Dispute Resolution Act of 1996 to assist other federal government agencies in resolving conflict in a variety of ways *e.g.*,
 - Facilitating dialogue among affected stakeholders prior to the finalization of regulations issued by U.S. government executive branch agencies in order to reduce litigation challenging such regulations and thereby avoid the direct and indirect costs of such litigation to both Federal agencies as well as the non-federal stakeholders.
 - Expanding systems to improve the efficient dispute resolution of other Federal agencies. Recent agreements include a project to reduce a backlog of 1,000 complaints by the general public against the Social Security Administration, and reducing a 13,000 case backlog at the Equal Employment Opportunity Commission 's Administrative Judge stage of litigation. There are many other examples.
 - In these efforts, the emphasis is on taking a systemic approach to resolving conflict, addressing the root causes of conflict before they cause disputes.

- Training mediators at a variety of U.S. government agencies so that they may provide localized, specialized, early and efficient dispute resolution services. Also leading the US Governments Shared Neutrals Program by administering and training the roster of collateral duty mediators. And running the website ADR.gov.

c. Changes to Our Hiring Practices

- To further develop our ability to provide the very highest quality services to the American people, we have been making great changes to the criteria for selection of new mediators at our agency.
- Since its inception, FMCS had hired predominantly from the ranks of union officials with deep experience negotiating contracts. While many of those mediators often performed collective bargaining mediation well, in most cases (with some notable exceptions Jan Sunoo being one) they were unable or did not have interest in expanding their skill sets to accommodate the evolving needs of the American workplace.
- In order to improve our ability to meet the very lofty goals we have set, we are now hiring mediators with extensive and varying educational credentials and experience. We have increased our hiring at the nation's top universities and are also hiring mediators with successful careers from the management side of the table, and the great insights into organizational design and behavior that they bring.

d. Changes to Our Performance Management System

- We have changed the emphasis in our performance management system from Quantity to Quality in order to deliver the very best of services to the American people;
- Previously, the number of cases that a mediator performed was the main driver of his or her performance evaluation and resulting annual bonuses. That incentive motivated our mediators to develop meetings that often did not result in productive gains for the clients or the agency.
- The system also incentivized our mediators to give scant attention to the value added by their Relationship Development & Training programs and therefore simply

copy or repeat the same programs that they had used, or had been in the agency, for decades.

- This is not to say that there were not many excellent professionals in FMCS at all times in our history, but it is true that the incentive structure motivated too many mediators to make choices that were good for their careers but were not valuable for the American people;
- In contrast, through a new self-assessment tool, the new performance management system incentivizes mediators to develop their professional skills sets and portfolios of services by tracking the goals that they set for themselves and how far they go in reaching or surpassing those goals;
- Through a customer experience survey that will go on line in FY 2020, the new system incentivizes mediators to be mindful to add the most value possible (which does not preclude a passive approach to mediation, if that is what is warranted) and serve the clients in the ways that are most useful to them.
- Through observations of mediators' performances by their managers, and monthly reports by mediators of their performance highlights, the new system provides for constant coaching and feedback to both improve their performances and grow professionally.
- In addition, the new system now gives mediators credit for Relationship Development & Training program preparation time, recognizing that time spent in the office researching, drafting, refining and discussing such programs is time well spent. Through the tracking of customer feedback, the system no longer incentivizes the mindless repeating of programs designed by the mediator or others a long time ago.

To sum it up we at FMCS are adapting and evolving to ensure that we will continue to be the premier dispute resolution and conflict management Agency in the United States. Once again it is a true pleasure to share this room with peacemakers. Blessed are the peacemakers!

One last thing I would like to do is to recognize the Honorable Chang Hee Won.

Presented on this 1st day of November, 2019

In recognition of his decades of friendship, support and collaboration with the Federal Mediation & Conciliation Service, and the invaluable leadership, innovation and advocacy that he has delivered on behalf of Alternative Dispute Resolution in the Republic of Korea, The Honorable Chang Hee Won is hereby designated as an Honorary Commissioner, with all of the rights and privileges pertaining thereto.