Alternative Resolutions

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The Newsletter of the State Bar of Texas
Alternative Dispute Resolution Section

May 2005 **Spring Issue** **Vol. 14, No.2**

CHAIR'S CORNER

by William H. Lemons, III, Chair, ADR Section

HELP WANTED

As this is my last *Chair's Corner*, it is tradition to review the past year, thank some people, and then look into the future. So let's do that.

THE REVIEW

By far the high point of my year was the highly successful CLE program the Section co-sponsored with the Frank Evans Center for Conflict Resolution last October. Held at South Texas College of Law, the two-day program was entitled *Advocacy Skills for Resolving Disputes.* We also focused on another intriguing topic – *The Vanishing Civil Jury Trial.* It was frustrating that the program was not well attended, and particularly that no litigators came to hear what we had to say. But even though CLE is tough these days, we are going to keep trying. Rob Kelly, Mike Wilk, and Frank Evans are already planning another program for this fall – a one-day event on **October 28, 2005** aimed at ADR professionals. There is an announcement about that program elsewhere in this newsletter.

After the October CLE, we all went back to work. The Arbitration Taskforce has actively addressed concerns expressed by the Senate Jurisprudence Committee about fairness of consumer/business arbitration and the effect of pre-dispute arbitration clauses. John Fleming reported on the discussion draft of the *Best Practices Guidelines for Consumer Arbitration*, and we published the draft for comments in the last newsletter. You may continue to help John and the Taskforce by providing comments, criticisms, suggestions and the like on the *Best Practices Guidelines*, to John at jfleming@austin.rr.com or by fax to (512) 476-9259. We will ask the general membership of the ADR Section to approve the *Guidelines* at our Annual Meeting on June 24 in Dallas.

The ADR Section is meeting its goal of *educating consumers and practitioners in the use of the arbitration process.* Presently, under the leadership of John Boyce (San Antonio), Council members have updated, and brought into the new millennium, the SBOT educational pamphlet *Alternative Dispute Resolution – Texas Style*. This group has also drafted an entirely separate SBOT informational pamphlet – *Consumer Arbitration in Texas* – and we will roll that out in June as well.

Last, the ADR Section continues its support of the DRC funding legislation that was introduced in both the House (Ruben Hope [Conroe] introduced HB 282) and the Senate (Jeff Wentworth [San Antonio] introduced SB 168). We also endorse and support C.S.H.B. 205, the enabling legislation for new ADR Chapter 161 on *Collaborative Law Procedures.*

THE THANKS

So many thanks to my wife, Pam, for her assistance with ADR Section meetings and matters – particularly when I put her in charge of something and then micro-manage that task and her job. Many thanks to our Executive Committee, and particularly the tutelage of Mike Schless, for keeping our train on the track. To John Fleming, John Boyce, Richard Naimark, (AAA) and Kim Lawrence (BBB)

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CHAIR'S CORNER
HELP WANTED
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for their dedication to the Arbitration Taskforce matters. And to John Fleming for being our hearing aid and voice of reason in the Texas Legislature. Finally, to all the wonderful members of the ADR Section Council for their fine attendance record, eager participation and willingness to roll up their sleeves and work. They also party pretty hard. Just feed them and they will come. And to Kelly Frels, Bar President, for being so supportive of our group, and to Constance Miller and Kathy Casarez of the SBOT Sections Department for their enthusiastic assistance.

HELP WANTED

Let's talk a moment about some things the Council is involved in for the future. First and foremost is *outreach.*

A subcommittee headed by Kathy Fragnoli (Dallas) is working to bring the ADR Section's message and knowledge to states (or other governmental subdivisions) that have not progressed as far as we have in ADR. She envisions a "speakers panel" to travel outside the state to address bar associations or other groups and tell them our story about ADR. A subcommittee headed by Leo Salzman (Harlingen) is intent on doing much the same thing in small towns or remote locations within the state of Texas. He envisions contacting outlying bar associations and the like to see if speakers from the Section might be invited to talk to their groups. Part of this could be done by videotaping of seminars and presentations. Walter Wright (San Marcos) is working on the same concept for the Mexican state of Nuevo León, which recently adopted a form of ADR legislation. **Please contact them and let them know that you can assist with *outreach* in some way.**

Let's talk about another form of *outreach.* In the last newsletter, we discussed how the Section had appointed a *Long-Range Financial Planning Committee* to address how it can effectively use its financial resources to promote the use of ADR. You may recall that the Section provided $2,500.00 in scholarships to the ABA Section on Dispute Resolution in March 2003, and sponsored *Breakfast with the Texians* during that event. The Section contributed $2,500.00 to the Frank Evans Center for Dispute Resolution at its inauguration in October. More recently, we contributed $1,000.00 to assist the graduate portfolio program in dispute resolution of Austin's *Center for Public Policy Dispute Resolution.* But let me give you another example of how we might be able to use our financial resources quite effectively.

Recently, as your Chair, I met with a representative of a quasi-public educational entity. With over 65,000 constituents (employees, students, contractors), this enlightened organization was determined to initiate ADR procedures at all levels to minimize and resolve conflict (and save enormous legal costs). As its constituents are extremely diverse – in culture, gender, age, and economics – I volunteered to suggest a *diverse* panel of mediators from which the *diverse* end-users could select neutrals. I couldn't do it. Not a chance. I went from one roster to another, and in large part, all the mediators were like me! (male, WASP, middle-aged, from big law schools and escapees from big law firms -- and largely not bilingual). I explored the federal court roster of neutrals, with the same result. How on earth could you expect a young Hispanic female student from the west side of San Antonio to be comfortable with someone like me as her neutral?

So as one of my last functions as Chair, I am mobilizing the troops. I am challenged to see what we can do about this lack of diversity. I have talked to at least one mediation training organization about coming here to assist in training local constituents in the ADR processes, with ADR Section support, both financially and otherwise. I have gathered what diverse section members there are (and there are some and they are wonderful) for suggestions. But one of the primary goals of the ADR Section is to improve diversity both within its ranks and in the end-users of ADR. This project will provide a great model for that. ***If you can assist in this endeavor, or have ideas on what we might do, please contact me***.

The Section has been very active in the field of arbitration. I think all of you would agree that this is a very hot topic. It is my personal observation that many of the members of the Texas Legislature are barraged with irate phone calls and letters from disgruntled participants – largely consumers – in the arbitration arena. This is all the Austinites hear. When I conduct the *Arbitration Advocacy* program, I hear anecdotal stories from all telling of the horrors of arbitration – yet, few if any have personal experience good or bad. But all have heard about a bad situation, and let me tell you what happened to my uncle Charlie . . . . Yet I have reason to believe that arbitration filings in the last ten years have surpassed filings during the first sixty-five years, and generally people arbitrate as a matter of choice. Litigants certainly are fleeing the courthouse. ***Please provide us with any positive stories you might have about arbitration in general, or with respect to a good experience you may have had in a particular case.***

The webpage of the ADR Section was significantly modified and modernized several years ago. We were so proud. At the last Council of Chairs meeting in Austin, we devoted a portion of our meeting to an in-depth study of how a section might make effective use of technology. John Sirman, the "techie" for the SBOT, projected numerous pages from the various SBOT sections. I eagerly anticipated seeing our page as an example of perfection. Never saw it. I did see others (Construction, Legal Assistants, Labor and Employment, Government Lawyers) that made me realize we were far behind the curve. Many were updated weekly. Most had useable directories of members. Several had interactive feedback areas. Indeed, the SBOT recommends that each section have an officer or committee devoted solely to "website and technology." ***If you are an ADR professional and have technical expertise, please call or email me. We need your help.***

One final note. Elsewhere in this newsletter you will find Mike Schless' article on nominations for the Council and for its slate of officers. We will vote on these nominations at the Annual Meeting. Be aware also that we will consider and seek section-wide approval of the *Best Practices Guidelines for Consumer Arbitration.* Once we have done that, we intend to publicize them for the legislature and courts to use as a reference. Lastly, there will be a fine CLE program at the Annual Meeting. We will have a booth at the Anatole for our Section, and we will have many publications, past newsletters, and other items to look at. ***Please attend the Annual Meeting, and come to the ADR Section luncheon, CLE program and year-end general membership meeting.***

AGENDA - ADR Section Council Meeting

April 2, 2005 - 12:00 noon to 4:00 p.m.

106 Palo Duro - San Antonio, Texas 78232

Chair's Report	(Lemons)
Approval of Minutes – January 8, 2005 Council Meeting	(Hargrove)
Treasurer's Report	(Lemons)
Committee Reports:	
Arbitration Roundtables	(Fleming, Schless)
Arbitration "Best Practices" Guide (adopt)	(Fleming, Lemons)
Newsletter	(Wright)
Legislative Initiatives:	
Senate Jurisprudence Committee	(Fleming)
DRC Funding Bill	(Schless)
HB 205 – Collaborative Law Bill in Chap. 154	(Fleming)
Other legislative activity	(Fleming)
New Business	
Annual Meeting and Fall CLE	(Wilk)
Nominations for Council Positions/Officers	(Schless)
2005 Evans Award	(Schless)
Alford v. Bryant	(Fleming)
Council Meetings and Dates	(Lemons)
1:30 Break and Working Lunch	
2:00 Committees and Assignments	(Lemons, Schless)

Here we will continue, in about a two-hour dialogue, our discussion from January on what committee assignments/tasks are needed to accomplish our goals, including:

Member Services	Lemons, Schless)
South Texas Initiative	(Salzman)
Long Range Financial Planning	(Lemons)
Update SBOT Informational Pamphlets	(Boyce)

Adjourn 4:00 p.m. sharp

ANNUAL MEETING FOR ALTERNATIVE DISPUTE RESOLUTION SECTION FRIDAY, JUNE 24, 2005

The Annual Meeting of the ADR Section of the State Bar of Texas is scheduled for 10:00 A.M. on Friday, June 24, 2005 in Dallas. The Section's meeting will take place in conjunction with the Annual Meeting of the State Bar of Texas. In addition to the usual business such as the election of new Council members and officers, the Section will discuss and seek approval for the Arbitration Best Practices and the Consumer Arbitration Pamphlet. The pamphlet is the product of meetings and discussions with arbitration providers, lawyers, and other interest groups, and it is designed to give consumers an even playing field in arbitration.

During the Section's luncheon, Bill Lemons will recognize outgoing officers and Council members, and he will present the Evans Award for outstanding service to the Texas ADR community.

Following the luncheon, the following outstanding speakers will present the following programs:

- Cris Gilbert will report on the status of court-annexed mediation in Texas.
- John Fleming will bring us an update on laws passed by the Legislature that impact the ADR profession.

Susan Schultz will facilitate an interactive presentation addressing thorny ethical issues facing impartial third parties.

We hope to see you there. Mark you calendars and plan to attend.

SAVE THE DATE FOR FALL CLE: OCTOBER 28, 2005!

The ADR Section of the State Bar of Texas and the Frank Evans Center for Conflict Resolution are hosting the Fall CLE program for ADR users and providers at the South Texas College of Law in Houston on Friday, October 28, 2005. The cost for the one-day conference is $125.00. An outstanding panel of speakers will present programs featuring new cases and legislative updates affecting ADR, the ADR Section's Best Practices Guidelines for consumer arbitration, an update on collaborative law practice, hot topics in mediation, an interactive session to compare and contrast "sissy" versus "bully" mediation techniques as well as other styles, ethical puzzlers, and a discussion of cross-cultural and community conflict resolution. Mark you calendars and plan to attend.

ALTERNATIVE DISPUTE RESOLUTION SECTION MEMBERSHIP TO VOTE ON PROPOSED BEST PRACTICE GUIDELINES FOR ARBITRATION AT ANNUAL MEETING

By John C. Fleming with Comments by William H. Lemons, III

In response to public concerns over the fairness of arbitration, particularly as concerns consumer arbitration, the *ADR Section of the State Bar of Texas has drafted a best practice guideline. These best practice guidelines were approved for publication by the Section's Council at its quarterly meeting held on January 8, 2005. Minor revisions were made at the Council's next quarterly meeting April 2, 2005, and the guidelines as revised were again approved. The Section is seeking comments on this draft. Importantly, the ADR Section Council will ask its general membership to vote to approve the guidelines at the annual meeting of the Section, which commences at 10:00 a.m. on June 24, 2005.*

Comments may be emailed to John Fleming at ***jfleming@austin.rr.com*** *or by fax to 512-476-9259.*

TEXAS STATE BAR ADR SECTION
BEST PRACTICES FOR CONSUMER ARBITRATION

Background: The use of arbitration agreements in contracts between a consumer and a business has expanded substantially in the last decade. Complaints about the arbitration process made by consumers resulted in the Texas Legislature conducting two interim studies on the subject. The House Civil Practices committee held hearings on the subject and issued a report in 2002, and the Senate Jurisprudence Committee held hearings and issued a report in 2004. The reports of the Interim Charges may be found online at Texas Legislature Online. The ADR Section of the State Bar monitored these hearings, and members of the Section have testified before the Committees.

In response to the concerns expressed by consumers, the ADR Section launched several initiatives. The Section convened several roundtables and invited business and consumer users of arbitration to share their concerns and perceptions with the Section. The Section devoted portions of the 2004 annual CLE to better equipping lawyers to advocate in the arbitration forum. In addition, the Arbitration Task Force was charged with developing a set of best practices for consumer arbitration. The best practices are intended to serve two purposes. First, the best practices are intended to serve as a guide to attorneys who draft arbitration clauses for use in a business transaction for the consumer. These best practices set forth what the Section believes to be adequate due process safeguards for consumers. Second, the Section is aware that Texas Courts have in the past looked to the Sections' Mediator Ethical Guidelines for guidance on ADR issues before the tribunal. The Section hopes that Texas Courts will likewise find these best practices a useful reference in determining issues of procedural or substantive unconscionability of an arbitration agreement in a contract of adhesion between a consumer and a business.

In developing these *Best Practices*, the Section has looked to the consumer protocols established by the American Arbitration Association and by JAMS. The Section believes that protocols providing similar procedural standards are appropriate for arbitrations which may not be conducted under the auspices of those organizations.

The Section believes that arbitration is an appropriate dispute resolution for consumer transactions. When conducted with adequate procedural safeguards, arbitration offers consumers an expeditious and fair resolution of their disputes. The absence of any one of the following factors, by itself, should not be determinative of whether the agreement/proceeding is or is not unconscionable.

BEST PRACTICES

Scope: The best practices described in this white paper apply to pre-dispute agreements to arbitrate that are contained in contracts between a business and a consumer. A consumer is a person who enters into a transaction primarily for personal, household, of family purposes.

1. Arbitration is a selection of a dispute resolution forum. An agreement to arbitrate is not the waiver of substantive legal rights, but merely a change in the forum. Therefore, an arbitration agreement must provide a fair process with appropriate safeguards for due process.

2. The agreement to arbitrate should be mutual and reciprocal. If a consumer is required to arbitrate the consumer's claims, then the business must equally be bound to arbitrate its claims against the consumer. The business should not be given an "opt-out" right unless the same is granted to the consumer.

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ALTERNATIVE DISPUTE RESOLUTION SECTION MEMBERSHIP TO VOTE ON PROPOSED BEST PRACTICE GUIDELINES FOR ARBITRATION AT ANNUAL MEETING

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3. The arbitration clause must be conspicuous and sufficiently clear to notify the consumer of the terms and conditions relating to the arbitration. Ideally, the notice should specifically state that both parties are waiving any right to a jury trial.

4. Arbitrators must be neutral and independent. Arbitrators should be required to adhere to the Arbitrator Ethics Guidelines adopted by the American Bar Association and the Alternative Dispute Resolution Section of the State Bar of Texas. This includes the requirement that arbitrators should be required to disclose all former and current associations and relationships with the parties and attorneys in a case that are likely to affect partiality or relationships that would cause a reasonable person to conclude the arbitrator was partial to one party to the arbitration.

5. Arbitration service providers must be independent. When an arbitration agreement names an arbitration service provider in which the business is a member, the agreement should also provide the option for the consumer to choose another non-affiliated and independent service provider to administer the arbitration. Full disclosure of the relationship should be made when a party is affiliated with or a member of the arbitration service provider.

6. All parties to an arbitration agreement should be provided an equal opportunity to participate in the selection of the arbitrator.

7. Consumers forum access fees which include arbitration filing fees, administrative fees, and arbitrator expenses must be reasonable. One of the factors to consider in the determination of what is a reasonable charge, is the amount of filing fees and court fees which a party would be expected to pay to initiate litigation of the claim.

8. The arbitration agreement should not require a consumer who does not prevail in an arbitration to pay the attorney fees or arbitration expenses of the business unless such payment is expressly provided in an applicable state or federal statute.

9. Consumers and businesses should be provided adequate disclosures and, if necessary, discovery in order to allow each party reasonable opportunity to fully present its claims or defenses. The amount and scope of discovery should be subject to the direction of the arbitrator and should be consistent with the equal goals of providing each party an adequate opportunity to develop its claim or defense and to avoid the excessive costs incurred in civil litigation.

10. A consumer is entitled to an in person hearing, and is entitled to be represented.

11. The arbitration venue should be in reasonable proximity of a consumer's residence.

12. The arbitrator must be given the power to award any damages or other relief that the consumer would be entitled to recover under applicable federal or state law.

13. The award of the arbitrator should include a brief written statement of the basis of the award.

14. The arbitration agreement should provide that when the size of the claim is small, either party may elect to bring the claim in small claims court.

15. A pre-dispute agreement to arbitrate should not require the arbitration award itself to be confidential, as there may be good reason to allow a synopsis of each award to be subject to public review or reporting. Normally, the proceeding is private. Subsequent to the occurrence of a dispute, the parties may mutually enter into an agreement providing that the arbitration proceeding, arbitration award, or both will be confidential.

STATE BAR OF TEXAS 2005 ANNUAL MEETING

Mark Your Calendar!

State Bar of Texas
2005 Annual Meeting
June 23-25, 2005
Dallas Wyndham
Anatole Hotel

LEADERSHIP SLATE ESTABLISHED BY COUNCIL

By Michael J. Schless

The ADR Section Council has approved a slate of officers and new council members to lead the Section in the 2005-2006 bar year. At its April 2, 2005 meeting in San Antonio, the Council approved the Nominating Committee's proposed slate of officers which includes John C. Fleming for Chair-elect, Jeff Kilgore for Secretary, and Cecilia H. Morgan for a second term as Treasurer. This year's Chair-elect, Michael S. Wilk, will automatically succeed William H. Lemons, III as Chair of the Section, and Bill will remain on the Council for another year as Immediate Past Chair.

Michael S. Wilk is President of Hirsch & Westheimer, a Houston law firm which he joined fresh out of the University of Texas School of Law in 1966. After many years as a business lawyer and litigator, Mike's interest turned to ADR in 1991, and he has been a leader in that field ever since. He is a past President of the Association of Attorney Mediators and has actively served Harris County's DRC as well as its Peer Mediation program. As a panel member of both AAA and the NASD, Mike has arbitrated many large and complex disputes. A Council member since 2001, Mike has served as Treasurer, and presently holds the position of Chair-elect.

John Fleming, who has been on the Council since 2002, has been the Section's eyes and ears at the state legislature for the past two sessions. A master of the legislative process and an experienced mediator and arbitrator, John is general counsel at the Texas Savings and Loan Department in Austin. A lawyer with over thirty years of experience, Jeff Kilgore has devoted most of his time for the last decade to mediation and arbitration in Galveston. Jeff has been an active leader of several bar, ADR, and civic organizations, and has been on the Council for nearly a year. Cecilia Morgan is being nominated for her second term as Treasurer. Cecilia is one of the most highly regarded mediators and arbitrators working in the Dallas office of JAMS. Cecilia came to the Council in 2003 to fill an unexpired term and was elected in 2004 to a full three-year term.

Bill Lemons served as in-house counsel at Braniff for several years before going into private practice in San Antonio, primarily in labor and employment and in complex commercial matters. A member of AAA's employment and commercial arbitration panels since 1997, Bill has also arbitrated numerous complex matters, some of them on the same panel with Mike Wilk. Partly because of his background, and partly because that is where the legislative action has been for the past two legislative sessions, Bill gets the credit for reminding us that of all of the non-profit ADR organizations in Texas, the ADR Section is the only one with a focus on arbitration and other forms of ADR in addition to mediation. Bill has been on the Council since 2000 and has served as Treasurer and Chair-elect prior to his current term as Chair of the Section.

The Council has also approved the nomination of five new members of the Council. If elected at the ADR Section's annual meeting to be held on June 24 in Dallas, these individuals will serve a three-year term ending in June 2008. They are John K. Boyce, III of San Antonio; Jay A. Cantrell of Wichita Falls; Thomas Newhouse of Houston; Mike Patterson of Tyler; and Susan Schultz of Austin.

An attorney since 1978, who now devotes most of his practice to mediation and arbitration, John Boyce has recently revised the ADR Texas Style pamphlet for the Section, a publication which has been distributed to the public by the State Bar of Texas for many years. He has also produced an informational pamphlet on consumer arbitration, which is described in this edition of Alternative Resolutions. Jay Cantrell wrote the article, "Bringing Gandhi to North Texas," which appeared in the September 2004 edition of Alternative Resolutions. Jay has had a general civil practice since 1978, as well as an ADR practice since 1992 in Wichita County, where he served as President of the county bar association in 1986-87. Tom Newhouse has taught ADR courses at the University of Houston Law Center ever since they were first offered there, and he has trained mediators at the A. A. White Dispute Resolution Center since it came to the U. of H. Mike Patterson was a trial lawyer in Dallas and then in East Texas, where he served as President of the Smith County Bar Association in 1987 and as President of the East Texas Trial Lawyers Association in 1993-94. In 1996, Mike became a full-time mediator and has never looked back. Susan Schultz served the State of Texas for many years, primarily in the public utilities arena, first as an Assistant Attorney General and then with the Public Utility Commission. For the past two years, she has served as the Deputy Director of the Center for Public Policy Dispute Resolution at the University of Texas School of Law.

The ADR Section Council bids a fond farewell to five individuals whose tenure on the Council ends in June. Danielle L. Hargrove of San Antonio has served on the Council since 2002, including two terms as Secretary. James W. Knowles of Tyler and Michael J. Kopp of Waco have both been valued members of the Council since 2002. Gene Valentini was elected to the Council in 2004 to serve an unexpired term. Michael J. Schless ends six years of service to the Section in June. Elected to the Council in 1999, Mike served two terms as Treasurer, then Chair-elect, Chair, and now Immediate Past Chair.

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A POINT OF PERSONAL PRIVILEGE

By Mike Schless

I rise on a point of personal privilege. As I end my six years on the ADR Section Council, I rise to express my gratitude to you. Yes, you. You, and all of the other wonderful ADR professionals in this state just like you, have made Texas a national and, I dare say, an international leader in the field of mediation. You, Frank Evans, started it all for the rest of us in Texas, and for that we are forever in your debt. But you have also given me your friendship, which I treasure. You, Gary Condra, demonstrated to us all that confidentiality, which is the bedrock on which mediation is built, is a principle worth fighting for at all cost, and for that we thank you. But you also allow me to call you "friend," and for that I am grateful. You, Suzanne Mann Duvall, through your boundless energy and enthusiasm, have provided leadership in virtually every organization that has had an impact on ADR in Texas in the past dozen years. Yet you also always seem to make time for delightful conversations and friendship with me, and for that I thank you. You, Bruce Stratton, along with Bill Low, gave so much of your time and energy to leading the challenging, and at times tedious, work of the Supreme Court Advisory Committee on Court-Annexed Mediations, sometimes sacrificing your personal health in the process. But what an honor it is for me that you are also my friends. You, Brian Shannon, along with Ed Sherman, Kim Kovach, John Fleming, and so many others, bring scholarship to the cutting edge of our profession and remind us that the more we learn, the more we need to learn. But I have also gained as much from your friendship as your scholarship. You, Judy Corder, Mary Thompson, Ross Stoddard, Courtenay Bass, Mike Amis, Ross Hostetter, Bud and Rena Silverberg, Trey Bergman, and so many others like you have trained the rest of us in accordance with the highest standards of professionalism imaginable; standards which you yourselves established. But in addition, you have given me your friendship. You, Judges Nancy Atlas, John Coselli, and Jay Patterson, you poor misguided souls traded lucrative careers in ADR for a robe and a bench, but in the process have brought a greater level of judicial understanding and acceptance for a process previously confused with meditation. But I am proud to also call you my friends. You John Palmer, Caliph Johnson, Wayne Fagan, Debbie McElvaney, Bill Lemons, and soon Mike Wilk, have devoted countless hours and endless energy to your leadership of the ADR Section, each making your own valued contribution to the exploration of the frontiers of Texas ADR. I thank each of you for that from the bottom of my heart, but I thank you even more for your friendship and guidance.

There are so many more of you whom I have not named, but to whom I also want to express my gratitude. You are the ones who are out there toiling in the ADR fields day in and day out. I know that it is for you, as it certainly is for me, a labor of love. I have had the honor of getting to know and become friends with so many of you over the past thirteen years since I left the bench to pursue the work and the process to which we are all thoroughly devoted. It is to you that I make one last request. Please make your commitment to our profession known to those who are on the ADR Section Council. Because, it is only when you do that that they will know that you are there and willing to serve. In that way, they can invite you to share in the leadership responsibilities and opportunities of the Section, keeping it fresh and vibrant and on the cutting edge. In true mediation fashion, that creates a win-win for everyone. The Section, and the entire ADR community, will benefit from your insights and your new ideas. And you will benefit from the many new friendships you will make, and the opportunities you will have to learn, just as I have, from fine folks like you. Thank you one and all.

LEADERSHIP SLATE ESTABLISHED BY COUNCIL
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The election of officers and new Council members will be held at the ADR Section's annual meeting on June 24 in Dallas at the Wyndham Anatole Hotel. The annual meeting, luncheon and awards banquet, CLE event, and first Council meeting of the new bar year comprise a full day of activities for the Section held in conjunction with the State Bar of Texas Annual Meeting. All current voting members of the Section are eligible to vote. Ya'll come!

As peace is of all goodness, so war is an emblem, a hieroglyphic, of all misery.

John Donne

RECENT DALLAS COURT OF APPEALS RULING ON ENFORCEABILITY OF MEDIATED SETTLEMENT AGREEMENT

By Anna Bartkowski*

The Dallas Court of Appeals recently issued an opinion on the enforceability of a mediated settlement agreement in Anderton v. Schindler, 2005 WL 281021 (Tex. App.—Dallas Feb. 7, 2005, no pet. h.).

In February 1998, Doyle Anderton, d/b/a A-1 Turf ("Anderton"), leased a sod farm from Tri-County Sod and Nursery Company, Inc. ("Tri-County"). William Schindler ("Schindler") signed the lease as Tri-County's president. Because Schindler's wife did not agree with the terms of the lease, the three parties signed a side agreement specifying an additional $1,000 per month for the forty months of the lease. Within ten months, disagreements about the lease arose, and Schindler locked Anderton out of the farm.

Anderton brought suit against Schindler and Tri-County in December 1998 for tortious interference, fraud, breach of contract, Deceptive Trade Practices Act violations, and intentional infliction of emotional distress. Anderton also asked for specific performance of the lease. Schindler counter-claimed for breach of contract and for damage to the property. Mrs. Schindler was not a party to the lawsuit.

The trial court ordered mediation, and the parties reached a mediated settlement agreement in January 1999. The parties agreed that Anderton would be released from his obligations under the lease and the side agreement in exchange for $10,000. In addition, the agreement provided that Schindler and his attorney would use their best efforts to secure Mrs. Schindler's signature on a mutual release that included claims regarding the side agreement.

Following the mediation, Anderton sent Schindler's lawyer a check for $10,000 made payable to both Mr. & Mrs. Schindler and a release with signature lines for both of them. Mrs. Schindler was not willing to sign the release or endorse the check. Schindler's lawyer returned the check to Anderton and asked him to send a new check payable only to Mr. Schindler and a revised settlement agreement with Mrs. Schindler's name removed as signatory on the release. Anderton did not send a new check or a revised settlement agreement because, he argued, Schindler breached by not obtaining his wife's signature; the mediated settlement, Anderton declared, was unenforceable.

Both parties filed motions for summary judgment on the issue of whether the settlement agreement was binding and enforceable. Judge Ray Grisham, of the 336th Judicial District Court of Grayson County, found there were no genuine issues of material fact as to the enforceability of the mediated settlement agreement but that there were fact issues relating to the compliance with or breach of the mediated settlement agreement. Judge Grisham set for trial the question of whether the parties had breached the settlement agreement. The trial court entered a judgment in favor of Schindler for damages, interest, attorney's fees, and costs, and it dismissed all of Anderton's underlying claims relating to the lease. Anderton appealed.

The question before the Dallas Court of Appeals was whether the settlement agreement was binding and enforceable. The court decided that the issue could be determined as a matter of law if the intent to be bound by the agreement was clear and unambiguous on the face of the agreement.

The appellate court reasoned that the enforceability of a mediated settlement agreement is determined in the same manner as any other written contract. Tex. Civ. Prac. & Rem. Code Ann. § 154.071 (a) (Vernon 1997); Hardman v. Dault, 2 S.W. 3d 378. 380 (Tex. App.-San Antonio 1999, no pet.) An agreement is enforceable if it is "complete within itself in every material detail, and . . . contains all of the essential elements of the agreement." Padilla v. LaFrance, 907 S.W. 2d 454, 460 (Tex. 1995).The intent of the parties to be bound is an essential element of an enforceable contract, and is generally a question of fact. Farah v. Mafrige & Kormanik, P.C,. 927 S.W. 2d 663, 678 (Tex. App.—Houston [1st Dist.] 1996, no writ). However, where that intent is clear and unambiguous on the face of the agreement, it may be determined arbitration clauses in consumer-lending agreements, as proponents maintain that the process is fair and cost-effective, while critics continue to argue that those who benefit are the businesses, not the consumers.

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CALIFORNIA COURT FINDS THAT SETTLEMENT JUDGE/MEDIATOR EXCEEDED HIS AUTHORITY

By Shawn Ellison*

What is the proper role of a mediator? Does a party's failure to participate in a mediation process in good faith diminish the rules of confidentiality governing the proceeding? These were some of the questions raised in a recent case heard by the California Court of Appeal, in which the court found that a settlement judge/mediator had exceeded his role as a neutral, non-fact finding facilitator.

The case of Travelers Casualty & Surety Co. v. Superior Court of Los Angeles,[1] began with actions brought by approximately ninety persons ("Plaintiffs") against the Roman Catholic Diocese of Orange (the "Church") for alleged childhood sexual abuse by various priests. Those cases are collectively known as Clergy Cases I, and they were coordinated within the Los Angeles County Superior Court with claims against dioceses in other parts of the state.

California public policy encourages mediated settlements. Accordingly, Judge Peter D. Lichtman was appointed by stipulated order as a settlement judge in Clergy Cases I. His role was to act as a mediator, not as a finder of fact. A series of ongoing settlement discussions was held with the Plaintiffs and the Church. These discussions included the Church's two primary liability insurers and their five excess insurers, all of whom reserved the right of withdrawing their defense and denying coverage of the Plaintiffs' claims.

In order to better understand the rest of this case, a brief look at California's rules regarding the insurer-insured relationship follows.

Under California law, an injured plaintiff has the right to bring a direct action against a defendant's insurer that does not defend its insured once the plaintiff is granted a judgment against the defendant. A necessary element of such a claim is a previous independent adjudication of facts based on an evidentiary showing during a proceeding that was free from the potential for abuse, fraud, or collusion. Without such a proceeding, the insurer cannot be liable in such an action.

Another legal rule governing the relationship between insurer and insured states that if an insurer rejects a reasonable settlement offer made within the insured's policy limits, such conduct breaches the implied covenant of good faith and fair dealing. In such a case, the insurer becomes liable for all damages that proximately result, including a judgment in excess of the policy limits.

However, when an insurer is defending the insured, and the insured settles with a plaintiff without the insurer's consent or participation, and the settlement contains a covenant by the plaintiff not to execute in exchange for an assignment of the insured's policy rights against the insurer, the insurer has no obligation to pay. In effect, coverage is forfeited.

On April 30, 2004, nine months after being appointed settlement judge, Judge Lichtman issued an order for the parties and the insurers to participate in a "Valuation Hearing." In ordering this hearing, Judge Lichtman cited as his guide case law, developed under Section 11580(b)(2) of the California Insurance Code, which gives an injured plaintiff who obtains a judgment against an insured defendant the right to sue the defendant's insurer. Judge Lichtman ordered the parties to submit briefs and present live testimony at the hearing, believing that the hearing would thus satisfy the "actual trial" requirement of the statute.

Judge Lichtman's goal for this hearing was to determine and advise the parties, based on an independent adjudicatory proceeding, of: (1) the nature and extent of injuries suffered by the various claimants, (2) the probability that the Church's liability would be established, and (3) the potential for damages, by verdict or settlement, resulting from any liability.

The insurers ("Petitioners") objected to this proceeding, contending that Judge Lichtman had no authority to make factual findings or determinations. When Judge Lichtman overruled their objections, the Petitioners asked the California Court of Appeal to vacate Judge Lichtman's April 30, 2004 order.

On May 21, 2004, the Court of Appeal issued a notice of intent to grant a peremptory writ in the first instance, stating that Judge Lichtman had no authority to
(1) adjudicate any aspect of the case, (2) conduct an actual trial, or (3) render any binding findings. The court threatened to vacate his April 30 order unless he agreed to delete certain portions of the order, including any mention of adjudication, trials, and findings.

Judge Lichtman agreed to make the deletions and issued a modified order on May 24, 2004. He maintained that he had never intended to adjudicate or make findings establishing liability or damages. Rather, he said, he intended to hold the Valuation Hearing and to "provide the parties and the insurers with its determinations(s) as to reasonable settlement and verdict values" in a proceeding free from the "potential for fraud, abuse or collusion."[2]

The Petitioners objected again, contending that the modified order still included provisions from Judge Lichtman to (1) pro-

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CALIFORNIA COURT FINDS THAT SETTLEMENT JUDGE/MEDIATOR EXCEEDED HIS AUTHORITY
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vide "adjudicated benchmarks" for the value of their claims, (2) make findings reflecting his determination of the verdict potential and settlement value of the cases, and (3) allow use of his determinations in subsequent proceedings, as permitted by law.

The Court of Appeal issued another order, suggesting that Judge Lichtman delete the references to "adjudicated benchmarks" and "findings reflecting." Judge Lichtman promptly complied. However, the Petitioners found these two deletions to be inadequate and objected once again. They noted that the modified order still retained language concerning Judge Lichtman's intention to make determinations about the trial and settlement value of the cases, along with his intention to make his final valuation order available for use in later proceedings, as permitted by law. The Court of Appeals, apparently satisfied with Judge Lichtman's modifications, dismissed these objections as moot.

The valuation hearing took place following the preliminary wrangling over Judge Lichtman's order. Counsel for both the Church and the Plaintiffs presented testimony and other evidence. Counsel for the insurers attended but did not introduce any evidence, nor did they examine any witnesses.

On June 8, 2004, Judge Lichtman issued a lengthy written order ("the Valuation Order") in which he declared his determination of the reasonable settlement value of the Clergy Cases I claims.

The Valuation Order also contained an extensive section describing Judge Lichtman's belief that the insurers had thwarted all attempts at settling the cases by their threat of coverage forfeiture should the Church settle in an amount that had not been properly adjudicated. Accordingly, Judge Lichtman declared his intention that the parties have "limited use" of the Valuation Order for the purpose of precluding the insurers from forfeiting coverage as well as for bolstering arguments alleging bad faith in a potential action against the insurers. Judge Lichtman proposed making the Valuation Order (except for the actual settlement valuations) available to the parties for subsequent open court hearings after sixty days, unless precluded by a higher court.

The Petitioners petitioned the Court of Appeal again, contending that Judge Lichtman's order exceeded his power as a settlement judge and violated the confidentiality provisions governing reports of mediation proceedings. The Court of Appeal agreed with the Petitioners and directed the trial court to vacate and seal the Valuation Order.

In deciding this case, the Court of Appeal began by looking to statutory and case law to define mediation. The court wrote that mediation "is essentially a process where a neutral third party who has no authoritative decision-making power intervenes in a dispute to help the disputants voluntarily reach their own mutually acceptable agreement."[3] A mediator must uphold the principles of voluntary participation and self-determination. Consequently, a mediator must respect each participant's right to determine the degree of his or her participation, and must not coerce any party to join or continue participation in a mediation.

California's Court Rules list specific examples of conduct that violates the principles of voluntary participation and self-determination, including "providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties, . . . and threatening to make a report to the court about a party's conduct at the mediation."[4]

The Court of Appeals found that Judge Lichtman had caused the mediation process to be coercive towards the insurers when he (1) attempted to preclude the insurers' ability to forfeit coverage and (2) offered the Valuation Order as evidentiary ammunition for any future bad faith claim by the Church against the insurers. These coercive actions effectively cornered the insurers, leaving them with little choice but to withdraw their rights to forfeit coverage and to pay to settle. The Court of Appeal felt that Judge Lichtman had thus exceeded his authority by addressing legal issues that were not properly before him.

Judge Lichtman's plan to reveal the contents of the Valuation Order in open court clearly violated the sacrosanct guarantee of confidentiality mandated by the mediation process. The court did not buy Judge Lichtman's contention that he was following public policy encouraging mediated settlements. Citing a California Supreme Court case, in which an exception to the confidentiality guarantee was denied even when a party refused to mediate in good faith, the court upheld the confidentiality rule for this mediation, in which one party's "limited and recalcitrant participation" made a settlement unlikely. The court stated clearly that "(p)reventing or punishing such conduct is not the job of the mediator."[5]

The court held that Judge Lichtman did not err by providing parties and insurers with his evaluation of plaintiffs' prospects for victory or the reasonable settlement value of the case. This evaluation was not only proper, the court reasoned, but may have been helpful in bringing about the settlement that ultimately resulted. However, the court held that Judge Lichtman should not have characterized his settlement valuations as findings. Nor should Judge Lichtman have taken a position regarding the question of whether the insurers had acted in bad faith.

In handing down this decision, the California Court of Appeal upheld the traditional role of a mediator as a neutral, nonfactfinding facilitator. The court also prevented any erosion of the guarantee of confidentiality that is essential to any successful mediation.

* ***Shawn Ellison*** *is a graduate of the University of Texas at Austin and a first-year student in the Legal Studies program at Texas State University's graduate school in San Marcos. He has been a full-time professional musician for twenty-three years. Shawn lives in Austin with his wife, Deborah, and their many dogs.*

ENDNOTES

1 24 Cal. Rptr.3d 751 (2d Dist. 2005).
2 Id. at 755.
3 Id. at 757.
4 Id. at 758.
5 Id. at 761.

PLAINTIFF'S TAXABLE INCOME INCLUDES PORTION OF RECOVERY PAID TO ATTORNEY AS CONTINGENT FEE

By Shannon Briones*

In a case decided on January 24, 2005, the Supreme Court of the United States held that "when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent-fee." This holding means that for income tax purposes, all settlement proceeds, including those paid directly to an attorney on a contingent-fee basis, are considered gross income.

In Banks, the court considered two separate actions in which former employees sued their former employers under federal and state employment discrimination statutes. When both plaintiffs settled their respective cases, they failed to include fees paid to their attorneys under contingent-fee agreements as gross income on their federal income tax returns. The Tax Court upheld notices of deficiency issued by the Commissioner of Internal Revenue in both cases. The Courts of Appeals for the Sixth and Ninth Circuits found that attorney's fees were not includable as gross income. The Supreme Court reversed and remanded judgments made by the circuit courts.

Initially, the Court was compelled to clarify the significance of the issue as it related to taxes for two reasons. First, because of the Alternative Minimum Tax (AMT), to take the legal expenses as miscellaneous itemized deductions would have not been possible. The AMT establishes a tax liability floor for non-corporate individual taxpayers. Second, the American Jobs Creation Act of 2004 was enacted after the two cases arose. The Act amended the Internal Revenue Code "to allow a taxpayer, in computing gross income, to deduct attorney's fees and court costs paid by, or on behalf of the taxpayer in connection with any action involving a claim of unlawful discrimination." Because the Act is not retroactive, it did not apply in this case.

The Court relied on the Internal Revenue Code definition of "gross income" as "all income from whatever source derived." In addition, the definition extends broadly to all economic gains not otherwise exempted. The "anticipatory assignment of income doctrine" was applied to emphasize that a taxpayer cannot exclude an economic gain from gross income by assigning the gain in advance to another party. The Court found the purpose of the doctrine to "prevent taxpayers from avoiding taxation through 'arrangements and contracts however skillfully devised to prevent [income] when paid from vesting even for a second in the man who earned it.'"

Furthermore, the Court agreed with the Commissioner's view that a contingent-fee agreement should be seen as an anticipatory assignment to the attorney of a portion of the client's income from any litigation recovery. Although a taxpayer client may not have "dominion" over the income at the moment of receipt, he or she does retain control over the "income generating asset", which is the cause of action derived from the plaintiff's legal injury. By retaining this control, the party that "earns the income and enjoys the consequent benefits" should be taxed. The Court rejected the argument that contingent-fee agreements should be treated as joint ventures or business partnerships for tax purposes. Attorney-client relationships are primarily principal-agent relationships, whereby the client "retains ultimate dominion and control of the underlying claim" and the attorney is an "agent who is duty bound to act only in the interests of the principal, and so it is appropriate to treat the full amount of the recovery as income to the principal."

The Court did not address the contention that application of the anticipatory assignment principle would be inconsistent with the purpose of statutory fee-shifting provisions because the cases were settled and based solely on the contingent-fee contracts. In addition, the court determined that the American Jobs Creation Act amended the Code to rectify "the concern for many, perhaps most, claims governed by fee-shifting statutes."

The implications of this decision affect both plaintiffs and defendants during settlement negotiation in an alternative dispute resolution context. First, with the exception of certain employment-related claims, plaintiffs are directly affected by the tax liabilities imposed. After taxes are paid, plaintiffs will realize even less of their awards. Second, both sides to a dispute will be cognizant of the fact that the plaintiffs must report the portion of a recovery paid to an attorney as a contingent fee as taxable income. Therefore, plaintiffs may feel the need to escalate the settlement amount in order to cover the additional tax costs, which would possibly lengthen time spent negotiating.

At advantage are claims that fall under the American Jobs Creation Act of 2004, which include actions that involve "unlawful discrimination." Unlawful discrimination, defined by the Act, includes the following: (1) at least sixteen federal

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PLAINTIFF'S TAXABLE INCOME INCLUDES PORTION OF RECOVERY PAID TO ATTORNEY AS CONTINGENT FEE

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statutes, including provisions of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act; (2) any federal whistle-blower statute; (3) and any federal, state, or local law (including common law) providing for the enforcement of civil rights or regulating any aspect of the employment relationship. The Act allows individuals that recover for such employment-related claims to deduct attorney's fees and court costs when computing adjusted gross income.

* ***Shannon Briones*** *is a graduate student at Texas State University seeking a Master of Arts degree in Legal Studies. She holds a Bachelor of Science degree from the University of Texas at Austin and currently works as a food safety manager at a local manufacturing facility. Her interests lie in civil rights issues, particularly in employment law.*

ENDNOTES

[1] Comm'r of Internal Revenue v. Banks, 125 S.Ct. 826, 829 (2005).
[2] 118 Stat. 1418.
[3] Banks, 125 S.Ct. at 830-31.
[4] 26 U.S.C. § 61(a).
[5] Lucas v. Earl, 281 U.S. 111 (1930).
[6] Id. at 115.
[7] Banks, 125 S.Ct. at 831.
[8] Id. at 832.
[9] Id. at 833.
[10]. Id. at 834.
[11] 118 Stat. 1418.

RECENT DALLAS COURT OF APPEALS RULING ON ENFORCEABILITY OF MEDIATED SETTLEMENT AGREEMENT

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as matter of law. See Hardman, 2 S.W.3d at 380. "[A] contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook." T. O. Stanley Boot Co. v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992).

The court found that the terms were sufficiently definite to determine the obligations of the parties and that the parties intended to be bound by it. Anderton did not raise a genuine issue of material fact as to whether the agreement was binding and enforceable, only about whether Schindler had properly performed. The fact that Schindler did not obtain his wife's release was irrelevant because it was not a provision of the agreement that he actually achieve that goal. The agreement was that Schindler and his lawyer use their best efforts to acquire Mrs. Schindler's release.

As a result, the court concluded that the trial court did not err in granting Schindler's motion for summary judgment. Schindler complied with the terms of the agreement, and Anderton did not. A mediated settlement agreement is binding and enforceable when it contains all the elements of a valid contract and the parties' intent is clear and unambiguous.

* ***Anna Bartkowski*** is a business owner and entrepreneur with over ten years of experience in managing several commercial property and service-related businesses in the Houston and Austin areas. She is currently a graduate student at Texas State University seeking a Master of Arts degree in Legal Studies with a concentration in Alternative Dispute Resolution. She will complete Texas State's Mediation Certificate Program this May and would like to thank Professor Walter Wright for his support and encouragement to participate in the field of Mediation.

ERNST & YOUNG REPORT ON CONTRACTUAL ARBITRATION IN LENDING-RELATED DISPUTES

By Diana Alexander*

Discussions about religion and politics have always sparked debate, and in recent years, the role of contractual arbitration in disputes between consumers and lenders has begun to generate its fair share of controversy. Although the option of pre-dispute arbitration agreements in the consumer-lending context has been available for decades, the push to include such arbitration clauses in consumer agreements has increased in the last ten years. Proponents of consumers signing pre-dispute arbitration agreements stress that arbitration is beneficial, as it provides an inexpensive, fair, and quick resolution. Critics argue that the practice of requiring consumers to sign pre-dispute arbitration agreements benefits corporations, while limiting the options available to the consumer. Opponents also maintain that consumers are typically unaware of the implications of the arbitration clauses until they are faced with resolving a dispute.

In the fall of 2004, Ernst & Young LLP (E&Y) released a report discussing the outcomes of contractual arbitration in lending-related, consumer-initiated cases.[1] The National Arbitration Forum (NAF) provided the consumer arbitration data examined in the study. The purpose of the study was to examine actual experiences of consumers who participated in the consumer arbitration process and determine whether the arbitration process benefits consumers.

The NAF provided E&Y with access to 226 case files and electronic data for lending-related, consumer-initiated claims filed between January 2000 and January 2004. E&Y examined the data concerning: the nature of the claim; input, service, response, and award dates; claim and award amounts; final status of the case; and whether the claimant or respondent prevailed. The 226 cases used in the study covered a variety of consumer-related issues, the majority of which were credit card disputes, chargebacks, or mortgage-related disagreements. E&Y also classified the claims as small, medium, or large. The majority of the claims, 73 percent, were small claims, which were less than or equal to $15,000.

E&Y used two measures to determine the percentage of consumers who were successful in the arbitration process. In first measure, the consumer was noted as the prevailing party if the decision of the arbitrator favored the consumer, or if the case was dismissed, either by both sides agreeing to dismiss or at the request of the consumer. According to the study, consumers prevailed in 79 percent, or 178, of the 226 cases. Because the first measure relied upon the assumption that the consumer prevailed even in settlement situations, E&Y included a second measure, which analyzed only the cases in which an actual arbitration hearing took place. Of the 226 cases in the study, only 97 of those cases reached the point of an arbitration judgment. Consumers prevailed in 53 of the 97 cases, or 55 percent.

The E&Y study also included the results of telephone surveys of 29 consumers in the 226 cases examined. During the telephone survey, consumers were asked to rate: their satisfaction with the resolution of their dispute; their satisfaction with the arbitration process; and the affordability and timeliness of arbitration. The results indicated that the consumers who participated in the survey were satisfied with the arbitration process. However, it is important to note that 25 of the 29 consumers who participated in the survey prevailed, either through settlement or dismissal or an arbitration decision. Survey respondents were also asked whether they used legal counsel, and if so, the total costs of the legal fees. Of the 29 consumers surveyed, 86 percent did not utilize legal representation during the arbitration process.

E&Y concluded that the findings from their analysis indicate that the arbitration process is favorable, not harmful, to consumers. In addition, E&Y noted that a majority of the survey respondents did not utilize an attorney, thus decreasing the costs of arbitration. The report recognized that limited information regarding lending-related, consumer-initiated claims was available for the E&Y study.

The presence of arbitration clauses in consumer-lending agreements will likely continue to be a controversial issue. As consumer advocacy groups continue to criticize the use of arbitration clauses, which many argue are often included in the fine print of agreements, businesses will continue to utilize such clauses, while stressing that the arbitration process is fair for both sides and is cost-effective. On February 24, 2005, the Center for Responsible Lending issued an evaluation of the E&Y report.[2] The Center sharply criticized the report and concluded that the report did not successfully prove that arbitration clauses are not disadvantageous to consumers. The Center commented on seven key topics of the E&Y report, focusing on its inadequacies and assumptions. It is unlikely that the E&Y report will be the last of its kind. Future studies will be funded to further examine the repercussions of the presence of

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ZONE OF PEACE IN EL SALVADOR: TOWARDS A CULTURE, SPIRITUALITY, AND THEOLOGY OF PEACE IN MESOAMERICA

By José "Chencho" Alas*

(Note from the Chair of the Newsletter Editorial Board: This article continues a series, begun in the last newsletter, whose purpose is to expose our readers to perspectives on Alternative Dispute Resolution from other parts of the world. If you are aware of ADR initiatives in other countries that may be of interest to our readers, please contact Walter A. Wright at ww05@txstate.edu.)

Peace is the state of harmony between body and soul, at the individual and community levels, within an environment that is politically, economically, socially, and earthly good and beautiful.

Peace is the constant recreation of the harmony between God and humans, among human beings, and between human beings and the Earth.

Background

On August 14 1998, 47 communities of the Bajo Lempa and Bay of Jiquilisco in southern El Salvador declared their region a "Local Zone of Peace," following the UNESCO guidelines for peace zones. They agreed to educate themselves in an organized way about human rights and obligations, in the use of dialogue for conflict transformation, in democratic participation and the sustainable use of their land, water, air, and forests.

The 47 communities consisted of former members of the Salvadoran guerrilla movement and the army, Evangelicals and Catholics, and also of refugees who returned to El Salvador from different Central American countries where they had sought refuge during the civil war. They all wanted to find an answer to the violence that existed in their province, Usulután, which was considered one of the most problematic in the country. The declaration constituted the beginning of a new way of community life and was made after approximately 25 workshops had been held with around 2000 people.

The *campesinos* (peasants) organized their communities for disaster prevention, and gave this new social movement the name "Coordinadora del Bajo Lempa y Bahía de Jiquilisco" (the "Coordinadora"). The south of Usulután is made up of plains bordered by the Rio Lempa (the biggest river in Central America) and the Pacific Ocean. Step by step, other goals were included in the Coordinadora´s strategic plan like food security, environment, and empowerment.

Today, the Coordinadora is a Salvadoran *campesino* movement that works in 86 communities with the goal of transforming problems like poverty, hunger, violence, and the lack of education, training, and skills. The communities have designed a long-term plan to achieve these objectives and create a Culture of Peace. Their vision is holistic because it includes human rights as well as obligations, conflict transformation, democratic participation, and sustainable economic development. In their vision, the Earth has a value in itself.

The Coordinadora and the Foundation for Self-Sufficiency in Central America (FSSCA) work together for the empowerment of rural communities for disaster prevention, environmental sustainability, economic self-sufficiency, social justice, and peace. The collaboration of the FSSCA goes in line with its social mission.

In order to be able to reach its goals, the Coordinadora receives funds from the FSSCA and other NGOs from Europe and Canada. Approximately 80% of the FSSCA's funds come from Jewish-American foundations, particularly the American Jewish World Service (AJWS), which is not so easy to explain knowing that the number of Jewish families in El Salvador is very small (there are less than 300).

This relationship between agencies including the Coordinadora brought up the question of how it is possible to work together. For the AJWS, the answer can be found in two important principles of Judaism: *tikkun olam* (the reconstruction of the world)

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and *tzedakah* (with justice and love). For the *campesinos*, it has been evident that what guides them has been their love for the Earth and food security. For the FSSCA, it has been the desire to help the Central American people in their struggle for self-sufficiency.

Reflections about the cooperation of former guerilla-movement members with the government, of Catholics and Evangelicals, and of Jews with other people were the inspiration for another question: Why don´t we take the idea of the Local Zone of Peace to a greater level: to all the Mesoamerican countries[1] and the United States, under the name: "Culture, Spirituality, and Theology of Peace Project?" We believe that with this project, individuals as well as different kinds of organizations have the opportunity to discover or renew values and principles that are essential for the maintenance and prosperity of life. At the same time, we find out what unites us, what is "common ground." Some participants find inspiration for peace work in culture, others in their spirituality, others in theology. If we can come to an agreement about the adoption of values and principles that are common to all religions and cultures of the world, and if we accept that the existing differences enrich the human family, it is possible to move forward in the cause of peace. That is what the project is all about.

The process that is going on in the Bajo Lempa region is extending to each one of the Mesoamerican countries as well as to the United States in order to establish an international network of peacemakers. The peace we yearn for does not mean only the absence of war. Instead, it is "the state of harmony between body and soul at the individual and community levels, in an environment that is politically, economically, socially, and earthly good and beautiful." Speaking theologically, "peace is the constant recreation of the harmony created between God and humans, among human beings, and between human beings and the Earth."

Project title and definitions

The title we have given the project is a little long. We call it the "Culture, Spirituality, and Theology of Peace Project." The reason for the name is the different things that inspire people to become peacemakers. Some feel inspired and committed based on the values and principles of the culture in which they have been raised. Here, reference can be made to UNESCO's definition of culture: "Culture is the whole complex of distinctive spiritual, material, intellectual, and emotional features that characterize a society or social group. It includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions, and beliefs."

Others feel attracted by the cosmological vision that generates in them a rich spirituality, which for example is the case of the Mayas and Native Americans. For them, spirituality is the living, operating, and dynamic force that unifies us with God and establishes a harmony between our bodies and our spirits, a force that opens us socially to others and continuously lets us know that we are children of the Earth and, for that reason, owe her the love and respect a mother deserves.

Finally, we speak of people who find inspiration in their theology, which is the case of Jews and Christians. In our project, theology includes two crucial elements: the first one, which we could also call "raw materials," is achieved through the constant and creative relationship of God, humans, and the Earth; the second is the reflection we make about this relationship. Our contemplation requires asking God about ourselves and about the Earth we belong to. The answer God gives us is theology. If we perceive theology in this way, it is not a doctrine or a group of dogmas but rather a message that asks us to transform the reality of chaos into a reality of harmony, the reality of injustice and oppression into one that is liberating, and violence into peace.

In our project, we make reference to values and principles. It isn't always easy to give a definition for these two concepts even though we all use them. However, one of the fruits the workshops in Mesoamerica have given us is the certainty that first, values begin to exist in our consciousness; afterwards, we generate principles. This process is because principles derive from a conscious or unconscious reflection we make about values.

Values are those norms of behavior that determine our way of acting ethically in our lives, our relationships with other people, animals, and finally, with every being on the planet. Examples of values include respect, solidarity, and security.

Principles are those norms, fundamental truths, laws, or motivating forces whose base is our universal or particular vision towards others and the world. For example: "All life is sacred." In the methodology of Appreciative Inquiry, this principle would be described in the following manner: "If all life is sacred, we have to act with respect for it." In this methodology, the principle is not presented in an abstract way, but rather as a suggestion we should follow in order to live more happily, a dynamic concept that guides us in life.

Importance of the project

Our world faces a crisis that can be a great opportunity to create a planet that is socially sustainable and peaceful, if we analyze it appreciatively. Ecological crisis on the spiritual, political, economic, and social level can create prophets, messengers of good news in the world who lead us toward profound changes in our way of thinking and acting. Certainly, we have an excellent opportunity to globalize not only hope but also solidarity with life itself in all its manifestations up to its most complex form: human life.

The paradigm in which our world is submerged and for which we all have some responsibility has not brought us the expected results. It is a paradigm based on wealth, the individual, science and technology, and commerce. With science we have tried to understand nature, to know her in order to modify her and then satisfy our thirst of wealth, and material things by means of technology. That creates the perception that we can

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dominate her. Yet in reality, the process we have been following has turned itself against us; the harm we are causing to the Earth is costing us too much. Today more than ever, we experience the concentration of wealth in a few hands and an increase in poverty that cries to Heaven. We see the deterioration of the environment with climatic changes that suffocate us, like the case of the summer 2003 in France, where approximately 15,000 people died due to a heat wave. Because of our scientific and technological "knowledge," we are losing one species every day. We are organized to destroy ourselves.

Our relationship with nature is in crisis. The list of offenses against the Earth is very long: deforestation, pollution, contamination of the soil, air, and water, ecological injustice, production and consumption models that are unsustainable, the destruction of biodiversity, the introduction of genetically manipulated foods for the first time in history, demographically irrational growth rates, and more.

In the case of our region, new economic policies insist on converting Central America and the south into a giant sweat shop where peasants, workers, and indigenous people are employed by transnational corporations. The new policies included in Plan Puebla Panamá (PPP), CAFTA (the Central America Free Trade Agreement), and FTAA (the Free Trade Area of the Americas) will partially change the geography and affect many people. Ninety-six percent of the $20 billion that the PPP will cost are dedicated to three projects: hydroelectricity, roads, and the construction of tax-free zones for sweat shops.

What we need more every day is a new vision, a new paradigm, a new dream that is based not on problems and crisis, but on the best, the happiest experiences in our lives, experiences of peace and harmony with the divine, with nature, and other human beings A new paradigm for us is what Thomas Kuhn describes, in Leonardo Boff's *Cry of the Earth, Cry of the Poor* (1997:9-10) as "'the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community,' which establishes the basis for a disciplined system by which a given society orients itself and organizes the whole of its relationships."

For our new paradigm, we need a "New Genesis," like the one Robert Muller dreams of. For 40 years, Muller was one of the principal leaders of the UN, and is also cited by Boff (1997: 39-40):

And God saw that all nations of the earth, black and white, poor and rich, from North and South, from East and West, and of all creeds were sending their emissaries to a tall glass house on the shores of the river of the rising Sun, on the island of Manhattan, to study together, to think together and to care together for the world and all its people. And God said: That is good. And it was the first day of the New Age of the Earth.

And God saw that soldiers of peace were separating the combatants of quarreling nations, that differences were being resolved by negotiation and reason instead of arms and that the leaders of nations were seeing each other, talking to each other and joining their hearts, minds, souls and strength for the benefit of all humanity. And God said: That is good. And it was the second day of the Planet of Peace.

And God saw that humans were loving the entire creation, the stars and the sun, the day and the night, the air and the oceans, the earth and the waters, the fishes and the fowl, the flowers and the herbs, and all their human brethren and sisters. And God said: That is good. And it was the third day of the Planet of Happiness.

And God saw that humans were suppressing hunger, disease, ignorance and suffering all over the globe, providing each human person with a decent, conscious and happy life, and reducing the greed, the power and the wealth of the few. And he said: That is good. And it was the fourth day of the Planet of Justice.

And God saw that humans were living in harmony with their planet and in peace with one another, wisely managing their resources, avoiding waste, curbing excesses, replacing hatred with love, greed with contentment, arrogance with humility, division with cooperation and mistrust with understanding. And He said: That is good. And it was the fifth day of the Golden Planet.

And God saw that men were destroying their arms, bombs, missiles, warships and warplanes, dismantling their bases and disbanding their armies, keeping only policemen of peace to protect the good from the bad and the normal from the mad. And God said: That is good. And it was the sixth day of the Planet of Reason.

And God saw humans restore God and the human person as the alpha and omega, reducing institutions, beliefs, politics, governments, and all man-made entities to mere servants of God and the people. And he saw them adopt as their supreme law: "You shall love the Lord your God with all your heart, all your soul, all your mind, and all your strength. You shall love your neighbor as yourself. There is no greater commandment than these."

And God said: That is good. And it was the seventh day of the Planet of God.

We consider our project an affirmation of Muller´s poem, like a seed of change to support life on "God´s Planet."

Content of the Project

The Culture, Spirituality, and Theology of Peace Project develops seven different themes we consider very important. These themes are:

1. Earth and Ecology
2. Myself and the Other
3. Gender
4. Human Rights and Obligations
5. Conflict Transformation and Reconciliation
6. Economics
7. Politics

The selection of the themes comes from the urgency we feel to develop a new paradigm in which life and the relationships we establish between all living beings are the priority. These

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relationships are primarily with all the elements that live in the soil, the air, the water, and fire.[2] In this paradigm, even though humans occupy a privileged place due to their capacity to think, love or destroy consciously, the Earth and Ecology are at the center. Due to that, we begin our project with workshops about Earth and Ecology. In a logical order, after having considered that we are the part of the Earth that has the ability to build relationships, we have to go and look into ourselves and discover our own richness, our capacities, our beauty, so that we can then discover the other, the one we are obliged to serve. This is the objective of the series of workshops that correspond to the second theme.

In this world of "myself and the other," women deserve special attention, for the little respect history and culture have had for them. We celebrate women as mothers, wives, girlfriends or friends, but immediately after Mother's Day, we deny their rights. We say that the paradigm in which we live is anthropocentric, when in reality it is andocentric, centered on men and treating women as second-class citizens. With gender as the third theme of the workshops, we hope to correct this injustice.

Another essential part of "myself and the other" is our rights and obligations. Naturally, not only human beings have rights, but all the other creatures have them as well. The fourth series of workshops is centered in this theme.

Rights and duties are not always respected. That's the origin of the conflicts we experience and that can have different dimensions. They can affect the individual, the family, the community, or society in general. Conflict transformation and reconciliation are necessary basic elements of human life and, therefore, theme number five of the workshops.

The two last themes correspond to economics and politics, which have a singular importance for our society. If the distribution of wealth is unjust and democracy does not come from the organized grass roots of the human community, life in harmony is not possible.

For the development of all these themes, there will be workshops in each one of the Mesoamerican countries and the United States, as well as regional encounters or conferences and peace institutes.

The Vision

Our vision is to create a society in which humans live in peace with themselves and with nature.

We want to establish a network of peacemakers in Mesoamerica and the United States who work for harmony in our world. We want a globalization that comes from the organized grassroots of our communities and peoples, which, by means of the exchange of ideas and solutions, achieve political, economic, cultural, and spiritual self-sufficiency and, therefore, live in a close communion with the Earth, the supreme living organism.

Everyone can be a peacemaker and contribute with ideas, facilitate workshops, organize conferences, spread the message of peace, or participate in marches defending the rights of the Earth or the creatures that live here.

The work spirit of the peacemakers

Our peace project resembles a triangle: peace with God (for those who believe in God), peace with oneself, and peace with Mother Earth. Within this triangle, we, the humans, have two characteristics: we are God's children, but we are also children of the Earth. What unites us is the S(s)pirit with capital and lower-case S: the Spirit that in the Christian tradition is Love within the Trinity, and the spirit of the Earth and our own. The work of the peacemakers with the people should be centered in the development of the spirit by means of the cultivation of a spirituality based in cultural and theological values and principles.

The term "spirit," according to history, has a profound meaning. In the *Old Testament*, it appears 389 times as the concept of *ruach*, which means "the vital sphere where the human being, the animal, or any other living thing imbibes life" (Boff 1997: 159). In Hebrew, the term *ruach* is feminine and can be found in the very beginning of *Genesis*, meaning the "mother of life" who creates and rules. In the human being, this spirit appears as the vital force that unifies body and soul. It guides us in the communication and socialization of our lives, gives meaning to our language, and opens us for the transcendent in a way that does not limit us but helps us remain open to God, to others, to the Earth. This transcendence rests within the spirit of liberty in which we have been created.

Our task in working with people is to invite and support them in their reflections and meditations so that they, using their own dynamics, can achieve a spirituality that inspires them to establish peace as we have defined it: "the state of harmony between body and soul, at the individual and community levels within an environment that is politically, economically, socially, and earthly good and beautiful." Or, theologically spoken: "the constant recreation of the harmony between God and humans, among human beings, and between human beings and the Earth."

From the organized and conscious grassroots, we can define cultural, spiritual and theological values and principles in order to reestablish our communion with Mother Earth, that is, with all living beings, with the soil, air, water, fire and, of course, with the creator of them all.

However, we have to be aware of the fact that there are many ways to work with people, depending on what organizations and their facilitators decide and what goals they have. One can easily note the variety of ways in the history of Latin America, which is rich in methodologies that seek liberation. We all remember Paolo Freire from Brazil, who, based on his famous book, *Pedagogy of the Oppressed*, teaches us to decode concepts, to move from the "production" of oppressed women and men to a critical education, adult consciousness, and the responsibility for our own destiny and the destiny of others. That is why we affirm that there is no such thing as just one recipe for working with the people.

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Liberation Theology has been another inexhaustible source of how to work with people. The method of see-judge-act has brought us, first of all, towards an intensive study of the roughness of political, economic, and social realities in Latin America. It has taught us to judge this of the *Bible*, to find out her it follows God's plan, and has helped us, finally, to become active for the change of unjust and oppressive structures into structures that liberate our people. The application of Liberation Theology had different degrees of depth and repercussions in each one of the Central American countries. Without it, we cannot understand the degree of commitment that was reached with many ex-combatants of the FMLN in El Salvador. Even though Liberation Theology cannot be defined as an ideology, it has been a source of commitment for the person who practices it, which should be the goal of every theology. Without practice, theology is nothing else but the doctrine of God.

For the Culture, Spirituality, and Theology of Peace Project, we have adopted a method that unmistakably has its origin in the experiences made in Latin America. We are talking about Appreciative Inquiry, which leads us towards the construction of a world based on positive elements through its four steps of discovery, dream, design, and destiny. Our peace project follows this method in our work with the people. The following section explains our method.

The following paragraphs are inspired by Clodovis Boff's work, "How to work with the grassroots." Boff speaks about animators. According to him, the first thing we must have in mind is the type of animator we need. If the animator comes from outside the community with which she[3] interacts, but also if she is a native of the community, she has to be completely immerged in it. The "outside animator" as well as the "inside animator" should know and appreciate all the values and principles of those with whom she works. This project's different workshop themes constitute the best source of knowledge and appreciation of these values and principles.

It is crucial for the animator, or peacemaker, to incorporate herself into the people. If that is not the case, destructive attitudes and new conflicts or new forms of suppression can result. Boff explains these attitudes in the following way:

1. "On the fence." This person . . .

- shows little firmness of commitment even though values and principles exist;
- in decisive moments, chooses the "most convenient" path;
- pretends neutrality: practicing solidarity with neither one nor the other; and
- insists on negotiated solutions at any price.

2. "Tendency towards abstract theories." This person . . .

- is not involved in the political, economical, social, cultural, and religious reality;
- prefers "escapism" wrapped up in the formulation of ideas instead of acting on those ideas;
- subscribes to "political sectarianism with signs of fanaticism and resentment;"
- has the "intellectual pretension of influencing the historical process and guiding the people;" and
- "treats social questions with morality when trying to understand or solve them."

3. Individualism, which manifests itself in

- the sickness of despotism (everybody else on the bottom, me on top);
- a lack of solidarity and organization (instead of working as part of a unified body);
- lack of interest or fear to get organized; and
- spiritual self-absorption.

One of the peacemaker's tasks is to serve as a guide so that people can discover universal values and principles common to all women and men and at the same time discover those values and principles that are characteristic for a certain group of people or a certain community. In the relation and reconnection of these universal values and principles with particular ones, we can find the seeds of peace. The intensive contact with divinity and nature inspires the peacemaker to realize her function in society. For that, she needs to be a "mystic," a person with an unconditional love that implies renouncing personal interests in order to offer herself to all her brothers and sisters, and to the whole creation. Peacemakers need to listen, appreciate, and make the diversity of opinions their own in order to really submerge themselves in the culture of their sisters and brothers instead of simply "being tolerant." Moreover, they need to respect the right of the community to commit errors. The peacemaker is the one who encourages the members of the grassroots to be the creators of their own history and destiny, respecting their own culture. The work does not need to be exclusively economic, political, and social, but fundamentally human and spiritual, that is, holistic.

According to Clodovis Boff, the peacemaker needs to show the following qualities or attitudes in order to be able to work with the grassroots.

- Love for people. The service we offer has to be given with tenderness and affection. Citing Freire, we learn that it: has to be an "act of love." Therefore, there is no space for arrogance or authoritarianism.
- Trust in the people. This is a consequence of the previous point, because "loving the other person as a subject means to love her possibilities and future. This means to love what she is so that she can become what she can and should be." There has to be "confidence in her wisdom and capacity to comprehend, confidence in her generosity and capacity to fight, confidence in her words."

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- Appreciation for what belongs to the people. This means "to perceive and value the positive manifestations of the popular culture," to know their struggle, their objectives, their ideals, their dreams.

- Serve the people. The peacemaker has to understand that she is always serving the grassroots, which means to "locate oneself at the disposition of the people and their true interests." This attitude implies assuming a heterogenic position, that is, to see the other and her liberation. To serve also means assuming a position of equality, located not *in front of* but rather *at the side* or *within the community.* Without this personal and profound attitude of service, any kind of law or mechanism implies the manipulation of the people by the person who is supposedly their servant.

- Respect for the liberty of the people. "Consider people as subjects, have confidence with them and their historical potential. This implies respect for the grassroots, for their words, their pace and initiative." "With respect...it is important for the peacemaker to nurture an attitude of listening, a disposition to learn, to accept criticism and corrections." All this means humility and openness to conversation, absorption, into the people.

The final objective of working with the grassroots is that they, themselves, find their identity and achieve their own liberty. In the beginning, the peacemaker works *for* the people, guiding them, teaching them to ask questions in order to achieve the development of a critical conscience. Then, later on, she works *with* the people, finding ways together, and, finally, she works *like* the people, identifying herself with them. In this moment, she no longer motivates because the people now have their own instruments to achieve liberty and the spirituality that relates them with the other and with nature.

Gregorio Iriarte, a Bolivian theologian, also presents a description of what a peacemaker should be. According to Iriarte, she has the responsibility to create the appropriate environment for the growth of the people so that the community can achieve its objectives.

Iriarte describes fundamental characteristics of the peacemaker:

1. To love and to be loved, to establish relations of brotherhood with the people; to know their names, their work, their projects, their difficulties; to cultivate solidarity, wisdom, generosity, patience, and unity.

2. To participate, contribute, and work, always conscious of the need for every person to be included and feel useful.

3. Give life meaning by planting the seed of happiness and confidence in the interaction with others. For example, a group that participates in a workshop can begin the day with a meditation where everyone can express her feelings, values, and appreciation for creation.

In conclusion, we say that for our peace movement, we need peacemakers, not bosses; we need motivators, not leaders.

* ***José "Chencho" Alas****, a Catholic priest, is President and Executive Director of the Foundation for Self-Sufficiency in Central America. The foundation, based in Austin, supports the Culture, Spirituality, and Theology of Peace Project. A more complete biography for Father Alas is located at http://fssca.net/fssca/bio.html. The home page of the foundation is located at http://fssca.net/index.html. Father Alas wishes readers to know that many of the ideas contained in this article were generated in workshops in El Salvador in which hundreds of members of the peace movement have participated.*

ENDNOTES

[1] Mesoamerica is the region from southern Mexico to Panama.

[2] Through the spirituality of the Maya and other participants, we are beginning to appreciate the importance of the elements, including fire, in our relationship with nature and the Earth.

[3] English, unfortunately, does not have a gender-neutral singular pronoun. Most writing and speech traditionally uses "he" to refer to either he or she, reinforcing the attitude that men, rather than women, are the agents of change. To remind us that women have an equal capacity and responsibility to be agents of change, this text will use female pronouns to refer to both women and men.

ERNST & YOUNG REPORT ON CONTRACTUAL ARBITRATION IN LENDING-RELATED DISPUTES

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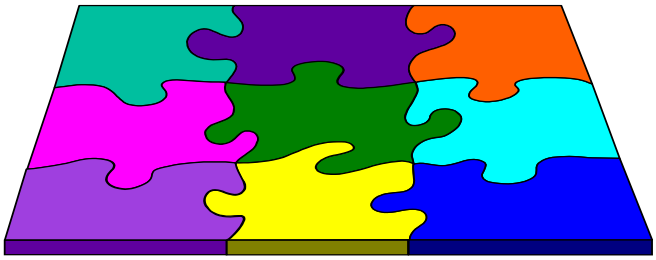
Diana Alexander is currently a paralegal at an Austin law firm. She received a Bachelor of Science degree from the University of Texas and worked for many years as a classroom teacher. She will receive a Master of Arts in Legal Studies from Texas State University in May. She completed forty hours of mediation training in the Legal Studies Program at Texas State University in 2004. She would like to thank Professor Walter Wright for his wisdom and encouragement.

ENDNOTES

[1] Ernst & Young, LLP, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, November 30, 2004, *available at http://www.arb-forum.com/media/EY 2005.pdf* (Wilmer Cutler Pickering Hale and Dorr LLP commissioned the study. The American Bankers Association provided funding for the study.).

[2] Center for Responsible Lending Issue Brief No. 25, *Comments on Ernst & Young Arbitration Outcomes Report*, February 25, 2005, *available at http://www.responsiblelending.org/pdfs/ib025-Ernst_Young_Arbitration_Comments-0205.pdf.*



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, 4080 Stanford Avenue, Dallas, Texas 75225, and office #214-361-0802 and fax #214-368-7258.

You are a senior partner in a large metropolitan law firm. In your capacity as a mediator, you receive a request from an attorney to serve as the mediator on a case for which a partner in your firm is one of the opposing attorneys.

Can you serve as mediator? Will it make any difference that the fee for your mediation services will be paid into the general revenues of your law firm? Will it make any difference if your partner (who is an attorney on the case) has a contingency-fee arrangement with your firm's client (a party to the mediation)?

"It is a conflict of interest any way you look at it."

Steve Nelson (Austin): Why is it I feel like I am about to walk into a trap and be showcased as the most unethical mediator on earth? Notwithstanding that trepidation, I do believe I could serve as the mediator, if full disclosure was made to all of the parties and everyone consented. In the past, I have mediated—with no problem—cases where my partners have been advocates.

My suspicion is that consent would be hard to get if the contingent fee were fully disclosed. Whether I would choose to accept the assignment is another issue . . . and thankfully, beyond the scope of your question.

Sherrie Abney (Dallas): Because I have almost always been solo, I have not had a problem like this one, but this is what I believe would be my response if I were in that position.

It sounds as though this is a two-party case, so everyone would be informed of my association with one of the parties since the opposing party's attorney is the one who requested that I mediate. If the attorney from my firm was a former partner, I think I could mediate the case with the agreement of all parties and attorneys. However, the fact pattern does not say former partner; consequently, I don't see any way for me to serve as mediator for this dispute. If my fee were paid into the general revenue fund, then my partner would be double dipping. If my partner had a contingency-fee arrangement, I would be double dipping if my partner won the case. In addition, I would have opportunity during the mediation to try to raise the amount of the settlement figure. If neither the mediation fee nor the contingency fee went into the general revenue fund, I would still not be comfortable doing the mediation. It is a conflict of interest any way you look at it.

Robert A. Black (Beaumont): The best practice is not to agree to mediate the case because of conflict of interest. It makes no difference whatsoever if the fee is paid into the general revenue of the law firm. It is actually worse if a contingency-fee arrangement is involved because your firm would benefit if more money is paid. That is a position a mediator should never have.

In reality, conflicts of interest can be waived if fully disclosed to all parties. A written waiver is prudent. I have occasionally agreed to mediate under these circumstances, but only if the firm's client is a minor player in the litigation. Even then, consciousness of the issue is inhibiting. As the mediator injects reality into the proceeding, is the party to the lawsuit wondering if the mediator is truly neutral? Is the mediator more reluctant to be an agent of reality? In short, the mediator's effectiveness is diminished. The parties do not need or deserve a mediator with diminished capacity!

Recognize also that mediating under these circumstances could lead to a Motion to Disqualify your firm. That motion could be embarrassing to you, your partner, your firm or your client. It could cause the court or the larger public to question your ethics or judgment.

Ruby Kless Sondock (Houston): I, as a personal matter, would not be comfortable serving as a mediator in this situation and I would decline the offer. I cannot imagine anyone else accepting the invitation but the question posed is one of ethics, **not personal preference**.

Obviously, the colleague has fully disclosed to his/her client all the facts, including but not limited to the contingency fee, and if the client still indicated in writing he/she/it wanted the person with the obvious conflict to serve (which I cannot imagine), and if the mediator is confident he/she can serve objectively and impartially, then, it would be pushing the envelope but could be within the "outer-outer" limits of being ethical. Sometimes, truth is stranger than fiction.

John Simpson (via Gloria Martin, his legal assistant) (Lubbock): Mr. Simpson has agreed to participate in your column for the SBOT newsletter. His response to your "Ethical Puzzler" is: "No! No! No!"

Comment: This puzzler is one that all of the participants agree, on first impression, does not pass the "smell test." Some believe that full and complete disclosure and waiver—written or tacit—might cure any real or perceived conflict of interest. However, as mediators we were all taught to avoid the appearance of impropriety (a.k.a. non-neutrality in this case) and further to adopt the portion of the Hippocratic Oath which states "above all, do no harm."

Like any other ethical dilemma, there's no problem until there's a problem. In other words, what if mediation runs amuck? How much harm would be done to the parties, their counsel, the court, the law firm, the other partners in the firm, the mediator, the public, and to the process itself?

ADR on the Web

ABA Section on Dispute Resolution

http://www.abanet.org/dispute/home.html

By Mary Thompson

The Section on Dispute Resolution is one of the fastest growing sections of the American Bar Association. With over 9500 attorney members and over 1000 members who are not attorneys, the section has taken a leadership role in a number of national ADR issues.

Following is a sampling of information found on the web site:

Newsletter. "Just Resolutions," the Section's newsletter, has the usual topics: message from the chair, conferences, updates from the Section's thirty committees, etc. One of the most interesting aspects of the publication – and of the site in general – is its broad scope of viewpoints from around the country. (See, for example, the November 2004 opposing viewpoints from Howard law professor Homer La Rue and Hamline law professor James Cohen on the topic "When is Mediator Manipulation Unethical?")

Resources. The Resources section has quite a bit of useful information. Arbitrators can find full texts of the Revised Uniform Arbitration Act and the Revised Code of Ethics for Commercial Arbitrators. Mediators can find a comprehensive list of standards of practice under "ADR Policies." One of the most interesting and innovative resources is sponsored by the Lawyer as Problem Solver Committee. Here law professors and ADR trainers can find an assortment of training exercises to help attorneys be more collaborative and effective problem solvers.

Online CLE. The site offers a variety of topics for video or audio continuing legal education. A broad array of titles is available, including "The Ethical Implications of Med-Arb," "Mediating in Distressed Family Systems," and "Mediation Advocacy." Costs range from $75 to $150 per session. Although some states are listed as offering credit for these classes, Texas is not among them. The site offers instructions for applying for credit in states not listed.

The site has some glitches in both navigating and accessing content, but for those willing to hunt around a bit, the ABA Section on Dispute Resolution offers attorneys and neutrals some valuable content with a national point of view.

***Mary Thompson**, Corder/Thompson & Associates, is a mediator, facilitator, and trainer based in Austin.*

If you are interested in writing a review of an ADR-related web site for Alternative Resolutions, contact Mary at emmond@aol.com.

Everybody today seems to be in such a terrible rush; anxious for greater developments and greater wishes and so on; so that children have very little time for their parents; Parents have very little time for each other; and the home begins the disruption of the peace of the world.

--Mother Teresa

ADR Section Calendar

2005

As a member of the ADR Section, you are always cordially invited to attend any of the quarterly Council meetings. We ask that as many members as can try to attend the annual meeting each year that is held in conjunction with the State Bar Annual Meeting. Next year, it will be in Dallas. Please note our calendar:

Council Meetings

January 8, 2005
10:00—3:00 p.m. Texas Law Center – Austin

April 2, 2005
10:00—3:00 p.m. Location to be Determined – San Antonio

June 24, 2005
2:30—4:30 p.m. State Bar Annual Meeting, Dallas

General ADR Section Meeting

June 24, 2005
2:30—4:30 p.m. State Bar Annual Meeting, Dallas

SUBMISSION DATE FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Summer	June 30, 2005	July 30, 2005
Fall	October 30, 2005	November 30, 2005
Winter	January 15, 2006	February 15, 2006
Spring	March 15, 2006	April 15, 2006

SEE PUBLICATION POLICIES ON PAGE 27 AND SEND ARTICLES TO:

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"All we are saying is: give peace a chance."

--John Lennon

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ Section Newsletter *Alternative Resolutions* is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ Valuable information on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

✓ Continuing Legal Education is provided at affordable basic, intermediate and advanced levels through announced conferences, interactive seminars.

✓ Truly interdisciplinary in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

✓ Many benefits are provided for the low cost of only $25.00 per year!

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2005 to June 2006. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____ Public Member_____ Attorney_____

Address_____ Bar Card Number_____

City_____ State_____ Zip_____

Business Telephone_____ Fax_____

E-Mail Address:_____

2005-2006 Section Committee Choice_____

ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. Articles must be submitted for publication no later than 6 weeks prior to publication. The deadline for each issue will be published in the preceding issue.
2. The article must address some aspect of alternative dispute resolution, negotiation, mediation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. If possible, the writer should submit article via e-mail or on a diskette (MS Word (preferably), or WordPerfect), double spaced typed hard copy, and some biographical information.
4. The length of the article is flexible: 1500-3500 words are recommended. Lengthy articles may be serialized upon author's approval.
5. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.
6. All quotations, titles, names and dates should be double checked for accuracy.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.

2. In the event of a decision not to publish, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right to edit articles for spelling, grammar, punctuation and format without consulting the author.
2. Any changes which affect the content, intent or point of view of an article, shall be made only with approval of the author.

Future Publishing Right

Authors reserve all their rights with respect to their article in the newsletter, except that the State Bar of Texas Alternative Dispute Resolution Section obtains the rights to publish the article in the newsletter and in any State Bar publication.

ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website addresses or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

ALTERNATIVE DISPUTE RESOLUTION SECTION

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