State Bar of Texas ADR Section

Alternative Resolutions Newsletter

Spring 2002 Issue

CHAIR'S CORNER

by Wayne Fagan
Chair, ADR SECTION

"The Section Website and Other Significant Developments"

As I sat down to prepare this my third report to you I was reminded of my old boss who used to say," I am not sure where we are going but we are making good time." While I am not sure of the specific details concerning the future of our Section, I am confident of our future and can report that we are making good time and picking up speed in getting there. The following significant events affecting our Section and ADR in general have occurred since my last report to you:

1) **Check Out Our Revised Website at http://www.texasadr.org**

Our revised website is up and running at http://www.texasadr.org. Now that we have the website infrastructure in place we will focus on developing the content to better serve you but in order to do so we need your help. Please view the website and advise me at wfagan@compuserve.com if you are a member of the Section and :(i) you did not receive a notice of your username and password;(ii) you received a notice of your username and password but you have not been able to log on to the members only section of the website; or (iii) your name is not listed as a member of the Section. If you are a member of the Section but your contact details are not correct, please correct your details when you renew your membership in the Section and then after we send out an announcement that the new membership information is listed on the website see if your contact details have been corrected. If your contact details have still not been corrected after the new membership information has been posted then send me an e-mail with your correct details and we will have the posted information corrected. You can also help us improve the website by sending me an e-mail advising me of any or all of the following: (i) any links to other websites that you think would be useful for us to list on our website; (ii) any information or suggestions you have to improve the website; (iii) any ADR forms you would like to contribute to be posted to the members only section of the website; and/or(iv) any announcements that you would like to have posted to our calendar of events and a website link for the event if one is available. The most frequently asked question submitted to our website concerns upcoming ADR training. This is an important topic for all of us therefore I have asked Judge John Coselli to Chair a task force to make recommendations to our Section Council on 13 April 2002 concerning uniform standards that a training will be required to meet before the training can be posted to our website. Once these standards have been approved they will be posted on the website. Thereafter, anyone that meets the standards may have their training posted to the website by submitting the information to me for posting.

2) **A Funny thing Happened on the Way to the Courthouse**

Thanks to the great support of the planning committee, the speakers and the attendees I am pleased to report that we had a very successful Conference in

Fort Worth on 1-2 February 2002. Special thanks go to **Kay and Frank Elliott**, the Texas Wesleyan School of Law and the law student volunteers for their tireless efforts and gracious hospitality. We are all in their debt for this terrific conference. If you were not able to attend the conference you will still be able to purchase the written conference materials and audio tapes of the conference. As soon as they are available an order form will be posted to our website. One of the highlights of the conference was the Friday lunch speech by Ambassador Nancy Ely-Raphel which was open to the public as well as to conference attendees. Those in attendance were so moved by the Ambassador's comments that her speech is reprinted in full in this Newsletter. I remember a number of years ago, Bertie Vigrass, who was then heading up the London Court of International Arbitration, saying to me ".. Wayne, when I retire I am going to start a business to create more disputes because we have too many arbitrators and not enough disputes…". Bertie was kidding of course but he was making the same point I have heard so often from both mediators and arbitrators, that is, that they would like to serve as neutrals more often. While I accept and appreciate that goal and wish all of my neutral colleagues well, I respectfully suggest that the neutrals might consider rephrasing their goal instead to state that " I wish I could utilize my skills as a neutral more often then I do…".It was the goal of this conference to illustrate some of the ways that neutrals can use their skills in addition to serving as neutrals, e.g. in system design (refer to the paper by Judy Corder and Mary Thompson), partnering (refer to the paper by Jerry Clay from Honolulu), helping clients develop online dispute resolution systems (see the report by Professor Benjamin Davis on the ABA E-Commerce Task Force) or helping to develop the ADR infrastructure in emerging democracies, just to name a few. We have all heard the phrase "think outside the box", well it is not just a phrase give it a try you will be amazed at what opportunities you can create for yourself.

3) **The Uniform Mediation Act("UMA")**

The Uniform Mediation Act was approved by the ABA House of Delegates on 4 February 2002. The proponents have now turned their attention to having the UMA enacted by the states. We will discuss the UMA and our Section's strategy for dealing with it if it is submitted to the Texas legislature at our next Council meeting in Austin on 13 April 2002.You should also check out, if you have not already done so, the UMA Resource Center on our website. Please add to the information referenced on our website an excellent article that has recently been published by Professor Scott H. Hughes of The University of New Mexico School of Law entitled "The Uniform Mediation Act: To the Spoiled Go the Privileges", 85 Marquette Law Review 9 (2001).This entire edition of the Marquette Law Review is devoted to a discussion of the UMA.

4) **Formation of Class Action & Mass Torts Subcommittee**

Thanks to the initiative of one of our Section members, Allen Church of San Antonio, the Section Council has approved the formation of a Class Action & Mass Torts Subcommittee of our Section to be chaired by Allen. For further details concerning this Subcommittee please refer to Allen's article which appears in this Newsletter. The formation of this Subcommittee is a great

example of how Section members can participate in the leadership of our Section. Allen called me up one day, told me that he felt there was a need for this subcommittee and said that he would be willing to Chair it after I had explained to him the responsibilities of a subcommittee chair. I asked Allen to send me an e-mail setting out his ideas, which he did, and I submitted it to the Section Council and it was approved within two months of Allen's first calling me to discuss his idea. If any of you have an area of particular interest that you do not think is being adequately covered by our Section at this time, please call me to discuss it, my direct line is **(210) 299-5484**.I promise if you get my voice mail I will call you back.

5) **Section Annual Meeting in Dallas on 14 June 2002**

Please note on your calendars that our Section Annual Meeting and CLE will be held as part of the State Bar of Texas Annual meeting in Dallas on 14 June 2002.We look forward to seeing you there.

Thank you again for your time.

ETHICAL PUZZLER

by Suzanne Mann Duvall

[This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, Texas Community Bank Building, 8235 Douglas Ave., #330 LB 61, Dallas, Texas 75225. Phone: 214.361.0802 FAX 214.368.7258]

Chapter 154.023 (a) of the Texas Civil Practice and Remedies Code defines mediation as "…a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, a settlement, or understanding among them." Chapter 154.023 (b) goes on to say "A mediator may not impose his own judgment on the issues for that of the parties."

Question: *(1) Is a mediator prohibited, by statute or otherwise, from conducting mediation in which he expresses a judgment or opinion?*

2) Should a party in an evaluative-style mediation (that is, a mediation in which the mediator expresses an opinion or judgment) be required to give informed consent prior to the commencement of the mediation?

H. Wayne Meachum (Dallas): (1) Nothing in sections (a) or (b) of Chapter 154.023 "prohibits" a mediator from expressing a "judgment or opinion" in conducting a mediation. Numerous situations can arise in a mediation where the mediator's "judgment or opinion" can be very helpful in moving the process forward and even in bringing about an ultimate resolution. However, such situations would not, normally, and should not include judgments or opinions on the ultimate issues over which the parties are in dispute. Further, the expression of such judgments or opinions should never be presented in such a way that compromises the neutrality of the mediator by giving either or both parties the impression that the mediator is "for" or "against" either of the parties.

(2) Yes; and the consent should be in writing. No party to a mediation should embark upon the process believing it will be conducted "one way" only to find that, after getting into the process, believing it will be a different way. Also, the mediator needs to have the protection of "consent in writing" if he/she is going to be expected to go beyond the traditional scope of a "third-party neutral" and, in effect, chose one party's "result" over another's.

Kathy Bivings-Norris (Montgomery County): There is a critical need to address the nomenclature for various valid, effective conflict resolution processes which, though all called mediation, are not all the same process and don't address the same client/case needs. We are still in the early stages of developing the field/profession of Conflict Resolution (the preferred replacement for "ADR"). Perhaps if we began to label ourselves "CR specialists" it would become easier to describe the processes which each of us elects to provide.

As an ethical CP providers, I would never evaluate a case or give my legal opinion. I am not a counselor-at-law – thus I am not qualified to do so. My forte is

processes, which deal primarily with CR prevention, procedural assistance such as training, mediation and facilitation and with reconciliation.

Two primary reasons exist for addressing the issue of nomenclature:

1. There is a continuing tension among various professions which drains energy from developing the field and educating potential users about it.
2. There is massive confusion among the users of conflict resolution processes about what process might work best for their case and who provides that service. The confusion leads to grievances – which leads to more outside regulation – which hampers us all in continuing to develop our own skills and also in developing the profession.

In the interim, since the nomenclature issues won't be resolved immediately, each Conflict Resolution provider has an on-going duty to provide information to clients prior to beginning the service. I come from the "purist" camp – my understanding of mediation as generally defined in the CR field is that it is not intended to provide case evaluation. There are a variety of effective processes which do that and there are certainly cases in which evaluation is a much needed component in the search for resolution. I believe we all owe it to the Conflict Resolution field to help clarify the processes for the benefit of the consumer.

Christopher Nolland (Dallas): I do not believe a mediator is prohibited by statute or otherwise from expressing a judgment or opinion. In virtually every mediation, the mediator will express an opinion explicitly or at least, implicitly by the kinds of questions he/she asks, the dialogue they employ, and their "challenges" to the parties' and counsels, beliefs and view of the case. Certainly almost all mediators properly opine on the wisdom of settlement and the unpredictability and undesirability of various non-settlement options, the dynamics of that particular mediation, the feasibility of settlement goals, and a raft of other issues. The statute prohibits the mediators from "imposing" their judgment on the parties. It does not prohibit a mediator from offering his/her view on a variety of issues, which the parties are free to accept, reject, or consider for what they are worth in whole, in part, or not at all. Indeed, an objective perspective may be the very thing that helps a party to focus and finally "get it." Properly sharing your view with the e only permissible approach.

With respect to an evaluative style mediation, "informed consent" is not necessary prior to the commencement of the mediation. First, typically the parties will have their own lawyers who can "protect" them. Second, the parties and their lawyers are effectively in control – they are free to simply ignore the opinions or judgment of the mediator (they can take a few lessons from my wife in that regard). Third, the mediator can and should tell the parties and their counsel (and obtain a written agreement to that effect) that they need not and should not consider the mediator's opinions/legal advice and that they need to look to counsel of record. However, the mediator does have a fresh and objective perspective (a/k/a an "opinion" or "judgment") is typically not available from any other participant in the mediation.

Debbie H. McElvaney (Houston): I believe that Tex. Civ. Prac. & Rem. Code §154.023 is quite clear in its directive that a mediator is an impartial person

whose job it is to facilitate a voluntary settle me t of a dispute, and in doing so, the mediator **may not** impose his/her judgment on the issues for that of the parties. This premise is embraced by virtually all DR associations with which I am familiar and it epitomizes the fundamental difference between mediation and other DR processes. Very simply, when a mediator imposes his/her judgment on the issues, the mediator has removed the perception of impartiality, which is a fundamental tenet of the process. Likewise, the mediator may have compromised such basic functions as encouraging joint responsibility for making decisions, analyzing options for resolving the dispute, addressing the needs of the parties, and aiding the resolution of what is perceived to be a fair settlement.

With that being said, I also believe that there is a vast distance on the stylist spectrum and that at any given time we mediators may move from one ”leaning” to another. On one end is the “coffee-cup-wagger,” who does nothing more than relay information from one side to the other. On the other end is the mediator who feels compelled to propound his/her judgment on the issues. Somewhere between these two poles rests the comfort zone for us as we try to balance impartiality with nudging the parties to settlement. Instead of presenting my own judgment on the issues, I prefer to challenge the parties through reality checks, continuously factual/legal information to adequately test the party, and generally, knowing when to suggest that a “stat” of the proceeding is in the best interest of all, such as when outside expert information is needed or when the parties have reached an emotional saturation point and need a break.

For those mediators who feel qualified to render their own judgment on the issues, I believe that this intention should be provided verbally to all of the parties prior to the mediation so that the attorneys can educate their clients as to the risks or consequences of the evaluative style. Likewise, I believe it to be a prudent move to obtain written, informed consent from all of the parties prior to the mediation. Such informed consent should manifest clearly that the parties realize and understand that the mediator’s evaluation may negatively affect the perception of his/her impartiality, the communication between the parties and the mediator and the parties, and the efforts to reach a compromise due to the perceived empowerment of one side over the other.

COMMENT: Chapter 154.023 (b) states that “a mediator may not ***impose*** his own judgment on the issues for that of the parties.” (emphasis added) It does not say that a mediator may not express an opinion or judgment.

However, in so doing the mediator would do well to be aware of (at least) three things (1) the Ethical guidelines for Mediators as promulgated by the ADR Section of the State Bar of Texas, (2) the proposed Rules of Ethics for Mediators and Mediations to be promulgated by the Supreme Court, and (3) the expectations of the parties and their counsel.

In defining mediation, the Ethical Guidelines state in part, “A mediator should not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties. ” The Comment portion of the definition states, “The mediator should not coerce a party in any way. A mediator may make suggestions, but all settlement decisions are to be made by the

parties themselves." The danger, of course, is if and when the mediator allows his judgment or opinion to "cross over the line," so as to be perceived by the parties as rendering a decision on the issues in the dispute, thereby rendering the decision made by t he parties involuntary.

Similarly, the Rules of Ethics for Mediators and Mediations make it clear that, "the parties retain all discussion-making authority, and the responsibility for reaching resolution rests with the partied and not with the mediator." Further, Paragraph 1 clearly states that, "the Mediator shall not…engage in acts that would be reasonably viewed as an attempt to compel or coerce them [the parties] to…enter into a settlement agreement." The requirements of Paragraph 3, Impartiality, are clear, "The mediator shall remain impartial and neutral, that is free from favoritism, or bias in word, act, or appearance," Neither this provision nor any other paragraph of the Rules, however, restricts evaluative mediation (that is a mediation in which the mediator expresses an opinion or judgment) so long as the mediator complies with all other provisions of the Rules. The danger, again, is the fine line between opinion, judgment, and suggestions as coercion as perceive by the parties.

Should, then, the parties in an evaluative style mediation be required to give consent prior to its commencement? While it may not be necessary to require such consent, the consensus appears to be that it certainly couldn't hurt. Both the parties (who would thereby be informed consumers of the mediator's services) and the mediator would be protected.

However, the problem of the perception of all participants as to when or if the "fine-line" is crossed would remain, regardless of such consent or documentation.

***Suzanne Mann Duvall**, former Chair of the State Bar of Texas Alternative Dispute Resolution Section, is an attorney and mediator in Dallas, Texas.*

CASE LAW & LEGISLATION UPDATE

This is a column designed to keep members of the Section informed about cases and legislation affecting ADR. John Fleming, Program Director at the Center for Public Policy Dispute Resolution at the University of Texas School of Law, administers this column. (If you are aware of any case law or legislation which affects ADR please fax a copy of the case or legislation and/or the relevant citations to John Fleming, at Fax No. (512) 232-1191, or by e-mail at jfleming@mail.law.utexas.edu, or contact John at (512) 471-3507.)

Legislative brief. The Texas House Civil Practices Committee will have a hearing on April 3, 2002 relating to its interim legislative charge to study issues relating to alternative dispute resolution. The Uniform Mediation Act (which was approved by the ABA House of Delegates in early February) is expected to be discussed.

US Supreme Court rules EEOC claims not subject to arbitration.

Facts: Baker was subject to a written agreement requiring him to arbitrate any claim which he might have relating to his employment with Waffle House. After Baker was terminated following a seizure, Baker filed a complaint with the Equal Employment Opportunity Commission alleging that Waffle House had violated his rights under the Americans with Disability Act. The EEOC initiated a lawsuit against Waffle House seeking injunctive relief and party specific relief for back pay, reinstatement, compensatory, and punitive damages on behalf of Baker. Waffle House asserted that because Baker had entered into a binding arbitration agreement, the EEOC could not pursue a court action on Baker's behalf. The Fourth Circuit had ruled that the existence of the arbitration agreement did not prohibit the EEOC from seeking injunctive remedies designed to correct the employer's systematic wrongful conduct, but that the arbitration agreement did act as a bar to the EEOC pursuing a court action for victim specific relief such as back pay, reinstatement and compensatory damages (See EEOC vs. Waffle House 193 F3rd 805 (Fourth Cir., 1999). The Supreme Court granted writ.

Held: The arbitration agreement between the employer and the employee does not prohibit the EEOC from seeking victim specific relief such as back pay, reinstatement, compensatory damages, and punitive damages. The Court noted that the EEOC was not a party to the arbitration agreement, and that as a general rule agreements to arbitrate are not binding upon nonsignatories. Moreover, the Court held that when the EEOC brings an action against an employer, it is not acting merely as the proxy of the employee, but may be seeking to pursue a public interest. To deny this, the court noted, would be to interfere with the enforcement scheme enacted by Congress. EEOC v. Waffle House 122 S. Ct. 754 (January 15, 2002)

Intentional Failure to Disclose Assets Basis for Setting Aside Mediation Settlement Agreement.

Facts: During a mediation of a divorce matter, Husband intentionally failed to disclose that he had earned and would receive a $230,000 bonus. Husband and Wife entered into a mediated settlement agreement. Subsequently, the wife withdrew her agreement when she discovered the existence of the undisclosed asset. The Husband sought to enforce the mediated settlement agreement because it met all of the statutory requirements set forth in Section 6.602(b) of

the Texas Family Code, that is the agreement contained the required prominent disclosure that it would be irrevocable, it had been signed by the parties, and had been signed by the attorneys present.

Held: The failure of the Husband to disclose a substantial asset caused the mediated settlement agreement to be unenforceable. The Court noted that where a party is under a legal duty to disclose information, and fails to do so and the other party enters into a contract under a mistaken assumption of fact, the resulting contract may be rescinded. Boyd v. Boyd 2002 Tex. App. Lexis 16 (Tex. Civ. App, Ft. Worth 2002)

Ex Parte Depositions; Sleeping Arbitrators

Facts: The attorneys for Von Essen took the deposition of their client without notifying the attorneys for Marnac and giving them an opportunity to be present. The "ex parte" deposition was then used at the arbitration hearing. Additionally, Marnac's corporate representative at the hearing believed he observed the arbitrator sleeping during the hearing, but no objection was made during the arbitration hearing. Following an arbitration award in favor of Von Essen, Marnac moved to have the award vacated, and Von Essen moved to have the award confirmed.

Held: Under AAA rules, the formal rules of evidence do not apply. Parties may be permitted to offer evidence by affidavit or declaration, thus the use of the "ex parte" deposition statement of Von Essen was permitted. Moreover, the Court noted, Marnac had been given a subsequent opportunity to depose the Von Essen witness. As for the sleeping arbitrator, the Court ruled that because no objection was raised during the arbitration hearing, even if the arbitrator had in fact been sleeping, the objection was waived and could not be raised for the first time at the confirmation hearing. Von Essen, Inc. v. Marnac. Inc. 2002 US Dist. Lexis 34 (NDTX., 2002)

MASS TORT LITIGATION & ADR: DANCING PARTNERS

By Allen Church

In the high-stakes game of mass tort litigation, defense and plaintiffs' counsel can usually agree on one thing; the best resolution for a bonafide case often comes not by way of an expensive and risky trial, but rather through a negotiated settlement. Negotiating is a clear mission for the ADR Section Committee of the State Bar of Texas. Negotiating not only can have distinct advantages for a more rapid "global" settlement between the plaintiff and defendants, but also the division process among the plaintiffs after the "global" settlement is determined. Increasingly, mass tort lawyers have come to rely on the aggregate or "global" settlement in resolving the claims of plaintiffs that typically number in the hundreds or thousands. Aggregate settlements arise when defendants offer a lump-sum settlement to a group of jointly represented plaintiffs and require, as a condition of final resolution that all plaintiffs participate in the settlement.

Plaintiff's attorneys are left with the responsibility of allocating the global settlement among their clients. The prudent mass tort lawyer should be aware of the ethical pitfalls inherent in the use of aggregate settlements.[1] In Texas, an ethical violation could result in forfeiture of attorney fees, and, clients need not prove causation or damages to prevail.[2]

The justifications that led to the development of the class action include several components such as:

- The protection of defendants from inconsistent obligations.
- The protection of the interests of the absent class members.
- The provision of a convenient and economical means for disposing of similar lawsuits.
- A procedure that provides a means to facilitate spreading litigation costs among numerous litigants with similar claims.
- A procedure to insure litigants with low damages, but high development cost have, a venue.
- A procedure for defendants in one venue to dispose of federal or state multi-district litigation.

Justification is also based on the fact that there are major differences between representing a single client and mass clients in the form of a lawsuit. The differences are profound both in substance and procedure.

Drawing on my own experience and other professionals I have interacted with Mass Torts Litigation throughout the United States, the bullet point differences are:

- SUBSTANTIVE: Although there are specific state and federal laws for consolidating and joining multiple plaintiffs, with multiple defendants in

multiple venues; common, statutory and case law are generally excluded, or given specialized definitions in class actions and mass tort litigation.

- PROCEDURALLY: The global settlement agreement creates a specialized set of rules for the administration and division of the "global" settlement among the class. Literally, a regime of private law to administer the global settlement among the plaintiff/class.
- CLASS ACTIONS ARE GENERALLY OLD. It simply takes time to build the class, particularly when consolidating multiple venues in multiple states in multiple types of court, i.e., Federal Bankruptcy Court and/or State Probate Court.
- "McJUSTICE": Due to the size and scope of the lawsuit, Class Actions are generally depersonalized. It is not unusual that plaintiff attorneys have never met the majority of their clients. And mostly, the plaintiffs/class give up their right to a jury trial. Although the Courts do retain a keen interest in "due process" as most procedural rules allow for representation of absentee clients. Although some states have no class action rule at all.[3]

Texas lawyers involved in Mass Tort Litigation on a regular basis are clearly a minority by count, but may be a majority by the amount of clients they represent. For example, I recently administered as a master, a class of 3,193 in which one attorney represented 1,237 clients.

Texas Mass Tort Litigation lawyers carry unique and specialized skills that are changing faster than ordinary law. This argues for more intense and frequent professional development for those lawyers involved in Mass Torts. Particularly, professional development is important in the area of ethical responsibilities on the plaintiff's side since every class action has a high potential for conflict of interest. However, counsel for the defense is not without their problems in defending class actions. The federal and some state class actions rule specifically allow for defendant class action litigation – a class action counter-suit. Federal Rule 23(a) provides in part: "One or more members of a class may sue **or be sued** as representative parties.." Defendant class actions have been certified when there is a need for a "procedural device that allows one who has a commongrievance against a multitude of persons to resolve a dispute by using only a few members of the class.[4] But serious problems can arise. Often there are different and inconsistent defenses and counter-suits which give rise to serious conflict.

Finally, I believe that every mass tort litigation creates new laws the moment it gets to judgment. I am not alone in that assessment. Because as to class actions, the procedure represents an exception to the general rule that one cannot be bound to a judgment rendered in a proceeding wherein one was not joined as a party.

Therefore, since all claimants cannot be named parties in the lawsuit, the action is by its very nature a representative proceeding. The named class plaintiff representatives in addition to prosecuting their own claims serve on

behalf of and pursue claims belonging to the absent class members. Further, the attorneys and named plaintiffs representing the plaintiff class, assume fiduciary responsibilities to protect the interest of the absent class members. This raises a unique issue in certifying class action: the adequacy of class counsel.

"The adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel and the ability of the representative to take an active role in and control the litigation and to protect the interests of the absentees."[5]

The prudent mass tort litigate should be aware of the practical and ethical pitfalls inherent in the use of aggregate settlements, some of which are:

- The Plaintiff lawyers right to withdraw due to unreasonable financial burden. A "negative valve" lawsuit.
- Certification, then subsequent de-certification of a class action.[6]
- The sheer number of plaintiffs often geographically scattered, increases probability of conflict of interest with attorney and the class representatives. Communications are strained and at risk. Further conflict may develop if subclasses are created.
- Aggregate settlement agreements without consent of absentee class members.

The above issues and others in Mass Tort Litigation are natural dancing partners with ADR, because there are so many ADR processes that are complimentary to attacking the complex factors outlined above.

FOOTNOTE S

[1] See Generally Fred Misko, Jr., A Professional Responsibility Checklist for the Class Action and Mass Tort Practioner, State Bar of Texas, Ethic and Mass Torts Symposium, February 6, 1998.

[2] Burrow v. Arce, 997 S.W. 2nd 229 (Tex. 1999).

[3] Mississippi has no class action rule. They combine a written procedural jointer, with an unwritten aggregate rule. See American Banker v. B. Alexander, 2001WL 83952 (Miss. SC) Feb. 1,2001

[4] In re Broadhollow Funding Corp., 66 B.R. 1005 (Bkrtcy EDNY 1986)

[5] Horton v. Goose Creek Independent School District, 677 F.2d 471 (5th Cir, 1982).

[6] Southwestern Refinery Co., Inc. v. Bernal, 22 S.W. 3rd 425 (Tex. 2000) with two (2) companion cases, eliminate Texas class action for personal injuries.

Allen Church *is Director of Class Actions for Resolute Systems in North America and is Chair of the Class Action & Mass Torts Subcommittee of the ADR Section of the State Bar of Texas. For information on joining the committee please contact Allen Church at:: (210) 967-6700, fax: (210) 967-6799 or through e-mail at jchurch@satx.rr.com.*

2002 CALENDAR OF EVENTS

40-Hour Mediation **"** Austin " April 3, 4, 5, 9, 10, 2002 **"** Dispute Resolution Center **"** (512) 371-0033

Association of Attorney-Mediators Annual Meeting and CLE Seminar **"** San Antonio **"** May 10-11, 2002 **"** Contact Brenda Rachuig at (800) 280-1368 or visit our website at www.attorney-mediators.org

Group Facilitation Workshop Series **"** Austin **"** May 10, 17 & 24, 2002 **"** The University of Texas School of Law Center for Public Policy Dispute Resolution **"** (512) 471-3507

Mediation Ethics and the Law **"** Austin **"** May 16, 2002 **"** Dispute Resolution Center **"** (512) 371-0033

Ethical Issues in Caucus Model Mediation **"** Austin **"** May 16, 2002 **"** Dispute Resolution Center **"** (512) 371-0033

40-Hour Mediation **"** Austin **"** June 5, 6, 7, 11, 12, 2002 **"** Dispute Resolution Center**"** (512) 371-0033

Negotiation Workshop **"** Austin **"** June 5-7, 2002 **"** The University of Texas School of Law Center for Public Policy Dispute Resolution **"** (512) 471-3507

Skills for Employment Mediators **"** Austin **"** July 24-26, 2002 **"** The University of Texas School of Law Center for Public Policy Dispute Resolution **"** (512) 471-3507

40-Hour Basic Mediation **"** Austin **"** July 24-28 2002 **"** The University of Texas School of Law Center for Public Policy Dispute Resolution **"** (512) 471-3507

40-Hour Mediation **"** Austin **"** July 31, August 1, 2, 6, 7, 2002 **"** Dispute Resolution Center **"** (512) 371-0033

Advanced Family Mediation Training **"** Austin **"** September 19, 2002 **"** Dispute Resolution Center **"** (512) 371-0033

40-Hour Mediation **"** Austin **"** October 2, 3, 4, 8, 9, 2002 **"** Dispute Resolution Center **"** (512) 371-0033

MJP PRIMER FOR ADR PROFESSIONALS

By Ann L. MacNaughton[1] and Susan Hackett[2]

What The Heck Is Multijurisdictional Practice?

Law practice today is increasingly seamless. With information and communication technologies enabling lawyers, clients, academics, and courts to interact without barrier, 24/7, nothing much gets in the way of today's lawyers serving clients.

Except for state lines. A national debate is raging -- with localized versions in state bars -- over whether and how state bar admission and licensure rules should limit the practice of law.[3] Questions include:

Whether states should continue to be the licensing authority of choice

Whether a lawyer should be able to sit at her desk in her state of admission and advise clients on the law of any jurisdiction, assuming she is competent to do so

Whether a lawyer licensed and in good standing in one state should be able to travel to another state to work on a legal matter, so long as she is competent in her work

Whether a lawyer who violates a professional rule or law of any state (including where she is practicing but not admitted) should be subject to that state's discipline (including any decision to disbar in the state(s) where admitted)

Whether a lawyer who relocates to another state should be required to join that state's bar (preferably by waiver, for experienced counsel) and be fully subject to its requirements

A growing number of lawyers say "yes" to each of these questions, and are working to bring down walls that constrain delivery of client services across state lines.[4]

Welcome to the "MJP" debate. What we're talking about is Multijurisdictional Practice or "MJP," and its relationship to unauthorized practice of law rules or "UPL."

And So What?

Go 'way from my window,
Leave at your own chosen speed.
I'm not the one you want, babe,
I'm not the one you need.[5]

Why does this MJP debate matter to us, ADR services providers?

As you may know, many lawyers and bar associations have examined the question about whether mediation and other ADR services are law practice, if

performed by lawyers, or other professionals, or in combination, in court-annexed contexts and other situations.[6]

Take a look at the first three recommendations included in the November 2001 Interim Report of the ABA Commission on Multijurisdictional Practice[7]:

Recommendation 1: The ABA should affirm its support for the principle of state judicial licensing and regulation of lawyers.

Recommendation 2: The ABA should amend Rule 5.5(b) of the Model Rules of Professional Conduct (Unauthorized Practice of Law) to provide that, as a general rule, it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer's services do not create an unreasonable risk to the interests of a lawyer's client, the public or the courts.

Recommendation 3: The ABA should adopt proposed Model Rule 5.5(c)-(e) to identify "safe harbors" that embody specific applications of the general principle stated in Recommendation 2; to identify other appropriate "safe harbors"; and to make clear that, except where authorized by law or rule, a lawyer may not establish an office, maintain a continuous presence, or hold himself or herself out as authorized to practice law in a jurisdiction where the lawyer is not licensed to practice law.

As you know, each lawyer takes a state bar exam after graduating from law school. If she passes, she is admitted to practice in that state, and subject to its rules and discipline, but typically not elsewhere. So what does this have to do with ADR services providers who may or may not be lawyers, but we all know one thing: *providing neutral services is not the practice of law.*

Isn't it? Then why is there any need for any "safe harbor" to protect ADR services providers from prosecution under "unauthorized practice of law" laws and rules? (Oops!) Look closely at the last paragraph of the proposed safe harbor pertaining to ADR services, with the troubling final paragraph set out below in bold:
3.4 The ABA should adopt proposed Model Rule 5.5(c)(4) to allow representation of a client in an arbitration, mediation or other ADR setting.

The MJP Commission recommends the adoption of a "safe harbor" for work on a temporary basis in a jurisdiction in which the lawyer is not licensed in connection with the representation of clients in pending or anticipated arbitrations, mediations or other ADR proceedings (with the exception of when admission is governed by a pro hac vice provision because the ADR proceeding is under the auspices of a court or government agency).

It is generally recognized that, in the ADR context, there is often a strong justification for choosing a lawyer from outside the jurisdiction in which the proceeding takes place. This is true, in part, because that jurisdiction may have no relation to the law governing the proceeding or to the dispute. Unlike in litigation, in ADR parties may select the site of the proceeding simply on the basis of convenience. At times, as in the case of international arbitrations, a site is chosen precisely because it has no connection to either party or to the dispute.

Thus, in ADR proceedings, the in-state lawyer is not ordinarily better qualified than other lawyers by virtue of greater familiarity with state law, state legal processes and state institutions.[8] Further, as noted by the ABA Section of Litigation in its comments to the Commission, "Clients have important considerations in ADR, which include confidentiality, consistency, uniformity, costs, and convenience. After all, non-binding ADR procedures usually require client 'buy in' to succeed. Denying a client her preferred counsel could hamper early ADR efforts and impede prompt resolution of disputes.[9]" It is for these reasons that many found the Birbrower decision troubling, and that the California legislature subsequently adopted a law temporarily authorizing out-of-state lawyers to represent clients in arbitration proceedings.

This proposed "safe harbor" would not address the work of arbitrators, mediators and others serving in ADR contexts in comparable non-representative roles. It is questionable whether work as an adjudicator or "neutral" in an ADR proceeding comprises the practice of law for purposes of UPL restrictions. Assuming it does, this work would generally be covered by the proposed "safe harbor", discussed above, applicable to professional services that non-lawyers are legally permitted to render, since it is generally understood that nonlawyers may serve as arbitrators and mediators and in similar roles in the ADR context.

What? *"It is questionable whether work as an adjudicator or "neutral" in an ADR proceeding comprises the practice of law for purposes of UPL restrictions"*?? Wait a minute. What's this all about? I thought we all knew that the providing of ADR services, whether by lawyers or by neutral services providers that are not licensed to practice law, does NOT comprise the practice of law. Now, go back and take another look at the Virginia Guidelines.[10]

If a safe harbor needs to be created in order for lawyers (and other professionals?) to provide neutral services without holding a license to practice law within the state where those services are provided, then how often are we all operating in violation of existing UPL rules?

Have you ever made a phone call on a client matter from another state's airport, or from a vacation in another jurisdiction? Does your practice involve clients whose interests and assets are all over the place? Do you communicate via the Internet (or phone or fax) with clients in states where you are not admitted)?

Even if you aren't a jet-setting lawyer, haven't you developed sufficient expertise in your employment or IP or commercial paper or family law practice that you can competently render advice (or research the proper advice) for clients whose interests lie in more than one jurisdiction? Let's face it: our practices are already multijurisdictional, but our rules aren't.

Therein lies the problem. Each day, the reality is that most lawyers, no matter how small their practices or what their expertise, deal with client issues and legal authorities that cross state lines in one way or another. They are violating the rules. But some folks say: there's no harm, so there's no foul; let sleeping dogs lie.

There are a lot of other worms in this can[11], but let's take a close look at this one.

Letting Sleeping Dogs Lie.

There are a lot of MJP mediators and arbitrators out there violating these rules every day and thinking to themselves, “Just shut up already. We can keep doing what we’re doing, and no one will be the worse off.”

Heck, the state bar UPL counsel knows y’all are out there, and they aren’t prosecuting you unless someone files a complaint (they can’t ignore reported infractions). So why should we care?

Two reasons. First, self-governance by Texas lawyers is under close scrutiny. Under the terms of the Texas Sunset Act, the State Bar must be reauthorized by the Texas Legislature, or it will be abolished on Sept. 1, 2003. Letting sleeping dogs lie suggests we think that breaking the rules of our profession is no biggie, and that’s simply wrong.

Second, sleeping dogs are waking up. Take a look at the *Birbrower* case.[12] There’s no end to how this issue can be used as a guerilla war tactic in the hands of opposing counsel.

Aren’t you worried that, one day, some smart lawyer for one side or the other with buyer’s remorse in connection with a mediated settlement will question the validity of your mediation privilege, since you were sitting in a outside the jurisdiction where you are admitted when you had that difficult conversation?

Tackling Other Arguments Against MJP Reform

Other arguments against MJP reform include:

“MJP will lead to increased risks to the public: to clients and local communities currently protected by state-by-state regulation.” Inherent in this argument is an assumption that clients and local communities *are* safer under the current system, so let’s tackle that first. State bar regulatory counsel are overwhelmed by the number of problems they already have to handle. They don’t have the resources--time or money--to discipline even all the licensed lawyers in their own states. So, the argument goes, if you add one more straw by making them responsible for regulating all those other lawyers who will flock into their states if MJP is authorized, you’ll break their backs.

Here’s the flaw: there is no empirical evidence or any other reason to believe that hordes of lawyers are waiting for the MJP green light to flood across state borders and savage local unsuspecting populations.

Also, MJP won’t change how clients find and retain their lawyers, nor will it change the number who are competent to do their work. Internet, world wide web, and other advertising opportunities already tell clients all over the world about the availability of lawyers and their services everywhere. Since many lawyers already engage in (unauthorized) MJP and rarely trigger complaints to the bar, there is no reason to believe that authorizing MJP will increase the work of state bar UPL counsel.

“Very, very few cases brought to the attention of state bar counsel assigned to regulate unauthorized law practice involve out-of-state lawyers,” says Bill Smith, General Counsel of the State Bar of Georgia and a leader of the National

Organization of Bar Counsel (NOBC). “And it’s not because they aren’t practicing in states where they aren’t licensed. It’s because the bulk of claims brought by the bar and the public are against incompetent lawyers operating in their own states where they are licensed.”

There is no reason to believe that authorizing MJP will make good lawyers go bad. And good lawyers are committed to the ethical precept that they should never take on work that they are not competent to handle. Instead they refer those matters to competent counsel.

Further, in those rare cases where an MJP lawyer goes astray in a “foreign” jurisdiction, current rules and practice make it tough for that jurisdiction (where the lawyer is *not* licensed) to apply sanctions. Under the Common Sense Proposal (see sidebar), full faith and credit would be offered to states, and MJP lawyers would have to subject themselves to local regulation for infractions committed on another state’s soil.

“MJP will put small firm and solo lawyers out of business and leave many clients without a meaningful alternative-–it will Wal-Mart the practice of law.[13] A lot of folks claim MJP serves only the interests of large-firm transactional lawyers. Actually, if you think about it, MJP is not nearly so attractive to large firms as it is to smaller ones.

Large firms already can tell clients, “Come to us! We’ve got lawyers in every state, so we can handle your work seamlessly from start to finish.” Authorizing MJP will let small firm lawyers and solos tell the same clients, “You don’t need to hire a firm with 500 lawyers (and attendant expense) to get that job done, I can give you the same level of quality at lower rates.”

And MJP won’t change the need for--or diminish the value of--local expert lawyers who know the courts, local rules and government, and are well respected in the community.

Perhaps these are among the reasons why ABA’s Standing Committee on Solo and Small Firm Practitioners has submitted one of the strongest endorsements so far for MJP reform.

“*MJP will decrease commitment to local /state bar needs such as pro bono service, IOLTA/client security trust funds, CLE, etc. and destroy our strong sense of community as local lawyers who work together to serve local needs.”* This is the toughest argument to counter, because there’s truth to it. While every MJP lawyer must still be licensed somewhere, and should participate in her local community, sadly, not all do. However, this is not the fault of MJP.

True, we all must all work to find better ways to serve those who can’t afford lawyers. After all, how many of us could even afford to hire ourselves, given the cost of legal services today? But this situation is not the product of MJP, nor will it be resolved by ignoring MJP reform.

True, problems associated with IOLTA/client security trust funds and malpractice insurance pools plague even the best “protected” bars. But, like the *pro bono*

publico situation, these problems aren't caused by MJP and won't be fixed by ignoring the problem.

True, lawyers must do more to seek out the continuing growth, balance, and education so crucial to our professionalism. But again, this situation won't be remedied by ignoring MJP reform.

As lawyers, we must recommit ourselves to our communities. That commitment should include updating our system of self-governance to reflect current reality, as well as fixing the problems that underlie it.

"MJP will create a race to the bottom, with newly-graduated students from unaccredited schools taking the bar in the 'easy' states, passing, and then flooding the 'hard' states, with resulting injuries to unsuspecting publics who otherwise would have been protected by the tougher licensing requirements in the 'hard' states." Every state we know of claims it is worried about "easy state" candidates flooding into it. We are still looking for the easy state.

Yes, more people are rejected California, New York, and a few other bars. But there also are thousands more who sit for those exams. Let's all get over the idea, anyway, that the bar exam is the perfect method by which to judge a newly minted lawyer's competence. Experience at the bar is the only real standard by which to judge a lawyer's competence. If a "bottom" candidate is admitted, and then tries to take her transitory matters into Texas, someone still has to hire her. Most clients aren't dumb, and those who are susceptible to the bad actions of bad lawyers are just as easily duped by bad lawyers admitted locally.

As a profession, we need to re-dedicate ourselves to teaching and mentoring new lawyers and policing bad ones. Retaining archaic MJP rules won't help us solve either of these problems, nor will it better protect our professionalism or the public.

"MJP will never work. There's no way the states can cooperate to form a system of coordinated regulation."

The best response we have to this argument is to point to many other groups of professionals who successfully manage exactly that. Doctors and accountants do it. Architects and engineers do it. Lawyers in Australia do it. Even European lawyers do it, despite "separation" there not just by jurisdictional boundaries but also by different languages, different legal and governmental systems, and centuries of non-cooperation!

What's stopping us?

Conclusion

The ABA Commission on MJP has drafted and distributed for comment an interim report.[14] Its final report is expected in May, for consideration by the ABA House of Delegates (which includes many Texas bar leaders, see sidebar) at its Annual Meeting in August in Washington, DC.

The Common Sense Proposal endorsed by the authors is a simpler approach, which would simplify the situation for mediators and other ADR services providers, as well as lawyers providing legal services to clients, by authorizing

MJP subject to certain safeguards, and thus eliminating the need for any "safe harbors" and the awkward questions they present. This proposal also probably will be introduced for consideration by the ABA in August, and also by state bars delving into this topic. It is attached in its present form as of the date this article was submitted for publication at this Institute, but is continually evolving as dialogue and discussion continue.[15]

At the end of the day, only the State Bar of Texas (or the Texas Legislature) can change the rules governing the delivery of legal and ADR services in Texas. With sunset inviting increased public scrutiny, shouldn't we focus on applying common sense to modernize MJP rules for more efficient and cost-effective services to our clients and the public?

FOOTNOTES—

[1]Past Chair, State Bar of Texas Corporate Counsel Section; Council Member, State Bar of Texas ADR Section; Council Member, American Bar Association Law Practice Management Section; Founding Principal and General Counsel, Sustainable Resolutions Inc.; Principal, Peterson Risk Consulting, a unit of Navigant Consulting, Inc.

[2] Senior Vice President and General Counsel, American Corporate Counsel Association, Washington, D.C.

[3] See generally, Susan Hackett and Ann L. MacNaughton *And the Walls Came Tumblin' Down* (pub. pending Tex. Bar Journal, March 2002); Ann L. MacNaughton and Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 Loyola Law Review 665 (2001);

[4] See generally www.mdpcentral.org; www.futurelaw.org, www.acca.com.

[5] Bob Dylan, *It Ain't Me, Babe (*1964).

[6] See, for example, *Guidelines on Mediation and the Unauthorized Practice of Law*, DEPARTMENT OF DISPUTE RESOLUTION SERVICES OF THE SUPREME COURT OF VIRGINIA (2000) (hereinafter the "Virginia Guidelines").

[7] http://www.abanet.org/cpr/mjp-home.html.

8 *See* American Arbitration Association (AAA), Letter to the ABA Commission on Multijurisdictional Practice, (June 15, 2001), http://www.abanet.org/cpr/mjp-comm_aaa.html.

[9] ABA Section of Litigation, Preliminary Position Statement on Multi-jurisdictional Practice (June, 2001) at 24, http://www.abanet.org/cpr/mjp-comm_sl.html.

[10] See Virginia Guidelines, supra note 6.

[11] See Hackett & MacNaughton, supra note 3.

[12] *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 17* Cal. 4th 119, 949 P.2d 1 (1998), *cert. denied*, 525 U.S. 920 (1998) (despite a written fee agreement, and despite most of the legal work being performed in New York, the California court held that the California subsidiary of the New York client of the New York law firm did not have to pay for "unauthorized law practice" in California: three brief trips to California by the New York lawyers, not licensed in California, to advise their client; negotiate with its opponent; and interview possible arbitrators. See note 9, supra, and accompanying text from MJP Commission Recommendation 3. See generally, Anthony Davis, *Why the Sky <u>Really</u> Is Falling*, in Gary A. Munneke and Ann L. MacNaughton, eds., MULTIDISCIPLINARY PRACTICE: STAYING COMPETITIVE AND ADAPTING TO CHANGE (ABA 2001)at 33.

[13] See note 3, infra.

[14] On-line at http://www.abanet.org/cpr/mjp-final_interim_report.doc#_Toc531678162.

[15] Continually updated copy of the Common Sense Proposal is on-line at http://www.acca.com.

BOOK REVIEW
The Third Side: Why We Fight and How We Can Stop

By William

Reviewed by Bob Otey
Penguin Books, 2000

The book begins with an overview of the history of mankind in conflict. William Ury presents himself as an anthropologist who is studying a "tribe" (human beings) in danger. This tribe is falling into destructive conflict patterns. He raises the question, "Are we humanly capable of living together without constantly falling into destructive conflict?" Is peace a possibility or a pipe dream?" This book goes beyond Getting to Yes *and* Getting Past No. It is an attempt not to deal with difficult individuals, but to change the culture of conflict itself from the family through bureaucracies. The Third Side is an attempt to explore why we fight and how we can stop the cycle of violence both verbally and physically.

Ury asserts our most critical challenge will be learning to deal constructively with our differences. He discusses examples of fighting including family feuds; violence in public schools; over 20,000 murders in the United States annually; almost 1,000,000 females assaulted; countries practicing genocide; and one very disconcerting example, the World Trade Center in 1993 with the truck bomb. He stated that if the truck had had a grapefruit sized nuclear bomb, it would have killed everyone within three miles. This reference was before September 11, 2001.

There seems to be an overriding negative feeling when trying to figure out how to best deal with conflict. He relates interviews with people who believe peace is impossible. He also uncovered three ingrained beliefs these people had when peace is perceived to not be an option:

When push comes to shove, there's no other way except to fight. It's human nature to fight. Anyway, there isn't much a person can do to prevent fighting.

He raises the question, "....what if it (conflict) were preventable?" This creates a completely different slant on conflict resolution. Ury presents, and we in ADR have come to believe, that our goal is not, nor should it be, to eliminate conflict because it is a natural process of human interaction. Conflict brings about change. He challenges the reader to think in terms of not eliminating but transforming conflict.

Three hard questions he addresses are:

1. What is the alternative?
2. Isn't fighting part of human nature?
3. How can we stop?

He reminds us of one very important element of conflict which we have many times forgotten; conflict is three sided. We forget when a man and wife fight, it affects the relatives, neighbors, allies, friends, and/or onlookers. He defines this *"third side*" as the community surrounding those in conflict. Ury reminds us that the third side frequently works to stop fighting. One example of the third side is the world community intervening in Bosnia/Croatia to stop the bloodshed and bring balance of power so all sides could peacefully sit at the table. The third side possesses the power of peer pressure and the force of public opinion.

Ury paints a rather gloomy picture when it comes to human conflict throughout the ages. He gives hope when he denies conflict is inherent but must be learned and that war is not genetically driven. He reminds us we have the knowledge and skills to instill the proper behaviors in individuals and to resolve conflict in a non-violent manner.

The "Knowledge Revolution" *is more powerful than all the armies one can* muster. Knowledge is the ultimate power. He states no two democracies have ever fought one another because there is a process available in this form of government to solve issues peacefully. Everywhere change is happening at a greater pace and with change comes more conflict. Interest-based organizations bring conflict to the surface rather than suppress it. This Knowledge Revolution *gives us* the power to destroy or create a "*co-culture*" of coexistence, cooperation, and constructive conflict.

He discusses three major opportunities when violence is escalating upward and channels them into horizontal patterns. We can do three things depending on what stage the conflict is in when we intervene. We can first, prevent *conflict* by being sensitive to latent tensions. Second, we can resolve *conflict when it develops through a* structured resolution process. And, third, we can contain *an escalating* conflict until cooler minds prevail and a method of resolution can be used. Ury states the motto of the third side as, "contain if necessary, resolve if possible, best of all prevent."

Why would this book be good for *mediators to study? First, this book challenges us to go beyond* dealing only with difficult individuals and situations. Second, it encourages mediators to look at changing the culture of conflict itself where ever it arises. third, it challenges mediators to look at a group of people often overlooked in a conflict situation and that would be individuals on the third side. Fourth, it assists mediators in analyzing a situation to determine whether it is at the resolution stage or needs some containment in order to eventually move towards resolution at a later time.

Bob Otey, Ph.D, *is a retired school administrator and currently an adjunct professor at St. Edwards University, Abilene Christian University, Southwest Texas State University, and Concordia University in Austin. He is also a mediator and trainer.*

Commercial Law Section

Meeting Without the Lawyers

By Jeff Abrams

When mediating a commercial dispute, the participants in the mediation are often the ones who, without attorneys, negotiated the original deal, which is now in dispute. Is it ever appropriate and advantageous for the mediator to get the clients together outside the presence of their attorneys? If so under what circumstances? I asked four well respected mediators their opinion.

Susan Soussan, Houston- "I often get the business people together without the lawyers. I have had tremendous success with this. However, I never do it without the permission of the attorneys. I do this when it's obvious to me that the business people just want to do another deal yet the lawyers are caught up in legal maneuvering. I have had clients thank me for allowing them to talk outside the presence of their lawyers. I'll usually leave the business people alone, unless one of them is a lawyer or general counsel. Timing is very important. Sometimes I'll do it before the joint session, before positions have been taken. Other times I'll do it right after the joint session. You get the sense of when to do it based on experience. I have had clients thank me for allowing them to talk outside the presence of their lawyers."

Gary McGowan, Houston- I don't routinely meet with the clients outside the presence of their attorneys. The most important rule is "if it ain't broke, don't fix it." However, if it appears that the mediation is heading toward impass, I will sometimes meet with the principles, without their attorneys. I'll do it if one party really respects the other or if there is mutual respect and if it seems like the parties will get along. They are sometimes willing to make greater concessions outside the presence of their lawyers. I will always ask if the lawyers have any objection to this but I can't remember one saying no. Sometimes the clients will ask for it themselves. This approach is not without risk. I had one or two mediations where one party rattled their saber and the other side became offended. It took a while to get back to square one."

Sid Stahl, Dallas- "I have found that it can be very helpful in commercial cases. Of course, it must be with the permission of the lawyers, which is usually easy to get, particularly late in the day. I use this approach when the case is deadlocked and I'm trying to break the impass. The negotiations will be difficult but it will appear that the business people really want to get it resolved. There are no hard and fast rules on when to use this approach. It's done by feel, like everything else in mediation. It usually works best when the parties mediating are familiar with each other because they negotiated the original deal. It doesn't work all the time but it has worked about 75% of the time. It also seems to work in accountant malpractice cases."

Courtney Bass, Dallas- "I will do it only with the permission of the lawyers. I may not even do it with permission if one of the lawyers seems uncomfortable with it. There are no particular rules as to when I do it. I just go with the flow,

play it by ear and see how the mediation is developing. Sometimes I'll ask just one side if they think it’s a good idea. Business people love to deal but you have to be careful because some just want a divorce and don't want to deal, face to face, with the other side. If there is going to be an on going relationship, I like to get the business people together at the end, with or without the attorneys.

Trafficking in Persons[i]

By Hon. Nancy Ely-Raphel [ii]

I'm glad to have the opportunity to speak to members of the legal community about the issue of trafficking in persons. It is important that you know what trafficking in persons is, what the law is, and the need for a coordinated interagency approach to address trafficking. Today I want to describe about the global scope of trafficking in persons, trafficking to the United States, what the U.S. government is doing about it, and what we all can do about it together. I will also include some excerpts of victim testimony. Trafficking in persons is a modern-day form of slavery, which has persisted into the twenty-first century, including in the United States. Trafficking in persons is a human rights violation and a crime.

You are all familiar with narcotics trafficking—the definition, the laws and the penalties. Anecdotal evidence from some parts of the world (e.g. Bosnia) tell us that trafficking in narcotics and guns, particularly in certain conflict-strewn areas, is evolving to trafficking in people.

Slavery and involuntary servitude have been outlawed since the Civil War. Statutes since then have outlawed peonage and other forms of forced labor or services. Congress recently acted to expand these laws under the Trafficking Victims Protection Act of 2000. The international community developed on a parallel track a protocol on trafficking in persons which supplements the UN Transactional Crime Convention.

Trafficking in persons is any act involved in the recruitment, abduction, transport, transfer, or sale of persons within national or across international borders through the use of force, fraud or deception with the ultimate goal the placement of human beings into situations of slavery of slavery-like conditions, such as forced labor, domestic servitude, debt bondage or forced commercial sexual exploitation.

In essence, trafficking in persons is the use of force and deception to transfer men, women, or children into situations of extreme exploitation. Examples of this may include Latvian women threatened and forced to dance nude in Chicago; Thai women brought to the U.S. and then forced to be virtual sex slaves; ethnically Korean-Chinese women held as indentured servants in the Commonwealth of the Northern Mariana Islands; and hearing-impaired and mute Mexicans brought to the U.S., enslaved, beaten, and forced to peddle trinkets on the street in New York.

Abdul Rehman's story illustrates what I mean by trafficking (Pakistan): When Abdul was 12 he was kidnapped from his village in Pakistan and taken to the United Arab Emirates where he was forced to work as a camel jockey. His owners fed him only once a day so that he would remain around 60 pounds. Camel jockeys are tied to the camel and their screams of terror make the camel

run faster during the race. Many children die before the race is over—by falling off and being trampled to death. Abdul ran away and was eventually sent home.

Victims of trafficking are primarily women and children, but men are also trafficked. Trafficking in persons, particularly women and children, is significant on every continent. Gauging the level of trafficking with precision is difficult because it is an underground industry. The U.S. government estimates that approximately 700,000 women and children are trafficked across international borders each year—this does not include trafficking within state boundaries.

Many trafficking victims fall prey to traffickers because they seek a better life or enhanced economic opportunities. They are vulnerable to false promises of good jobs and higher wages. Some victims have answered advertisements believing they will have a good job awaiting them in a new country. Others have been sold into slavery by a relative or acquaintance. Victims are forced to toil in sweatshops, brothels, construction sites, agricultural fields, mines, or in civil wars. Political instability, civil war, natural disasters, poverty, lack of educational or job opportunities, and discriminatory social or cultural practices contribute to trafficking in persons to the U.S. and around the globe.

Traffickers take advantage of the unequal status of women and girls in the source and transit countries, including harmful stereotypes of women as property, commodities, servants, and sexual objects. Traffickers also take advantage of the demand for cheap, unprotected labor, and the promotion of sex tourism.

Sumithra's story is yet another example of trafficking (India): When Sumithra was 8 years old she was placed into debt bondage. Her family owed a debt to a moneylender and was unable to pay it off. She was taken as collateral and forced to work off the debt. She was forced to work five days a week from 6 a.m. to 7 p.m. rolling 1,500 cigarettes per day. She earned 75 cents a day and was allowed one 30-minute break per day. If she failed to meet her quota, she was beaten.

Why do people engage in trafficking? Criminal groups choose to traffic in human beings because it is high-profit and low-risk. Unlike other commodities, people can be sold over and over. Narcotics or weapons can be sold only once and then they are gone. Traffickers in persons, much like terrorists and narcotics, operate boldly across sovereign borders. They have capitalized on technological and communications advancements and have also exploited economic crises in Russia and Asia as well as regional conflicts such as Kosovo. The United Nations estimate that trafficking in persons generates approximately $7 billion annually.

The trafficking in persons industry worldwide also is closely intertwined with other related criminal activities, such as extortion, racketeering, money laundering, bribery of public officials, drug use and gambling. For example, Immigration and Naturalization Service raids on brothels run by traffickers have netted heroin and counterfeit currency. And the Wah Ching, an Asian organized crime group engaged in smuggling and trafficking of Asian women, is also

involved in gambling, robbery, murder, drug trafficking and loan sharking. The Wah Ching also has connections to Asian organized crime groups in Boston, New York City, Los Angeles, Seattle, Dallas, Vancouver, and Toronto.

Trafficking in persons often involves conspiracy, document forgery, visa, mail and wire fraud. Even in the United States, some traffickers have been known to supply the women with fraudulent state identification and social security cards. This involvement in a multitude of criminal activities and ties among various criminal associations only serves to increase the burden on local, state, and federal law enforcement.

What is the scope of the trafficking problem to the United States? We estimate that approximately 45,000-50,000 women and children are trafficked to the United States each year. Trafficking in persons is prevalent in all regions of the United States. Victims traditionally come from Southeast Asia and Latin America; however, increasingly they are coming from Eurasia and Central Eastern Europe. Primary source countries for the United States include Thailand, Vietnam, China, Mexico, Russia, Ukraine, the Philippines, and Korea. The United States has seen victims of trafficking forced into begging schemes, forced commercial sexual exploitation (such as forced prostitution, stripping, peep and touch shows, and massage parlors that offer a variety of sexual services), sweatshop labor, agricultural labor, and domestic servitude.

There have been reports of trafficking in at least 20 different states, with most cases occurring in New York, California, Florida and some cases have arisen in Texas. Evidence suggests that state and local law enforcement have only scratched the surface of the problem. Trafficking in persons cases are hard to uncover as the crime usually occurs “behind closed doors,” and language and cultural barriers often isolate the victims.

Traffickers typically lure women to the U.S. with false promises of jobs as waitresses, nannies, models, factory workers, or exotic dancers. Traffickers also recruit women abroad through advertisements and employment, travel, model, or matchmaking agencies. Many women fall victim when they apply for work at seemingly reputable employment agencies which are unlicensed or unregulated. Capitalizing on rising unemployment, disintegrating social networks, and the low status of women in the source countries, the traffickers promise high wages and good working conditions in exciting U.S. cities.

Here is one victim’s story: Inez from Veracruz, Mexico was approached by a family friend who told her about job opportunities working in U.S. restaurants. Inez was told that her immigration papers would be taken care of and that she could change jobs if she didn’t like working at the restaurant. She was taken to the U.S., her identity papers were confiscated, she was locked up in a trailer and forced to work as a prostitute—seeing 30 men per night. She was told that she owed the smugglers money and if she didn’t work, they would hurt her family in Mexico.

In reviewing the major trafficking cases in the U.S., the perpetrators tend to be smaller crime groups, smuggling rings, loosely linked criminal networks,

and corrupt individuals who victimize their own nationals. The size or structure of the criminal group has no bearing on the violence, intimidation and brutality that is commonly perpetrated on the trafficking victims. Many small trafficking rings are extremely vicious. Moreover, technology has made size irrelevant in terms of a crime group's ability to establish commercial or business-like structures. Traffickers have easily established businesses in the U.S. and abroad to conceal their activities and illicit proceeds from law enforcement as well as deceive the victims.

So, what are we doing about this horrific crime of trafficking in person? The U.S. government is committed to combating trafficking in persons in the U.S. and around the world. At the U.S. Department of State, I head the Office to Monitor and Combat Trafficking in Persons. This is a brand new office that is charged with ensuring that federal agencies are coordinating their efforts here and abroad to combat trafficking in persons. The agencies we work with include the Departments of Justice, Health and Human Services, and Labor, the Central Intelligence Agency, and the Agency for International Development. Every year my office produces a report to Congress examining foreign governments' efforts to combat trafficking in persons.

Our strategy to fight trafficking in persons is a 3-prong strategy, we call it the 3 P's: Prevention, Protection of victims and Prosecution of traffickers. Prevention of trafficking in persons includes supporting school and literacy programs, job training, alternative economic development programs, and public awareness campaigns. We now support public awareness campaigns that warn potential victims about trafficking in over 30 countries. Protection of victims includes supporting shelters and halfway houses, providing medical, psychological and counseling services to victims and repatriating them safely to their home countries. Prosecution of cases is key—it is important that these cases result in convictions and appropriate sentences. All three prongs require that we work with other countries to ensure that they have strong legislation criminalizing trafficking and protecting victims. Both domestically and internationally we must train law enforcement, prosecutors and judges in order to ensure that they are aware of these laws and able to conduct effective investigations against traffickers.

In October 2000, the Trafficking Victims and Violence Protection Act became law. This law criminalizes trafficking in persons in the United States. Before this, U.S. prosecutors had to use a variety of criminal, labor and immigration statutes to prosecute traffickers—and often the sentences against the traffickers were low and the victims were deported. Traffickers may face up to 20 years in prison, or life imprisonment in some cases, and have the profits they earned from enslaving people confiscated.

Victims of trafficking in persons to the U.S. are now given better protection. Before this law, trafficking victims were often deported since they were in the country illegally. Now, victims that work with U.S. law enforcement to go after the trafficker may be given the right to stay in the U.S. and work—the t-visa.

Uncovering, investigating and prosecuting trafficking cases while protecting, assisting and repatriating victims is a complicated and resource-intensive task. Distinctions regarding trafficking in persons, alien smuggling and illegal migration are sometimes blurred. Whereas alien smuggling usually involves short-term monetary profit, trafficking in persons usually involves long-term exploitation for economic gain. Organized crime groups profit from both the trafficking fees and the trafficked person's labor. In some cases, the traffickers may profit even further by using the trafficked people as "manpower" for other criminal purposes, such as selling drugs. Sometimes trafficking cases may be labeled as worker exploitation cases. And because traffickers can also re-sell debts to other traffickers or employers, victims are often caught in a cycle of perpetual debt bondage.

Trafficking in persons is a global problem. Solving this problem and bringing relief to its many victims is only possible through cooperative efforts. This cooperation must occur between governments and non-governmental organizations at the federal, state, and local levels. Destination countries must work with transit and source countries to stem the flow of trafficking; and source countries must work not only to prevent trafficking, but also to help with the reintegration of trafficked victims back into their home society.

What can you do? You can organize an interagency working group including representatives from law enforcement, prosecutors, and NGOs to devise a plan or working group on how to respond to trafficking in your community. Often when a trafficking ring is uncovered, there are numerous victims that are in need of shelter, medical attention, legal services, and language services. Community leaders should ask themselves—what would happen if tomorrow a sweatshop is raided and we find ourselves with 70 Thai victims? This happened in El Monte, California and could happen here.

You can also support poverty-alleviation programs abroad that are run by non-governmental and international organizations, or faith-based groups, and you can volunteer at community outreach centers for new immigrants. As Attorney General Ashcroft has said "trafficking is not only a serious violation of U.S. law but an affront to human dignity." It is up to all of us to stand united against this contemporary form of slavery. Thank you.

I'm happy to take questions.

[i] *Keynote speech presented by* ***Ambassador Nancy Ely-Raphel*** *at the annual meeting of the ADR Section of the State Bar of Texas in Fort Worth, Texas, on 1 February 2002.*

[ii] ***Ambassador Ely-Raphel*** *is currently serving in the U.S. State Department as Head of the Office to Monitor and Combat Trafficking in Persons. Prior to assuming her current position Ambassador Ely-Raphel served as U.S. Ambassador to Slovenia. As Coordinator for Bosnia, where she was a principal player in formulating programs to implement the Dayton Peace Accords; as Principal Deputy Assistant Secretary of State for Democracy, Human Rights and Labor; and as Assistant Legal Adviser for African Affairs at the State Department, Ambassador Ely-Raphel has played an extraordinary and decisive role in furthering programs to address human rights and humanitarian concerns in eastern and central Europe and the former Soviet Union. An expert on Africa, she played a critical role in developing a legal assistance program for political detainees inside South*

Africa and drafted the document which formed the basis for the Constitution adopted by the first democratically elected government in the republic of Namibia.

A graduate of Syracuse University and the University of San Diego School of Law, Ambassador Ely-Raphel was Assistant United States Attorney, Deputy City Attorney for San Diego, Associate Dean of Boston University School of Law, and senior trial attorney with the Organized Crime strike Force of the U.S. Department of Justice before joining the State Department.