Alternative Resolutions

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

February 2005 **Winter Issue** **Vol. 14, No. 1**

CHAIR'S CORNER

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

WHAT IS GOING ON HERE?

We reported to you in the last newsletter about 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 are already planning another, similar program for this fall.

But now it is time to get back to work. Published elsewhere in this newsletter is the Agenda for the Council meeting held in Austin on January 8. The Agenda should give the members an idea of some of the topics that the Council focuses on each meeting. The Council is a very hard-working and dedicated group, and as Chair, I truly appreciate each Council member. At the January meeting, we had all but one of the Council members in attendance. Now – remember – these are volunteers who have to travel in from many different locations. The only member who didn't come was recovering from heart-bypass surgery; he would have attended, but his doctor said he couldn't.

Remember that the Council has established three goals for this term:

Goal A: To advance the field of arbitration by insuring fairness and educating consumrs and practitioners in the use of the process.

Goal B: Increase the use of ADR for conflict management outside the courtroom.

Goal C: Increase membership diversity, input and benefits.

Let's talk about how we are addressing each. First, the Arbitration Taskforce is actively working to address concerns expressed by the Senate Jurisprudence Committee about fairness of consumer/business arbitration and the effect of pre-dispute arbitration clauses. John Fleming reports on the discussion draft of the Best Practices Guidelines for Consumer Arbitration elsewhere in this newsletter. Please help John and the Taskforce by providing comments, criticisms, suggestions and the like on the discussion draft. These may be emailed to John at jfleming@austin.rr.com or by fax to (512) 476-9259.

The last newsletter contained numerous fine articles addressing and analyzing the Avary v. Bank of America, N.A. and Alford v. Bryant cases pertaining to mediation confidentiality and mediator privilege. In the interim, Avary settled, so

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only Alford remains on appeal. I invited comments from the membership as to what role, if any, the ADR Section should take in the Alford appeal. The Association of Attorney-Mediators (AA-M) will file an amicus brief in Alford sometime before the February 7, 2005 deadline, and has inquired if the Section would be interested in supporting its position. In all, I received but three comments.

After lengthy discussion, the Council has determined not to take a position or file a brief in Alford. This is in some part due to the lack of concern expressed by its membership. It is partly because of the cumbersome requirements imposed because it is a State Bar entity. The Section leadership feels very strongly that there is a very strong mediator privilege and that the confidentiality provisions of Section 154 could not be clearer. It is not clear, however, that those issues are directly before the court in Alford. Nonetheless, we are confident that Prof. Scott, author of AA-M's amicus brief, will do his typically fine job of briefing *Alford,* and so we leave it at that.

The October CLE program went far toward educating consumers and practitioners in the use of the arbitration process. Presently, Council members are in the process of updating, and bringing into the new millennium, the SBOT educational pamphlet Alternative Dispute Resolution – Texas Style. If necessary and helpful, we may promulgate an entirely separate pamphlet on arbitration, and particularly consumer arbitration. More on this later.

With respect to the second goal, the Section is highly behind the DRC funding legislation that has now been introduced in both the House and the Senate. Congressman Ruben Hope (Conroe) introduced HB 282 in the House, and Senator Jeff Wentworth (San Antonio) introduced SB 168 in the Senate. We are very excited about the prospects for this very fine and badly-needed legislation.

A subcommittee headed by Kathy Fragnoli is working on a way 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 has the idea of maintaining a "speakers panel" to be called upon 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 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. We also plan a social function this spring in the Valley. Walter Wright is working on the same concept for the Mexican state of Nuevo Leon, which recently adopted an ADR statute.

With respect to membership, several things now appear on the near horizon. The Section has appointed a Long-Range Financial-Planning Committee to address how the Section can effectively use its resources to promote the use of ADR both in Texas and elsewhere. Part of that is to design a formula where the Section can, through grants or contributions, utilize its financial resources to promote and encourage use of ADR, yet always maintain financial stability.

You may recall that the Section provided $2,500.00 in scholarships to the ABA Section on Dispute Resolution in March 2003 for its mid-year meeting in San Antonio. We also sponsored Breakfast with the Texians during that event. More recently, the Section contributed $2,500.00 to the Frank Evans Center for Conflict Resolution at its inauguration. Last week, we contributed $1,000.00 to assist the graduate portfolio program in dispute resolution of Austin's Center for Public Policy Dispute Resolution. Please let me know of any suggestions you may have in this regard.

The Section has also concluded that CLE programs, which in the past were viewed as fundraisers, should be predominantly seen now as a service to membership and to the bar in general, so long as expenses are covered. Additionally, we are working on a program to provide free or reduced-rate membership in the Section for newly inducted members of the State Bar, newly trained volunteers at the DRCs and to new graduates of accredited 40-hour mediation schools.

In addition to the topics I have already mentioned, this issue of the newsletter focuses on appellate mediation. Frank Evans, Margaret Mirabal, and Robert (Randy) Roach have all written excellent articles covering different aspects of this topic. Many thanks to Debbie McElvaney for her help in gathering the articles.

This issue also begins a series of articles about ADR traditions and developments in other countries. The first article reviews traditional dispute-resolution practices in India. Look for future articles from El Salvador, Mexico, Argentina, and other countries. Send ideas for this series—and any other topic that might be of interest to our members—to Walter Wright.

In sum, we have a lot going on. Please note the names on the roster of officers and Council members (including our new ones) in the newsletter. Get hold of one of them in your area, and speak with him or her about what you think of what we're doing, what you think we should be doing, and what you might be able to do to help. This is a wonderful group, and what is before us is so timely and important.

AGENDA - ADR Section Council Meeting

January 8, 2005 - 10:00 a.m. to 3:00 p.m.

Texas Law Center - 1414 Colorado - Austin, Texas

Chair's Report (Lemons)
- Report on Activities

Approval of Minutes – October 13, 2004 Council Meeting (Hargrove)
Treasurer's Report (Morgan)

Committee Reports:
- Arbitration Roundtables (Fleming, Schless)
- Newsletter (Wright)
- Legislative Initiatives:
  a) Senate Jurisprudence Committee (Fleming)
  b) DRC Funding Bill (Schless)
  c) HB 205 – Collaborative Law Bill in Chap. 154 (Fleming)
- New Business (Lemons)
  - *Amicus* Brief in *Bank of America* (and *Alford*)
  - Procedure to change Section Name
  - Request for Contribution (Graduate Portfolio Program)
  - Annual Meeting and Fall CLE (Wilk)
  - Delegate(s) to SBOT Resolutions Committee
  - Jim Knowles (Vacancy on Council)
  - Austin Attorney Mark Lee

Lunch and Social Hour

Committees and Assignments (Lemons, Schless)
Here we need about a two-hour dialogue on
what committee assignments/tasks are needed
to accomplish our goals and mission, including:

- Member Services (Lemons, Schless)
- October, 2004 CLE
- South Texas Initiative (Salzman)
- Update SBOT Pamphlets on ADR
- Jurisprudence Committee Interim Report

Council Meetings and Dates (Lemons)

Adjourn 3:00 p.m. sharp

SENATE JURISPRUDENCE COMMITTEE

ISSUES INTERIM REPORT ON ARBITRATION

By Bill Lemons

In mid-December, 2004, the Jurisprudence Committee of the Texas Senate issued its Interim Report, including several recommendations concerning arbitration in Texas. The Committee, chaired by Senator Jeff Wentworth, had among its responsibilities **Charge 3**: *Study arbitration statistics and the role of the American Arbitration Association. Specifically, the Committee shall make recommendations to improve and ensure the efficiency, effectiveness, and fairness of arbitrators and arbitrations.*

The Jurisprudence Committee held a number of public hearings on this charge. In August, John Fleming and I, as private citizens acting in a resource witness role, testified before the Committee. In November, the ADR Section hosted another *Arbitration Roundtable*, which was well attended and included participation by Jennifer Fagan (General Counsel – Senate Committee on State Affairs), M.L. Calcote (Director and General Counsel – Senate Jurisprudence Committee) and David Williams (Senior Policy Analyst – Senate Jurisprudence Committee).

In summary, the Recommendations include:

1. The Legislature should enact legislation requiring businesses that mandate (through pre-dispute arbitration clauses) that consumers arbitrate disputes with them to provide those consumers with adequate information upfront (what rights are involved, who will be the arbitrator, who pays the costs, what discovery is there, etc.);

2. The Legislature should enact legislation to require the State Bar of Texas to produce an informational pamphlet for distribution to the public and to consumers who may be required to arbitrate disputes with businesses;

3. The Legislation should enact legislation to require that arbitrators hearing consumer/business report certain information (largely the nature of the dispute and the final decision issued); and

4. If legislation requiring reporting (number 3 above) is adopted, legislation should also be enacted requiring the business to advise consumers where that information may be found and obtained.

Legislation will obviously not be necessary to carry out the third recommendation. As is described in John Fleming's article in this Newsletter, the Arbitration Taskforce of the ADR Section has already addressed the fundamental fairness issues by promulgating its discussion draft of *Best Practices Guidelines for Consumer Arbitration.* This draft is published for comments, so please let John know of your thoughts on the guidelines.

Further, another subcommittee of the ADR Section (Mike Wilk, John Boyce and Bob Wachsmuth) is in the process of revising the SBOT informational pamphlet *Alternative Dispute Resolution - Texas Style.* Thoughts are that it perhaps may be best to develop yet another separate pamphlet solely to discuss arbitration and appropriate arbitration protocols for the general public to be aware of.

The Interim Report may be found on the Senate web page:

http://www.senate.state.tx.us/75r/Senate/commit/c550/PDF/rpt_c550_dec2004.pdf

Our thanks to the Senate staff and all who have participated in this very important exercise, particularly Richard Naimark of the AAA and Kim Lawrence of the BBB. We will keep you posted on future developments.

MEDIATOR SKILLS PARTICULAR TO MEDIATORS

*By Margaret Garner Mirabal**

I. The Setting

You are the attorney for one of the parties to a civil appeal pending in a Texas state appellate court. The court has ordered the parties to mediate early in the appellate process. The clerk's record has been filed, but not the reporter's record. The appellate briefs have not been prepared or filed. The appellate court has agreed to abate the appeal for sixty days to give the parties an opportunity to mediate before incurring substantial additional expense.

II. Appellate Mediation—What to Expect

Ideally, the appellate mediator will not only be trained in people and negotiation skills, but will also be familiar with standards of appellate review and the appellate process. The mediator will know trial and appellate procedure. The mediator will also be familiar with any local rules of the particular appellate court involved and will have a sense of the trends in that court, such as reversal rates for particular types of cases.

Counsel should be prepared to provide the mediator with the trial record, including pleadings, motions, orders, jury charge, and judgment. The pre-mediation statements explaining the anticipated issues on appeal should be accompanied by copies of relevant statutes and case law.

Prior to the mediation, the mediator will likely read the record and the parties' memos in order to be familiar with the issues to be presented to the appellate court for resolution on appeal. In addition to reading the authorities provided by counsel, the mediator may do some independent research. It is very helpful to be prepared regarding the legal issues, even for a facilitative mediator who does not tend to give advice or opinions during the mediation. By knowing the law and the legal issues involved, the mediator will be able to ask questions that will help the parties recognize the strengths and weaknesses of their positions, along with BATNAs (Best Alternatives To A Negotiated Agreement) and WATNAs (Worst Alternatives To A Negotiated Agreement).

III. Some Examples

In certain cases, the best a successful appellant can hope for is a reversal of the trial court's judgment and a remand for a new trial (e.g., when the appellate issue is factual sufficiency of the evidence, or harmful trial-judge error in evidentiary rulings). In such situations, the mediator will assist the appellant and counsel in factoring in the costs of "winning"—returning for another trial and a possible second appeal—into their negotiation strategies.

In some cases, a party (whether it won or lost in the trial court) may have a strong interest in reaching a settlement on appeal due to the possibility of an adverse appellate ruling that will have precedential value for future disputes. A trial court judgment is just between the parties in one case, while an appellate opinion may create "bad" law (at least from the loser's perspective) with ramifications beyond the case itself. Additionally, a party may not want a summary of the evidence—exposing "dirty laundry"—published for all to see in S.W.3d volumes and on the internet. The mediator can assist the parties in taking such practical matters into consideration during negotiations.

In certain interlocutory appeals (such as appeals from temporary injunctions), the parties will have an opportunity, with the help of a trained mediator, to negotiate a settlement of not only the appeal, but also of the whole underlying dispute, making a continuation of litigation in the trial court unnecessary. Thus, it is important to have a mediator who is knowledgeable not only in appellate law, but also about trial procedures and the underlying subject matter.

An appellate mediator can assist the parties in asking the appellate court for the appropriate relief upon settlement, whether a dismissal of the appeal, a reversal or vacation of the trial court's judgment, a remand to the trial court, a rendering of judgment, or some other alternative allowed by the rules and permitted by the particular appellate court in which the appeal is pending.[1]

Further, some cases can benefit from an appellate mediation even after the appellate court's "unfavorable" opinion has issued, because some (but not all) appellate courts are willing to withdraw issued opinions if the parties settle and request withdrawal.

Experienced appellate mediators can also assist the parties in assessing other circumstances that may make a settlement an attractive alternative to proceeding with an appeal, such as the fact that appeals through the different appellate court levels can take many years to complete, with the concomitant stress, time disruptions, and costs. A party who won in the trial court and is confident of ultimate success on appeal may still prefer to

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settle and collect money now rather than count on the solvency of the debtor years down the line. The debtor may be able to avoid the threat of execution on property by arranging an acceptable pay-out, or may convince the creditor to allow a discount based
on the value of money today compared to its value years from now after all appeals have been exhausted. Payments may be structured in ways to allow beneficial tax consequences. A trained appellate mediator can help the parties and their attorneys move their focus away from the legal appellate issues, and redirect the focus to the parties' needs and interests that would benefit from a negotiated settlement. This is true not only in creditor/debtor money-judgment appeals, but also in cases involving parties with continuing relationships, such as probate and family-court matters.

IV. Conclusion

Appellate mediation works. Choose a mediator with skills particular

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*Retired Justice Margaret Garner Mirabal has served on Texas state trial and appellate courts for a combined total of over 16 years. She is an arbitrator and mediator. She was a member of the first 40-hour mediator training course in Texas, conducted in 1980. Her web site is: http://www.MargaretMirabal.com.

ENDNOTES

[1] *See* Tex. R. App. P. 43.2.

[2] *See* K.R.Vowell, *Mediation: It's Not Just for Trial Courts Anymore! A Survey of Mediation Programs in the Courts of Appeals, in* STATE BAR OF TEXAS ADVANCED CIVIL APPELLATE PRACTICE COURSE (1999).

2004 CALENDAR OF EVENTS

Two-Day Arbitrator Training Houston; The Better Business Bureau of Metropolitan Houston, Inc. The State Bar of Texas approved for twelve hours of MCLE credit. The cost of the course for ADR Section members is $300, and group discounts are available. For class schedules and additional information, contact klawrence@bbbhou.org.

Mediator Ethics Houston; December 11, 2004; 3 hours; Worklife Institute; Contact Diana C. Dale 713-266-2456

Workplace Conflict Resolution (24 Hours); December 15-17, 2004; Worklife Institute; Contact Diana C. Dale 713-266-2456 website: www.worklifeinstitute.com

Basic 40-Hour Mediation Training; Houston; January 27, 28, 29 & February 3, 4, 5, 2005 (20 hours each week); Worklife Institute; Contact Diana C. Dale 713-266-2456; meets TMTR standards; 40 hours CLE/CEUs including 3 hours ethics; www.worklifeinstitute.com

Transformative Mediation Houston; January 20, 21, 22, 2005; Worklife Institute; Contact Diana C. Dale 713-266-2456; www.worklifeinstitute.com

40Hour Basic Mediation Training Houston, January 14-16 continuing January 21-23, 2005; University of Houston A.A. White Dispute Resolution Center; Contact Robyn Pietsch 713-743-2066

40Hour Basic Mediation Training Houston, March 14-18, 2005; University of Houston A.A. White Dispute Resolution Center; Contact Robyn Pietsch 713-743-2066

40-Hour Basic Mediation Austin; January 24-28, 2005; The Center for Public Policy dispute Resolution; University of Texas School of Law; For more information call 512-471-3507

Ten Keys to Breaking an Impasse in an Appellate Mediation

*By Robert M. (Randy) Roach, Jr.**

Introduction - The Impasse Problem in Appellate Mediations

Appellate mediation is certainly one of the most challenging types of mediations. In most appellate mediations, the case has already been mediated once before trial, and that pre-trial mediation ended in an Impasse. In Texas, where nineteen of twenty cases settle before trial, it is the particularly difficult mediation that ends in an Impasse before trial and must be mediated on appeal. The appellate mediation is made even more difficult because the party that prevailed at trial normally feels that the trial has vindicated its position on the merits and has proven that the other side was being unreasonable. Whatever anti-settlement feelings that the prevailing party had before trial are likely to be even more hardened against settlement after they win at trial. No mediation is more difficult to settle than a mediation that has previously ended in an Impasse and then produced a winner and a loser at trial, but that is precisely the situation that frequently confronts the appellate mediator.

Given this situation, it is imperative that the appellate mediator come to work armed with an array of strategies and methods for breaking the inevitable impasses that occur in mediations and to avoid reaching the final Impasse that ends the mediation without a settlement. This article will offer such strategies and methods in the form of Ten Keys to afford the appellate mediator with an expanded arsenal with which to break Impasses and settle cases.

Caveats

Two caveats are in order. First, as used above, there obviously is a big difference between an "impasse" and an "Impasse." Mediations end because the parties have reached a true Impasse. This is the kind of impasse that ends the mediation, leads to trial, and may ultimately produce an appellate mediation. In any successful mediation, before trial or on appeal, the mediation may reach a temporary impasse at various points in the process, but the adept mediator is able to break the log jam and move the mediation forward to settlement. This paper will use the lower-cased "impasse" to refer to the temporary logjams that occur in mediations when the parties refuse to change their settlement positions, but where the mediator succeeds in convincing the process to resume without ending the mediation. The paper will use the upper-cased "Impasse" to refer to the logjam that cannot be broken and thus ends the mediation, causing the mediator to declare an Impasse.

The second caveat is that both parties must want to settle the case for the mediation to have a realistic chance of settlement. If the party with the judgment is not willing to take a significant discount off the judgment award, or if the appellant wants both parties to do a walk away, there is little point in conducting the mediation because an Impasse is a virtually certainty. This situation oftentimes occurs if the appellate mediation takes place before the arguments are briefed on appeal. One way to deal with this is for everyone to agree in advance not to conduct the appellate mediation in earnest until after the case is briefed.

Key No. 1. Movement is the key to breaking any impasse.

It seems axiomatic that the key to breaking an impasse and avoiding an Impasse is to achieve movement. Movement is the antithesis of an impasse. As long as the mediator has something new to talk about, and as long as the parties have a basis for moving their settlement positions, any impasse can be broken. Parties who are continuing to exchange numbers are not at an impasse. When one party is refusing to move to a new number, however, the opposing party is likely to refuse the mediator's suggestion to move to a different number. Parties do not like to bid against themselves. On the other hand, when one party sees that the other party is moving its number, the first party also is more likely to move its number. For this reason, the mediator should continually impress upon each party the importance of continuing to move its settlement position if it expects the other party to move its position. In the general caucus and the private caucuses, I make it clear to both parties that, for me, it is an article of faith that movement is the key to a successful mediation. Like a shark that must move through the water or else die, so too must a mediation continue to move through the numbers or die. Once the parties see that this process is working and that each movement is followed by an opposing party's movement, the parties become more confident in their mediator and more optimistic that mediation might actually produce a settlement.

Two corollaries are important. First, I tell the parties that I do not care how little the movement is. All I care

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about is continuing the movement. The dollars will work themselves out at the end, but only if the movement does not stop. Second, I do not want either party to give me its bottom-line dollar position before the end of the mediation. Movement is much more important than knowledge of a party's bottom line.

Key No. 2. The judgment makes a big difference.

The primary difference between a pre-trial mediation and an appellate mediation is obvious: the existence of a judgment. An existing judgment means that virtually all of the uncertainties inherent in a pretrial mediation have been resolved. The many questions concerning how the jury will view the competing facts and how the trial judge will apply the law have been answered. By the time the case comes to appellate mediation, the trial has answered whatever uncertainties there were about how sympathies would play out at trial, whether the jury would like or dislike witnesses, whether the trial court would apply this law or that law, who was in the wrong, who deserves to be compensated, and how much this case is worth. The uncertainties about what will happen at trial normally are the key factors that cause cases to settle in pre-trial mediation, but those uncertainties are no longer present on appeal.

The existence of a judgment fundamentally turns on its head one of the primary dynamics of mediation: uncertainty. A judgment makes certainty, as opposed to uncertainty, the operative dynamic in an appellate mediation. Reflecting the jury's findings of fact and the court's conclusions of law, a judgment provides relative certainty as to the outcome of the dispute. With the full force of the law and the courts behind it, the judgment makes one party a judgment creditor and the other a judgment debtor. Unless that judgment is reversed on appeal, there is certainty that a sheriff could soon be seizing the losing party's property and selling it off in order to satisfy that judgment. The certainty that judgments will be enforced if not reversed is often the single biggest reason why appellate meditations reach an impasse. Quite simply, the wining party sees no reason to take less than the full amount of the judgment that will soon be owed by the losing party. Just as in other types of mediations, the perceived absence of uncertainty could spell the doom of any and all appellate mediations.

Nevertheless, appellate meditations can and do result in settlement, precisely because the certainty of the judgment can be turned into a powerful tool to break impasses. During one particular period over two years, this author settled 100 percent of his appellate meditations. In each of those cases, the impasse was broken because the process continued to move. The process moved because there were new circumstances, occasioned by the relative certainties of the judgment and the appellate process, for the parties to consider in determining whether settlement was in their interests. As will be described below, these new circumstances pertaining to the uncertainties inherent in appellate review of the judgment can become as useful to settling the case on appeal as were the unique uncertainties of the trial process before trial.

Key No. 3. The issues should be briefed by both sides before the appellate mediation.

Because an appellate mediation concerns the parties' respective prospects for success on appeal, it is important for the appellate mediator to understand their positions on appeal before beginning the mediation. If the parties have completed their briefing before the appellate mediation takes place, the mediator will have both parties' best articulation of their appellate arguments, both for and against reversal. Before briefing, the parties' positions can be more hopeful than realistic, and they cannot be as competently evaluated by the mediator, as compared to reviewing filed appellate briefs. Even compared to oral argument, the parties' positions will probably never be more thoroughly stated than when articulated in a filed brief. Also, when the parties have been forced to do the research and to articulate their arguments in writing, each party's counsel is much more likely to have a reality-based assessment of the limits or weaknesses of their argument relative to their opponent's argument. Only with the briefs in hand can an appellate mediator effectively evaluate the arguments and the case law that can lead to reasonable predictions on how the appellate court might rule in the appeal.

Key No. 4. Predicting how an appellate court would rule on some of the issues underlying the appeal can inject movement into the mediation and break impasses.

Based on a review of the appellate briefs that a court will use to decide the appeal, many appellate arguments for reversal can be broken down into one of two categories: "easy calls" and "tough calls." An easy call is an argument that a consensus of appellate specialists could easily predict would likely fail on appeal. A tough call is an issue that would be difficult for appellate specialists to predict how the court of appeals would rule. Appellate judges and appellate specialists know and will say that most appellate arguments are easy calls, and very few arguments are tough calls. One of the biggest issues in the handling of the mediation and the breaking of impasses will be how the mediator handles discussing the tough calls and the easy calls with the parties during the course of the mediation.

Key No. 5. Explain how the deck is stacked toward affirmance and against reversal.

One of the most important factors unique to appeals and conducive to breaking an impasse is the fact that the appellate process is complex, arcane, and consciously

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designed toward making appellants losers on appeal. Most non-lawyers do not have a clue concerning this aspect of the appellate process. Most lay people believe that an appeal is essentially a retrial of the case, a second bite at the apple. Of course, nothing could be further from the truth. The procedural law governing appeals is intentionally geared to make affirmance the norm and reversal the exception.

The statistics confirm this reality and normally come as a shock when presented during the appellate mediation. Statistically, the chances of any particular appeal producing a reversal is somewhere between 10 to 17 percent, depending on the appellate court. That means that somewhere between 83 and 90 percent of all cases on appeal are going to be affirmed. That is sobering news for most parties, and even experienced appellate lawyers find those numbers chilling. Client who lost at trial and want to believe they will win on appeal may choke on those numbers.

The statistical reversal rate is so small because the appellate process is intentionally designed to promote affirmances of trial courts wherever possible. There are many, many examples of this new circumstance on appeal that an appellate mediator may artfully use at the right moment to help break an impasse. Some of the most obvious examples follow.

First, the standard of review that the court of appeals must employ in analyzing an appellate argument is geared toward affirmance, not reversal. For example, it is not enough for the trial court to have made an error in the exercise in the court's discretion; the abuse of discretion must be clear. Moreover, even if the trial court did commit a clear abuse of discretion, that is not sufficient to reverse the case. The trial court's error must also have been so harmful as to cause the rendition of an adverse judgment, where otherwise the judgment would not have been adverse. The harmful error requirement in Rule 81(b) is frequently the reason why even reversible trial court error does not result in a reversal of the trial court's judgment.

Even when the trial court is wrong in its application of the law, the de novo standard of review presents obstacles. In conservative jurisdictions, appellate courts predictably are not going to expand the causes of action by which plaintiffs may recover damages. Also, appellate court judges who are former trial court judges are sometimes viewed by appellate specialists as more likely to affirm than to reverse a trial court judge.

Erroneous jury findings are even more difficult to reverse. Factual-insufficiency points, requiring a showing that the jury's finding of fact was manifestly unjust and against the great weight of the evidence, are extremely unlikely to be sustained. Legal-insufficiency points, which are sometimes sustained on appeal, are still extremely difficult to show. By definition, if there is any evidence to support the jury's verdict, the legal-insufficiency point is supposed to be denied. Moreover, legal-insufficiency points are normally used to reverse judgments, and are normally not much help to plaintiffs who have lost in the trial court.

Even where trial courts have committed reversible error, appellate courts often determine that the error was waived and not preserved at trial or on appeal, thus precluding reversal on that point. Waiver issues are obviously touchy issues in an appellate mediation when the trial lawyer who waived the error is at the mediation, but waiver points can also help the appellate mediator break an impasse when skillfully handled.

Focusing on the cost of appeal can also help push the key log out of the way and break the jam. For example, an appeal handled by an appellate specialist will normally cost the client much more than an appeal handled by the trial attorney. When an appellate specialist tells parties that if she were to handle the appeal from start to finish the cost would be somewhere between $100,000 and $400,000, the uncertainty about the real cost of appellate briefing and oral argument can be a pro-settlement dynamic that can help break impasses.

Even if the case is reversed, most reversals result in a remand for a new trial as opposed to the rendition of judgment. A remand for new trial injects the reality of additional years of litigation, new uncertainties, and additional expense. When the cost of retrial and possible reappeal are figured into the settlement-dollar equation, especially when the parties are at an impasse but otherwise in the same dollar ballpark, clients can see the undesirable prospect that a remand could produce a costly and multi-year detour back into the trial courts and the appellate courts all over again. This prospect of further prolonged litigation can break some impasses and help the case to settle.

Key No. 6. Use the general caucus to set up your efforts to break subsequent impasses.

The general caucus can be useful in preventing an impasse from prematurely terminating the mediation. One important function of the general caucus is for the appellate mediator to obtain the confidence of the parties' counsel and to impress the parties themselves by demonstrating that the mediator knows what he or she is talking about concerning their issues and their prospects on appeal. By demonstrating a thorough understanding of each party's arguments, the mediator conveys that he or she has not only read the briefs, but has expertly analyzed the issues. The parties' counsel may then want to hear what an objective appellate expert thinks about the likely outcome of the arguments on appeal.

A second function of the general caucus is to allow the prevailing party to trumpet its victory in public. While this approach carries a real possibility of polarizing the parties, the truth is that the judgment has already polarized the parties. Some public crowing by the prevailing party

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that it has been vindicated at trial can have the helpful effect of allowing that party to experience the satisfaction of its victory in non-monetary terms, thereby lessening its need to measure victory simply in terms of dollars obtained through settlement.

A third function of the general caucus is that the appellant needs the opportunity to make its case for why the judgment is going to be reversed. Ultimately, the only merit-based reason for a plaintiff to agree to take an amount of money less than the judgment would be the risk of reversal presented by appellant's arguments. Also, to whatever extent the counsel for appellant is not persuaded by the sound of his or her own explanation of the argument, it may make that attorney more reality-based about the limited prospects for success on appeal and increase the corresponding attractiveness of settling the case.

The general caucus also allows the mediator to describe the process that he or she is going to use for the mediation. For example, I tell the parties that the mediation will proceed on two tracks: a merits track and a dollar track. The merits track will consist of discussions with each party concerning the strengths and weaknesses of its appellate arguments. The dollar track will consist of a continual exchange of numbers between the parties. I share my view that the meditation must continue to move or it will die. For meditations, movement occurs when each party moves its position on the numbers, and I emphasize that the amount of any particular movement is far less important than the fact of the movement. I also make clear that we will be exchanging numbers from the very beginning of the mediation and will not be waiting for the completion of the merits-track discussions before beginning the dollar-track discussions. Finally, I tell the parties that if they are both agreeable, I am prepared to give them my candid assessment of their likelihood for success on those merit issues that are "easy calls" and that I will tell them when I think the issue is a "tough call." I do not want to give the parties so much information that it would lead them to re-craft their arguments, but there are usually strengths and weaknesses to each side's position on the merits that, if appreciated by each party, might make the process of settling the case much easier. In my experience, the parties have always agreed to this sharing of my predictions concerning their arguments. Generally, I believe that those parties who pick an appellate expert to mediate an appeal do so because they value their expertise on the appellate issues more than they value the full-time mediator's expertise in the mechanics of mediation.

Key No. 7. Use the caucus to keep the parties moving on the merits track and the dollar track.

In my experience, the parties save their best ammunition in support of the merits of their appellate position for presentation in the private caucus. I am usually impressed by each side's development of its argument, but in the ultimate analysis, it is often possible to predict with a fair level of confidence whether an appellate court is going to affirm or reverse on any particular argument. It is critically important that the mediator give full recognition to the legitimate aspects of each party's arguments. This approach enhances the mediator's credibility when the discussion turns to the weaknesses of their positions. Predictably, in the first several private caucuses, the attorneys are very aggressive advocates for their position, but in the last several private caucuses, they are much more reality-based concerning the limitations of their positions. At this point in the process, the parties themselves often take over the mediation.

In each private caucus, the importance of moving the party's settlement-dollar position in the direction of settlement is emphasized. I generally do not leave the private caucus room until I have a settlement number that represents some movement by that party. Importantly, once both sides see that this particular mediation process is producing continual movement in the direction of settlement, momentum picks up and the settlement process can sometimes be completed in just a half-day mediation.

Inevitably, however, as the parties close in on their final position, the parties become reluctant to make a new settlement offer, claiming that they are at or near their final offer. This is the right time to employ other specific devices for dealing with an impasse.

Key No. 8. Conditional Offers: "If I get the other party to X, will you go to Y?"

Although certainly not unique to appellate mediations, the hypothetical or conditional exchange of improved settlement-dollar positions has proven to be a good way to break impasses and continue to move the mediation toward settlement. Once the parties become reluctant to move from their respective settlement-dollar positions, they may be persuaded to change their positions if the mediator is able to talk the other side into moving from its last position. Sometimes the movement is of equal dollar amounts, and sometimes it is in relatively equal proportions. In my view, the amount of the change is not important; it is the continued movement of the parties' numbers that is key.

The added benefit of this approach is that the parties believe that the mediator has some influence over the other side, which gives the party some incentive to agree conditionally. Once both sides have some confidence that the process will continue and that the other side will be caught up in the process of trying to get the case settled, each party begins to believe that the case can actually be settled, and each side starts thinking about settlement positions with which it can live, as opposed to the position it would ideally want.

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Key No. 9 Utilize the let's-split-the-difference approach.

Once the mediator believes that the parties have gone as far with their settlement positions as they are going to go, one method for breaking the looming impasse is to suggest a "split the difference" settlement with both parties. The mediator tries to commit each party to accept a deal at a particular number that is exactly in between the parties' respective last positions. This should only be tried after the mediator believes that all of the water has been wrung out of each party's settlement positions and only if there is a reasonable gulf that the mediator thinks might be bridged by splitting the difference. This approach has a certain equality to it; both parties are moving equal distances from their professed bottom line. If each party would be willing to accept a settlement based on splitting the difference between the parties' respective final positions, then a mediator earns the credit for achieving a miraculous settlement.

Key No. 10. As a last resort, consider the "mediator's proposal."

If the mediator does not believe that both parties are willing to split the difference in order to settle the case, a last resort may be to offer a "mediator's proposal." In the mediator's proposal, the mediator proposes a single number that is judiciously located somewhere between the two sides' respective settlement positions, and that number is offered to both sides. If both parties accept the number, then the case is settled at that amount. If only one party or neither party accepts the proposed number, then the case does not settle, and the parties are not told whether the other party accepted or rejected the proposal.

For either a split-the-difference settlement or a mediator's-proposal settlement to occur, both parties must want to settle the case, both parties must have made as much movement as they can justify, and there must be the prospect of a reasonable resolution that the parties do not want to lose. If both parties feel that the mediation process has resulted in more progress toward a fair and equitable settlement than they had expected prior to the mediation, then they may each believe that this approach is an opportunity to settle the case that may not come again in the future. This belief is especially true where the mediator has earned the confidence and respect of both parties and has induced both parties to make offers far better than what either party had expected to offer prior to the mediation. These conditions occur far more frequently than one might objectively predict.

Conclusion

Although the existence of a judgment is the single biggest difference between a pretrial mediation and an appellate mediation, and although the existence of the judgment predictably hardens some parties' settlement positions, the certainty that a judgment will bring execution if not reversed can also help settle the case. By focusing on the parties' prospects for success in the appeal and developing a positive atmosphere conducive towards settlement, impasses can be broken and successful settlements can be achieved in appellate mediations.

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ADR PROGRAMS IN THE STATE APPELLATE COURTS

*By The Hon. Frank G. Evans**

The term "alternative dispute resolution" and its acronym "ADR" are familiar to most judges and legal practitioners. During the past thirty years, many state intermediate courts of appeal and federal regional appellate courts have implemented some type of court-related ADR program. This article will focus on the ADR programs that have been implemented in the state appellate courts.

Several years ago, a special committee of the Council of Chief Justices of the state intermediate courts of appeal conducted an informal survey to determine which state appellate courts had implemented ADR programs. Using the information obtained from the courts responding to that survey, questionnaires were sent to the same courts asking for current information about their ADR programs. Thirty-three courts responded to the questionnaires.

The purpose of this article is to provide an overview of various ADR models that have been developed by the intermediate courts of appeal and to examine some of the features of successful ADR programs. With this goal in mind, the article will first consider some of the circumstances that have encouraged appellate courts to use ADR processes, and then discuss why some ADR programs seem to have been more successful than others. Finally, the article will examine some apparent trends the field of alternative dispute resolution and offer some suggestions about ways in which appellate ADR systems can be used with greater effectiveness.

Reasons appellate ADR systems developed

Before the Second World War, most appellate courts were able to dispose of their dockets in a timely fashion by using a relatively simple first-in, first-out case-management system. In those more leisurely times, a three-judge court, with the help of a court clerk and possibly a secretary, could maintain a current docket by issuing some thirty to forty opinions per judge per year. This relaxed working environment gave appellate judges more time for careful research, deliberation, and writing.

In the era following the Second World War, this appellate working environment began to change. As civil litigation proliferated, trial and appellate courts, particularly those in heavily populated areas, became inundated with new case filings. Burgeoning court dockets created unwieldy case backlogs, resulting in extensive delays and additional costs for lawyers and their clients. In response to a growing public outcry, an alarmed bench and bar began to look for new case-management methods that would enable the courts to dispose of their cases with greater efficiency and dispatch.

During the past quarter-century, ADR methods such as mediation have gained increasing popularity as a means for resolving civil disputes in a timely and efficient manner. This widespread acceptance has resulted in a nationwide paradigm shift in dispute-resolution methodology, and as a result of this movement, a substantial number of trial and appellate courts have implemented court-related ADR programs.

Early Appellate ADR Efforts

The survey information indicates that most appellate-court ADR programs were established during the past two decades. However, at least one ADR program precedes that time period. In 1975, for example, the two Houston courts of appeal implemented an experimental ADR program in which a former chief justice conducted informal settlement conferences in civil cases selected at random. Although the program was statistically successful, resulting in a substantial increase in the courts' number of voluntary dismissals, it was discontinued after two years when the retired judge's services were no longer available.

A similar settlement-conference program was initiated several years later by the same two appellate courts. In that experimental program, three sitting judges on the court rotated their services as the court's "settlement conference judge." That program was also statistically successful, resulting in an even greater number of voluntary dismissals. However, it too was discontinued after a two-year trial period, because the court concluded the time of the three judges could be used more effectively while sitting as members of a court panel hearing and deciding cases.

Types of Appellate ADR Programs

The intermediate courts of appeals implementing ADR programs usually have selected one of two basic models. The more traditional model is frequently called a "settlement-conference" program, which ordinarily is ad minnistered by a sitting or retired judge or court staff. The settlement-conference judge may or may not be trained in mediation techniques and usually follows a more proactive role in encouraging the parties to compromise. A more progressive ADR model involves the court

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only in an administrative capacity. In this model, members of the court staff move the case toward a mediation or other voluntary ADR process through normal case-processing methods. The mediators are either selected by the parties, or in default circumstances by the court, and the court staff play no part in the separate confidential mediation sessions. If the case settles, the court is so advised; otherwise, the court does not involve itself in the ADR process.

A hybrid combination of these two models is represented by the "Scheduling Conference" concept, which involves a sitting or retired judge in the court's scheduling and case-processing tasks. In this model, the conference judge (or staff person) meets with the parties to discuss procedural problems that may be involved in the processing of their case to "at issue" or final disposition status. In the course of those conference discussions, the conference facilitator encourages the parties to consider mediation or some other ADR process. Thus, the settlement discussions occur as incidental elements of the scheduling-conference discussions. Each of these different ADR models has benefits and disadvantages, as will be discussed later in this article.

Acceptance of and Resistance to Appellate ADR

While the survey information suggests that the appellate bench and bar have generally accepted the ADR concept, there are yet a number of appellate judges and lawyers who still believe that ADR processes are not cost-effective at the appellate level. These beliefs are generally founded on one or more of the following premises:

- Once a judge or jury has decided a case, it is too late to use an ADR process.
- The party who won in the trial court has no reason to settle the case on appeal.
- After judgment, the only issues remaining are issues of law, which can only be resolved by an appellate court's decision.
- After parties have invested a great amount of time and money on the trial-court proceeding, they have little interest in negotiating a settlement at the appellate level.
- In a complex appeal, the court should not order an ADR referral over the objection of appellate specialists who have gained sophistication in handling such complicated matters.

There are also those who believe that an appellate court exceeds its legitimate judicial function when it actively encourages parties to pursue out-of-court settlements. This view seems to be based on the idea that the legitimate function of an appellate judge is limited to hearing the parties' arguments, deciding the appellate issues, and rendering a decision that provides a final outcome of the case as well as legal precedent for the public.

Despite these and other concerns, a many intermediate appellate courts have implemented ADR programs that are successful in that they help the courts maintain a current docket and help the parties settle their dispute with the least expenditure of time and money.

Experience of appellate courts in developing court-related ADR programs.

At least 33 state courts of appeal, located in 17 different states within the United States, have adopted some type of ADR program. These courts are located in Arizona, (Divisions 1 and 2); California (District 1, District 4 - Divisions 1 and 2); Connecticut; Hawaii; Idaho; Kentucky; Maryland; Massachusetts; Michigan; Missouri; New Mexico; New Jersey; New York (Judicial Departments 1, 2, and 3); Ohio (Districts 1, 10, and 12); Oregon; Texas (Districts 1, 2,3, 4, 5, 9, 10,11, 12, 13, and 14); and Utah. In addition, four courts of appeals—Pennsylvania, South Carolina, Virginia, and Wisconsin—are presently studying the implementation of such programs. The Florida (4th District) court of appeals has discontinued its mediation program, concluding that the benefits gained from the program were "too meager" when balanced against the costs involved. The Massachusetts Appeals Court has also ended its mediation program due to an expansion of the size of the court and a belief that the program was not cost-effective. Another court of appeals (California 4th District) has temporarily suspended its settlement-conference program, finding that the program had been so successful that the court no longer had a backlog of cases. An analysis of the information received through the questionnaires shows that the appellate ADR programs have much in common:

- In most ADR programs, the parties' participation is mandatory.
- Under most programs, either the court or the parties can initiate an ADR process.
- The ADR programs have produced significant numbers of successful settlements.

Almost all ADR programs have had a positive impact on the court.

Benefits and problems related to appellate ADR

The benefits of an appellate ADR program likely will differ from court to court. The nature of a court's normal civil docket usually will have some bearing on the benefits the court can expect from an ADR program. For example, if the court has a civil docket that contains cases of the type regularly being resolved by ADR processes, it can usually anticipate a high level of ADR settlements. Also, a court with a significant backlog of civil cases likely will see greater benefit from an ADR program than a court without such a backlog. However, case management is only one aspect of a successful ADR program. Indeed, a well-

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designed and efficiently administered ADR program provides a valuable service to the public, as well as to the parties and the legal community.

On the other hand, an appellate ADR program probably will require the commitment of additional administrative time and financial resources. Thus, in determining whether to implement such a program, the court should balance the probable benefits of such a program against such additional administrative and financial burdens. Moreover, the court should be aware that even the most efficient ADR program will not be successful in every case. Accordingly, unless the cases are carefully screened for their settlement potential, the parties and their counsel may consider the program to be a waste of time.

Types of cases appropriate for an appellate ADR referral

hen both parties are willing to engage in responsible settlement negotiations, almost every kind of civil dispute can be resolved through the use of an appropriate ADR process. Therefore, almost every type of civil appeal should be considered a potential candidate for an ADR process.

Some appellate disputes seem to "cry out" for an ADR intervention. For example, consider the following scenario:

Harry Johnson started his wholesale regional sales effort about four years ago. His new business proved to be such a huge success that he decided to expand his market throughout the State of Texas. To develop this expanded market, Harry contacted an old high-school buddy, Monty Woods, who Harry believed to be the best used-car salesman in the county. Harry gave Monty an exclusive sales contract, which entitled Monty to a commission on every sale made in the state, but the contract required Monty to bear his own sales costs, including travel, advertising, and publishing. The agreement had a one-year term, which could be extended by mutual agreement.

During the first year of this expanded effort, the company's sales were spectacular. In fact, business was so good that Monty hired two new salespersons to handle his East Texas region. To do this, Monty had to make an investment out of his own pocket of approximately $60,000 to cover advance commissions and advertising costs. Early the following year, Monty sent an email to Harry confirming a one-year extension of their agreement. Monty did not get a written reply, but he did receive a garbled voicemail from Harry to the effect that, "It sounded like a good idea.@ Monty was not alarmed at the lack of written response, because he knew that Harry was very busy.

About six months later, Monty sent an email message to Harry explaining his marketing plan for the future and confirming a one-year extension of the exclusive agency agreement. Within a few weeks, Monty received a letter from Harry=s lawyer, stating that Harry would be willing to enter into an exclusive agency agreement covering Monty's East Texas region, but that he did not want to extend it to any other Texas counties. Monty then learned by discreet inquiry that Harry had approached the two East Texas sales representatives and had offered to hire them as exclusive agents for their territories. Monty was so angry that he wrote a hurried article for the national wholesale sales journal, complaining of the way Harry had treated him.

Monty's lawyers filed suit alleging breach of the agency contract and seeking recovery of his investment, consequential damages, attorney's fees, and costs. After extensive and costly litigation, a jury found that Harry had made fraudulent promises to Monty; that he had breached the sales contract; and that he had violated his fiduciary relationship with Monty. But the jury also found that Monty had defamed Harry by writing the article in the trade journal. The jury awarded Monty the sum of $85,000 as actual damages on his fraud and breach-of-contract claims and $17,000 in attorney=s fees. However, the jury awarded Harry the sum of $50,000 on his defamation claim plus $12,000 in attorney's fees. The trial court, after hearing both parties' post-trial motions, entered judgment for Monty for his actual damages but denied his claim for attorney's fees. The court entered a judgment n.o.v against Harry denying any recovery on his defamation claim. Both sides have appealed the trial court's rulings.

Monty's lawyer assures him that the trial judge was just "plain wrong" in refusing to award him attorneys fees, and she is confident that the error can be reversed on appeal. Harry has hired a new lawyer for the appeal, who also expresses confidence that the trial court's ruling denying his defamation claim will be reversed on appeal. Based on these lawyers' rough estimates, the total costs of the appeal should run somewhere between $50,000 and $75,000.

After two years of fighting, both Harry and Monty feel angry, confused, and depressed. Their extensive litigation has taken a heavy toll in terms of time, cost, energy, and emotional stress and has had a very negative impact on the lives of both men and their families. Neither man will now speak to the other, and their wives and children (who were once good friends) now view the "other side" with suspicion and distrust. Both men would like to bring the matter to an honorable conclusion, but neither seems to know how to expedite a final outcome. Also, each man feels a moral commitment to stay in the litigation until the very end, hoping to be the victor in the final "win-lose" contest.

Although both parties in the foregoing scenario have invested heavily in the lawsuit, they have just begun their appellate struggle. Often at this stage of the proceeding, neither party fully appreciates the amount of additional

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time, cost, and stress that will be required for their continued fight in the courts. One goal of an appellate ADR process, therefore, is to help the parties recognize how the continuing drain of an adversarial proceeding will negatively impact their personal lives and business productivity.

The key to a successful ADR process

Experience has shown that settlements can be reached in most civil cases despite the amount of money involved, the complexity of the issues, or how much the parties seem to dislike one another. Once parties have obtained enough information to make an objective evaluation of their risks, time, and expense, they usually are willing to engage in meaningful settlement negotiations.

An appellate court can help the parties in this evaluative process by encouraging them to exchange the information essential to their evaluations and to conduct their negotiations in a responsible manner. Armed with this evaluative information, each party can better predict the probable outcome of the appeal and make some reasonable estimate about whether the adversarial process will ultimately work to their advantage. Obviously, a timely and efficiently administered ADR program can help lawyers and their clients determine at an early point in the appellate process whether a reasonable compromise will probably be in their best interests.

When an appellate court should consider referring a case for an ADR process

Usually, an appellate ADR process is most cost-effective when initiated early in the appellate process. For this reason, most appellate ADR programs focus on determining the settlement potential of an appeal as soon as possible after it has been filed. In many cases, the parties and their counsel have enough information at the beginning of the appeal to make a reasonable assessment of its settlement value, and by resolving the dispute at that stage of the appeal, they usually can avoid the extra time and expense involved in preparing the case for appellate submission.

Many appellate courts require the parties, at the time of the docketing of the appeal or soon after, to submit a written statement providing essential information about the case. In most of the courts surveyed, only a short time is allowed for the submission of such informational statements. For example, in Arizona Divisions 1 and 2, docketing statements must be filed within ten days of filing notice of appeal; California, District 1 (within ten days); Connecticut (statement must be filed at time of docketing); Hawaii (at docketing); Kentucky (within twenty days); Maryland (within ten days); Massachusetts (within fifteen days after notice); Michigan (within twenty-eight days); Missouri (at docketing); New Mexico (after case screening); New Jersey (after screening); New York, Depts. 1, 2, and 3 (at docketing); Ohio (at docketing); Oregon (within ten days of issuance of form statement); Texas (to be contained in docketing statements due within fifteen days after filing of notice of appeal); Utah (due at time of docketing).

Using the information provided in these statements, the court's administrative staff and conference judge can obtain a preliminary view of the nature of the dispute and begin to develop some ideas regarding the settlement potential of the case. In Arizona (District 1), for example, the docketing statement form contains a question asking whether the case should be included in the court's settlement program. A party's answer to this question does not determine conclusively whether a case will be assigned to the program, and if one party answers the question, "No," the settlement-conference attorney frequently makes a telephone call to counsel to determine the basis for the answer. Unless the party's explanation clearly indicates the ADR referral is inappropriate, the settlement-conference attorney may suggest a telephonic conference call with all counsel to resolve the issue.

Criteria for determining whether a case is appropriate for an ADR process

It is difficult to establish any bright-line criteria for determining whether a particular appeal is appropriate for an ADR referral. During the early years of appellate ADR programs, some lawyers and judges believed that an ADR process probably would be unsuccessful in appeals from summary judgments, temporary injunctions, or interlocutory rulings. Today, most experienced lawyers and judges recognize that such appeals can be resolved through voluntary settlement procedures.

Another widely held belief was that an ADR process likely would be unsuccessful if the appeal involved only "legal" issues or some "matter of principle" to which a party was emotionally committed. Today, most lawyers and judges know that the success (or failure) of an ADR process depends more upon the timing of the intervention, i.e. whether the circumstances are such that the parties are willing to make an objective analysis of their case and then engage in meaningful settlement negotiations. When such circumstances exist, an appellate court's persuasive intervention can provide an effective catalyst for productive settlement discussions.

The responses obtained from the state appellate courts show that many types of appeals are being resolved through the appellate ADR programs. For example, ADR processes have provided an effective means for the voluntary settlement of appeals in business/contract; probate; attorneys' fees; employment; environment; family law and personal injury cases, and the resolution of appeals from rulings on summary judgments; mandamus actions, and administrative proceedings.

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Legislative enactments and court rulings that have encouraged the use of appellate ADR processes

In some states, appellate ADR programs have been implemented pursuant to state statutes; in other jurisdictions, the programs have been based on court rules. In 1987, for example, the Texas legislature enacted a broad ADR procedural statute (the "Texas Alternative Dispute Resolution Procedures Act") that established a new state policy encouraging the voluntary resolution of civil disputes and the early settlement of pending litigation. Under this Act, all state trial and appellate courts are expressly mandated to carry out this declared state policy and, for that purpose, are given discretionary authority, on their own motion or on the motion of a party, to order parties to pending litigation to participate in an appropriate ADR process. The Act describes the different kinds of ADR processes available to the parties; explains how a party may object to an ADR referral order; sets forth the qualifications, standards, and duties of a court-designated ADR neutral; and imposes a confidentiality protection applicable to all ADR processes, whether related to a pending lawsuit or not.

For the first several years following the enactment of this Act, only a few Texas courts implemented an ADR program. Gradually, as the bench and bar began to realize the benefits that could be gained from a court-related ADR program, a growing number of trial courts and some appellate courts began to experiment with different ADR models. Initially, the courts seemed to favor the more familiar neutral-evaluation processes such as the moderated settlement conference and the summary jury trial. However, as more lawyer mediators entered the ADR field, courts soon found that the mediation process was a simple and productive means for encouraging voluntary settlement negotiations. As a result, mediation soon became the ADR process of choice for most Texas lawyers and judges.

How an appellate court can ascertain whether a particular ADR model will be cost-effective

In designing and implementing a court-related ADR program, judges and court staff usually adopt a procedural model that seems best suited to the goals of that particular court. Obviously, because all courts do not have the same goals, it is difficult to determine whether a particular ADR model adopted by one court will be cost-effective when implemented in another court. Therefore, this article will simply point out some of the procedural differences in these programs and make some general observations regarding their relative benefits and disadvantages. For this analytical exercise, the various program components are considered under categorical headings as follows:

Statement of Policy Goals

The responses received to the survey questionnaires do not reflect the goals of all the responding courts. However, the answers do suggest that the courts have similar goals. For example, the goals expressed in the Arizona appellate ADR model are as follows:

- To provide an alternative means to resolve certain civil appeals and to enhance public confidence in the appellate process;
- To help the parties avoid the additional legal expense and emotional cost of an appeal;
- To reduce the court's calendar;
- To help the parties realistically explore a settlement; to limit and simplify the issues on appeal; and to provide a speedy and just resolution of the dispute.

The Arizona ADR model is not entirely related to docket control. Rather, it is to give the parties a meaningful opportunity to take control of the litigation and have the ability to craft a settlement that is closer to their needs than what an appellate decision could provide.

Similarly, the goals expressed in the California ADR model are as follows:

- To provide an informal and confidential process that maximizes the parties' participation and gives them an opportunity for settlement that they often would not take on their own initiative;
- To increase public satisfaction with the judicial system;
- To save the taxpayers time, money, and resources; and
- To reduce the court's mounting backlog of civil appeals by settling cases with a minimal use of court resources.

The Hawaii and New Mexico ADR models express similar goals:

- To improve judicial efficiency;
- To provide a valuable service for lawyers and their clients.

In Ohio (10th District), the goal of the ADR program is to provide counsel and the parties with a neutral, low-cost and low- risk forum for the resolution of ongoing litigation.

In Texas, the goal expressed in the ADR Procedures Act is, "to encourage the peaceable resolution of disputes, with special consideration being given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, through voluntary settlement procedures.[4]"

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Types of Appeals Referred (or Excluded) from ADR

The procedural models of most state courts of appeals do not specify the types of appeals that will be considered appropriate for an ADR referral. However, some states do list the categories of cases that will be considered appropriate ADR candidates. In Arizona, for example, all appeals will be considered eligible for an ADR referral except: (1) criminal appeals; (2) habeas corpus proceedings; (3) incarcerated prisoner appeals; (4) juvenile court appeals; (5) Economic Security Board appeals; (6) direct appeals from corporation commission; (7) workers' compensation cases; and (8) special actions. Similarly, in California (First District), an appeal will be eligible if it involves a business matter, civil rights, corporations, construction, consumer protection, contracts, copyrights, defamation, disabilities, discrimination, domestic relations, employment, environment, harassment, health care, housing, insurance, intellectual property, labor, landlord/tenant, the media, medical malpractice, neighborhood problems, partnerships, patents, personal injury, probate, product liability, property damage, real estate, securities, sports, and taxes. In Oregon, the eligible category includes all civil, domestic relations, administrative, and workers' compensation cases.

In California (4th District, Division 1), the court excludes cases from ADR consideration if they involve (1) bankruptcy stays; (2) appellants in propria persona; (3) a public agency, unless the petition alleged a tort, unlawful discharge, or personal injury; (4) redevelopment; (5) environmental; (6) class action, including denial of class certification; (7) probate; (8) conservatorship, or a (9) guardianship proceeding. Similarly, in Connecticut, cases are excluded if they fall within the category of criminal; habeas corpus; juvenile; pro se; and special statutory appeals. In Hawaii, cases in the excluded category encompass appeals ranging from a revocation of a driver's license to a restraining order. In Missouri, the court's exclusionary list includes cases involving termination of parental rights.

Stay of Proceedings (Extensions of Time)

Under Arizona's procedural model, the order of referral stays the normal briefing schedule pending completion of the settlement process. This same policy is followed in several other appellate courts, including: Kentucky; Michigan; New Jersey; Oregon (120-day abeyance) and Texas (14th District).

In other courts, the referral of a case to an ADR process does not automatically stay the appellate proceedings, nor does it extend the normal appellate timetable for filing the record and briefs. See, for example: California (First District); Connecticut; Texas (1st District); Idaho; New Mexico; New York (2nd Department)(court will consider extension on good cause shown); and Ohio (12th District) (allowing parties to request time extensions for filing record and briefing). In most courts, even those that do not have a specific procedural rule, it seems likely that parties could obtain a reasonable extension of time to complete certain appellate functions upon a timely showing of good cause.

The ADR Referral Process

Under Arizona's procedural model, if the appeals court determines, upon the recommendation of its settlement conference attorney or a party's confidential request, that a case is appropriate for mediation, it assigns the case to an appellate mediator who is either a retired judge or an active member of the bar. A party may resist the proposed assignment by filing written objections within five days of the order. The appellate mediator is selected by the settlement-conference attorney from a list of appellate mediators maintained by the court, and the parties are not charged for the mediator's services.

Under the California model, the court initiates ADR consideration by sending a case-screening form to the parties shortly after their filing the notice of appeal. Using this form, the parties are required to supply information regarding the basic facts of the case; a history of their negotiations; and whether the case is one of first impression or involves the construction of a statute or regulation. The program administrator, after discussion with counsel, assigns the case to a mediator, who will serve pro bono during preparation for the mediation and for the first six hours of the mediation session; afterwards, the mediator may charge remuneration at the "market rate." The court's program coordinator schedules the mediation sessions.

Most of the other courts responding to the survey question seem to have similar policies regarding the mandatory referral process, although several of the courts, Idaho and Texas (9th District) for example, do not issue referral orders except on the parties' mutual agreement. Also, it appears that even those courts that mandate participation have some provision allowing a party to voice an objection to an inappropriate ADR referral order.

Parties' Motion to Participate

Under the express provisions of some courts such as Arizona, either party can file a confidential request with the court asking that the case be assigned to a settlement conference. If the request meets certain conditions, the court will issue an order assigning the matter to such a conference procedure. The court may, in its discretion, stay all or part of the appellate proceedings pending completion of the procedure. Some courts give the parties an option to intervene in a settlement process by filing a motion containing an "opt-in" request.

Preliminary-Conference Procedure

The preliminary-conference concept is not new to the appellate courts. Historically, courts have used such conf-

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ences to deal with matters arising before submission and to obtain information regarding the status of the appeal. When used during the early stages of the appellate process, the preliminary conference provides a valuable tool: (a) to enlist counsel's help in reducing and streamlining the issues on appeal; (b) to develop an appellate timetable; and (c) to determine whether the case is appropriate for an ADR referral. Among the courts using such a procedure are: Connecticut; Hawaii, Kentucky; Maryland; Michigan; New Mexico; Ohio (12th District), Oregon; and Utah.

In Texas, the Houston Court of Appeals (1st District) administers a "collaborative scheduling and settlement conference program" in which a retired judge conducts an informal conference with counsel within thirty to forty-five days after the docketing of the appeal. During this conference, which counsel are required to attend and the parties are invited to attend, the conference judge engages counsel in discussions regarding the development of an agreed timetable for completing the appellate record, filing the appellate briefs, and engaging in a mediation or some other ADR process.

A preliminary-conference procedure can be very helpful to the court and to the parties. It enables court and counsel to streamline the appellate process and to develop a collaborative forum for the early settlement negotiations. The role of the conference judge is to focus the parties' attention on the procedural aspects of the appeal, help them reduce the amount of time and cost involved in preparing the case for submission, and encourage them to make an objective evaluation of their respective positions.

Settlement-Conference Procedure; Final Report

Many of the appellate courts also use a "settlement-conference" procedure that is quite similar to a typical "mediation" process. Usually, such a settlement conference is conducted by a "settlement-conference" judge or facilitator after the case has been determined appropriate for an ADR referral but before the time arguments are submitted to the court. In some programs, an active "sitting" judge on the court serves as the settlement-conference judge; in other courts, that function is performed by a retired judge or court staff attorney. Some courts provide special training for the conference judge or facilitator, other courts do not.

Some settlement-conference programs are mandatory for counsel only, while others require the attendance of counsel and the litigants. Some courts select cases for settlement conferences at random; others refer only certain types of cases to the settlement process.

In most courts, the settlement-conference process is considered "confidential," and the parties' discussions during the conference are not divulged to anyone, including the referring court.

In the Arizona model, the court's settlement-conference attorney is required to prepare a "final report" after the completion of the settlement conference, which must be approved by the appellate mediator. In this report, the settlement-conference attorney must explain why the settlement conference did or did not succeed in that particular case. The information contained in this final report is deemed to be confidential and cannot be used for any purpose other than to compile data pertaining to the success of the program. Obviously, the settlement-conference attorney's final report must be carefully crafted and used in a manner that will not diminish the protections of confidentiality related to the ADR proceedings.

Mediator and Program Evaluation; Procedural Forms

Under the ADR rules of several appellate courts, the parties participating in an ADR process are asked to complete a mediator and/or program evaluation form.

Rates of Successful Settlements

Whether a particular ADR program is successful usually will depend upon the court's particular goals. Most appellate ADR programs have at least two basic goals: (1) the reduction of cases on the court's civil docket; and (2) the availability of an affordable forum in which the parties themselves can negotiate a voluntary resolution of the dispute.

One method for determining whether a particular ADR program is productive is to examine the percentage of successful settlements recorded during a given period of time. The reported success ratio of voluntary settlements ranges from 18% to 90% for the courts that responded to the questionnaire. For obvious reasons, an accurate analysis of these reported rates would require careful consideration and comparison of additional data relating to the periods of time covered by the reports, the types of disputes involved in the programs, and other such relevant factors.

These reports seem to suggest that an appellate court's settlement rate will tend to increase over the years as the court's judges and the practicing bar gain greater familiarity with the ADR processes and their effective use.

Whether participation in an appellate ADR program should be voluntary or mandatory

A court proposing to initiate an appellate ADR program should consider, as a matter of court policy, whether to mandate participation in the process or whether participation should be voluntary. In courts where participation is mandatory, the court may allow the parties to "opt out" of the ADR referral, at least where good reason is shown.

As judges and court staff gain additional experience in analyzing the settlement potential of cases, it seems likely they will be less persuaded by an attorney's bare assertion that there is no possibility of settlement. In

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deed, most judges have learned that attorneys= skepticism about settlement potential often has little bearing on the ultimate success of meaningful settlement negotiations.

The role counsel should play in an appellate ADR process

Understandably, parties to an appeal (and sometimes their counsel) may perceive post-trial settlement negotiations to be a waste of time. In some cases, the parties may have engaged in extensive, albeit unsuccessful, mediation efforts in the trial court. In others, the party prevailing in the trial court may be slow to recognize the advantages of an appellate settlement, while the losing party may be so stunned by the verdict as to be incapable of rational analysis. In such a situation, counsel may find it difficult to encourage their clients to engage in realistic case evaluation and to participate in a mediation or other ADR process. As the Arizona Appellate Settlement Program (1996-2001), page 9, notes,

"Because there has been an order or judgment identifying a 'winner' and 'loser,' the dynamics of appellate settlement conferences differ substantially from pretrial negotiations. Some factors make appellate settlement more difficult than earlier settlement attempts: counsel and the parties may have become more entrenched in their legal positions with a conviction that they will be vindicated on appeal; the trial process often increases animosity; an attorney may want a published opinion concerning a recurring legal issue for an institutional client; and the judgment may be so clearly correct that appellee has little incentive to give up anything."

"On the other hand, there are factors making it easier to settle at the appellate level: most individuals do not enjoy the tension of litigation and want to achieve finality as quickly as possible; additional attorneys' fees in relation to the amount in controversy create economic incentives for both parties to settle; an appellate decision affirming or reversing may not end the underlying litigation; a timely final resolution is more important than a future decision; and an institutional client may want to avoid a published opinion in certain cases."

Appellate counsel fulfill their professional responsibility by making sure their clients understand the value of making an objective evaluation of their positions and the benefits that can be gained from a voluntary settlement process. By making effective use of an ADR process, counsel often can open their clients' eyes to the strengths and weaknesses of their case and the benefits to be gained from a rational compromise.

The advantages of preliminary conferences

A preliminary conference can be a valuable tool for both the court and counsel, creating an informal forum in which the court can clarify its expectations regarding the preparation of the case for submission and a procedure by which the court can decide whether the case is appropriate for an ADR referral.

An appellate court can use a preliminary-conference procedure to encourage parties to evaluate the settlement potential of their case at an early point in the appellate process. Ideally, the court can conduct the preliminary conference within a relatively short period of time after the docketing of the appeal and before the parties have invested a great deal of time and expense in the appellate process. Some appellate courts require the parties= counsel to attend this preliminary conference in person, while others allow counsel to participate in the conference by telephone. An obvious advantage of face-to-face attendance is that it provides an opportunity for the court's conference moderator to engage in informal discussions with counsel about a wide variety of matters, including the probable benefits of an ADR referral.

In a preliminary conference, the conference moderator will seek to determine: (1) whether there are any anticipated problems in preparing the appellate record; (2) whether the parties have accurately identified the principal issues on appeal and will be able to comply with the court's appellate timetable; (3) whether the parties understand the probable risks, time, costs, and stress involved in the appellate process; (4) whether one or both of the parties will likely sustain substantial economic loss in the event of an unfavorable outcome; (5) whether a published appellate-court decision is essential to either party; and (6) whether a court-referred ADR process would substantially assist the parties in their settlement negotiations.

A preliminary conference program enables a court to combine its case-administration function with its ADR function, so that both procedural functions are efficiently coordinated as part of an integrated case-management system. Under such an integrated system, the conference judge, court administrators, and administrative attorneys can perform interactive functions in tracking an appeal through the appellate process to its Aat-issue@ destination. Such a system also enables the chief justice to readily determine the procedural posture of the case by monitoring the conference-status reports and procedural orders. Using the information provided by the conference judge, the court's administrative judges and staff can more accurately predict when a particular case will achieve "at-issue" status and thus schedule its submission with improved efficiency.

Whether the appellate court should enter a formal order when referring a case to an ADR process

Generally, after a court has decided to refer a case for an ADR process, it should issue an order to that effect. In this order, the court should specify: (1) the type of ADR process (e.g., mediation); (2) the name of the ADR facilitator (if known); (3) the date, time, and place to conduct the ADR process (if known); and (4) whether the ADR referral will extend the normal appellate timetable. The

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order should also state that all parties and their representatives will be required to attend the process and, if appropriate, that if any of the parties are corporate entities, their corporate representatives must be individuals with adequate authority to negotiate a settlement. Finally, the order should state, if appropriate, that the ADR procedure will be considered confidential and that all matters occurring during the process will not be disclosed to anyone, including the court.

Types of ADR processes most appropriate for an appellate dispute

For most lawyers and judges, mediation has been the ADR process of choice. This is probably due to their familiarity with the process, as opposed to other ADR processes, and probably because so many lawyers have become commercial mediators available for court appointments.

The mediation process is considered a preferable ADR choice where the parties have some social or business relationship or where the dispute hinges upon the emotional well-being of either or both of the parties. Mediation gives the parties an opportunity to vent their anger or emotions, and it also enables the parties to "think outside the box" in choosing a solution that will be mutually beneficial to both parties. Thus, mediation has been used successfully in the resolution of a wide variety of disputes involving commercial transactions, family conflicts, personal injury claims, and business litigation. Indeed, there are few areas of conflict where mediation has not proven to be a viable ADR forum.

There are some cases, however, where the parties' interests might be better served by the use of an evaluative process. Sometimes the parties believe so strongly in the merits of their positions and become so committed to their own perceptions, that an objective third-party evaluation is critical to meaningful settlement negotiations. In such a situation, the conference judge or ADR administrator may recommend that the parties consider a neutral evaluation process such as a moderated settlement conference, a mini-trial, or a summary jury trial to help the parties develop a realistic analysis of the strengths and weaknesses of their positions. After the parties have obtained such objective evaluations, they likely will be better prepared to continue their settlement discussions.

Whether parties to an appeal can expedite a final decision as to outcome by making an agreement for a binding determination on the issues

The answer to this issue will depend upon the rules of appellate procedure applicable to the particular dispute. Under some states' rules of appellate procedure, the parties can enter into an agreed motion that specifies the procedural disposition of the case. For example, under some courts' procedural rules, parties can agree, subject to the court's approval, that the trial court's judgment will be set aside and that a different judgment will be entered in accordance with their settlement agreement.

The parties may also agree to submit the disputed issues to a third-party neutral evaluator (usually a retired judge) who reviews the parties' written arguments and then enters a final evaluative determination on the merits of their respective positions. Under such an agreement, the neutral evaluator's determination constitutes a final and binding decision that establishes a contractual basis for the enforcement of the parties' rights and remedies.

How a party can resist an ADR referral

An appellate ADR process usually provides benefits for both parties, because it gives each party the opportunity to resolve all issues in dispute, not just those that are being asserted on appeal. However, there are cases where an ADR process may not be a viable option for one or both parties. For example, an insurance company may need an appellate decision interpreting an insurance-policy provision, and the issues on appeal may present an ideal opportunity for a favorable decision. In another situation, a party may need a declaratory construction of a statute or constitutional provision, which only an appellate court can issue. In deciding whether to resist an ADR referral, counsel should consider a number of factors, including: (1) the client=s ultimate goals and underlying interests; (2) the amount in controversy, the complexity of issues, and the time and cost involved in the appeal; (3) the risks involved in the appeal process and whether the client will benefit from or be hurt by the passage of time; and (4) whether the appeal will be final or will only be a step in a long appellate process.

The procedural means for resisting an ADR referral will depend upon the rules and statutes of the particular jurisdiction. Under the Texas ADR statute, for example, a party must file written objections to a proposed ADR referral within ten days after receipt of the referral order. If the court finds that there is a "reasonable basis" for the objection, it "may not" require the parties to proceed with the ADR process.

The success of appellate ADR programs

It would be difficult, and probably quite expensive, to develop an accurate cost-benefit analysis of all comparable appellate ADR programs. However, some appellate courts have made internal evaluations of their own ADR programs, and their reports offer guidance to courts seeking to establish new programs or to improve existing programs.

In Arizona, Division One, the court conducts an ongoing evaluation of its ADR program by providing questionnaires to participating attorneys and litigants. These questionnaires ask questions about the kind of

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dispute; whether the case settled, in full or in part; a*nd* if not, whether the issues were narrowed; whether the mediator was prepared and effective; the estimated costs on appeal; and whether the party and counsel were satisfied with the process. Evaluations for the past fiscal year indicate a settlement rate in excess of 60%.

In making a general evaluation of comparable appellate ADR programs, it would be helpful to have the answers to the following questions:

- How many and what types of disputes were referred to an ADR process, and what was the disposition of such disputes within specified periods of time?
- Did the resolution of disputes reduce the number of cases on the court's docket, and did such a reduction in volume have any appreciable impact on the court's efficiency and productivity?
- Has the ADR program provided any measurable assistance to the court in reducing the amount of time and cost required for processing an appeal?
- Do the bench, bar, and general public support the program and consider it to be beneficial to their interests?

In assessing the success of an appellate ADR program, it should be noted that numbers of final dispositions may not truly reflect the worth of the program. Although the voluntary dismissal of one case may be perceived as having little impact on the court's docket, that dismissed case is one less "problem" that must be processed through the court's case-management system and ultimately decided by a panel of judges. Therefore, while the court's normal caseload may require the judges and court staff to continue to work diligently to maintain the court's docket at current status, an efficient ADR program will enable the court's judges and staff to concentrate their full attention to those cases that must be decided in the regular course of the court's business.

The reaction of the bench and bar to appellate ADR programs

The survey responses indicate an enthusiastic response from the members of the bar participating in the programs. In Arizona, Division One, 81% of the lawyers responding to the court's survey considered the court's program to be helpful. In Texas, on the other hand, the response was somewhat mixed. Several years ago, a Delay Reduction Committee of the Houston Bar Association Appellate Section conducted an informal survey of appellate lawyers who had participated in the First Court of Appeals (Houston) collaborative scheduling-conference program. The results of that survey indicated that the lawyers participating approved of the conference program by a margin of five to one. However, the Houston Bar Association Appellate Section conducted a more comprehensive survey this past year, which asked its members whether they favored a mandatory mediation process. About 60 % of the members responding to that survey stated they were opposed to mandatory mediation, but a similar percentage favored the First Court of Appeals status-conference program discussed above. The survey report explains that, "these results may be skewed by the special expertise of our members; if a case merits retaining an appellate specialist, it will often be so difficult (or divisive) that settlement is impossible. On the other hand, some cases become more amenable to settlement once appellate specialists are involved, with their added knowledge about the prospects for success on appeal providing a more reliable foundation to evaluate the case." Therefore, the report opines, "appellate mediation may generate its greatest benefits in cases involving less experienced appellate practitioners who are not as sophisticated in evaluating the merits of an appeal."

There are, of course, a variety of reasons why some members of the bar may oppose appellate ADR programs in general and mandatory mediation programs in particular. There are also a variety of possible reasons why a majority of the appellate bar (even those opposing mandatory mediation) expressed approval of an appellate scheduling and settlement-conference program. One possible explanation is that attorneys recognize the value of a scheduling conference as a means for obtaining procedural information about the court's policies and for having an opportunity to develop face-to-face dialogue with the court's judicial representative regarding the procedural future of the appeal, including the advisability of an ADR referral.

But regardless of the intensity of the opposition, it behooves the judges and court staff of any court administering such a program to develop a means for continuing dialogue with any skeptics among the bar to gain their understanding and support. In essence, the conference procedure provides a greater opportunity for the parties to determine by collaborative dialogue whether voluntary settlement negotiations will likely be productive at that particular time in the dispute.

Probable trends in the use of appellate ADR

It is, of course, impossible to predict the future with any degree of certainty. However, the continued growth of civil litigation, the increasing strength of special-interest groups, and the high volume of business activity all point to an increasing number of new civil-case filings.

In view of the ease with which parties can appeal an adverse decision, it also seems probable that appellate filings will keep pace with the trial courts' dockets. As litigation costs continue to rise, it is likely that litigants will bring increased pressure to reduce the costs and time involved in an adversarial proceeding. This pressure likely will motivate the bench and bar to make additional

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use of ADR methods. Accordingly, the level of ADR usage in the appellate courts should steadily increase during future years.

It also seems likely that the success ratios of appellate ADR programs will continue to rise as more judges, lawyers, and ADR practitioners gain experience, skills, and knowledge in making effective use of ADR processes to settle appellate cases. Based on the information obtained from the responding courts, it appears that today's appellate ADR programs have settlement rates that are only slightly less than those reported by trial courts, dispute-resolution organizations, and private mediation entities dealing with similar types of cases.

The essential features of a successful and cost-effective ADR program

A successful and cost-effective appellate ADR program likely will have most, if not all, of the following features:

- **Early Intervention:** An efficient and effective appellate ADR program will encourage the parties to exchange information, evaluate their positions, and engage in voluntary settlement negotiations at the earliest practicable point in the appellate process. To achieve these objectives, the court should: (1) issue a public statement of policy reflecting its support of ADR procedures; (2) ascertain that: all judges and court staff are enthusiastic about the program and highly committed to its success; (3) determine that experienced settlement facilitators or mediators will be available, either full or part-time, to serve pro bono or at reduced rates during the experimental phase of the program; and (4) that the court has reasonable access to a forum for conducting mediations and other ADR processes.

- **Preliminary Conferences:** An efficient and effective ADR program will utilize the services of an experienced judge or staff attorney to conduct informal preliminary conferences with counsel (and possibly their clients) at an early stage of the appellate process. To achieve this goal, the court should establish rules and procedures that encourage lawyers to engage in collaborative discussions with the conference judge and with each other to resolve procedural problems regarding the filing of the appellate record, the reduction and streamlining of appellate issues, and the appropriate use of ADR processes.

- **Evaluative Analysis:** An efficient and effective appellate ADR program will integrate an evaluative component, which will enable the court's judges and administrative staff to determine whether the program is performing its functions in a timely and cost-effective manner. In this regard, the court's evaluative procedure should provide an accurate measurement of the court's productivity, both before and after the initiation of the ADR program, and should give the court an accurate means for determining whether the program is reducing the number of cases on appeal; the time required for processing the appeal to at-issue status; and the level of resources required to administer the program. In essence, the evaluative component should reflect whether the program is: (1) meeting the court's designated goals; (2) reducing the court's time, costs, and expenditure of resources in processing civil appeals; and (3) assisting the parties in the prompt and efficient disposition of their disputes.

- Bar, Judicial, and Public Awareness: An efficient and effective appellate ADR program will have long-range support of the trial and the appellate bar and judiciary, as well as the public's general understanding and support. In this regard, the court's judges and staff should meet periodically with lawyers and trial-court judges, as well as with representatives of the general public, to develop an ongoing dialogue about ways to improve the court's ADR system and to integrate new and innovative techniques and processes that will enhance its efficiency and cost-effectiveness.

Conclusion

The high volume and complexity of new case filings will continue to require the appellate courts to look for new ways to improve their efficiency and productivity. One proven way to improve court efficiency is through the cost-effective use of alternative dispute resolution (ADR) processes.

An appellate ADR program provides a way for litigants to avoid the risk, time, and expense involved in the appellate proceeding. It also can help the court maintain a current civil docket. This, in turn, allows the court's judges to focus their attention on the cases that require their deliberation and judicial action.

Finally, a well-planned and implemented ADR system will provide a valuable service to the litigants and the general public alike. The system should offer parties to an appeal an affordable and readily accessible means for resolving

THE PANCHAYAT: A FORM OF TRADITIONAL DISPUTE RESOLUTION IN INDIA

*By Chhaya P. Phatarpekar**

I. Introduction to Rural Indian Culture.

India, one of the most heavily populated countries in the world, supports diverse cultures. Seventy percent of its people live in villages, where the major occupation is farming. Other prominent occupations are pottery, weaving, tanning, metallurgy, and carpentry. Because Indian villages are small units of integrated populations, individuals know one another and expect to deal with one another in the future. Villages also have integrated workforces where men and women work side-by-side in the fields and share resources, worries, and the joys of good harvests. Villagers share festivals and spend evening hours around fires enjoying hookahs, which are oriental tobacco pipes with long tubes passing through water. Traditions and customs strongly govern the lives of villagers in India. Villages often are divided into religious communities that observe the same moral codes and that participate in common religious celebrations. Village life focuses on three concepts: maintaining power within the community, preventing disharmony, and preserving relations between centuries-old neighbors.

This article will discuss two modes of dispute resolution adopted by people in rural India: Traditional Village Panchayats, which have control over entire villages, and Caste Panchayats, which have control over members of particular castes. "Panchayat" means a council of five members.

II Traditional Village Panchayats.

Before British colonialism in India, there was a system of village administration, including administration of justice, by Traditional Village Panchayats (TVPs). These councils were probably as old as the villages themselves and likely the only institutions of dispute resolution. TVPs were based on the principle of "Panch (five) Parmeshwara (Almighty/God)," which means God resides in the five members and speaks through them.

A. Membership in TVPs.

Traditional Panchas were usually middle-aged or older men who belonged to a high caste. They were respected because of their wealth, the families they came from, their intelligence, their age, and their interest in participating in village affairs. Panchas were not always literate, but a firm character supporting an innate sense of justice was invaluable. Panchas often spent their leisure time in discussions and in keeping abreast of village gossip, rumors, and facts.

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their disputes before spending a substantial amount of time and money in preparing the case for appeal. It should also assure the general public that the court is truly concerned about the emotional and financial welfare of its constituents and demonstrate the collaborative commitment of the bar and the judiciary to provide affordable and timely dispute resolution options.

Epilogue: Whatever happened to Harry and Monty?

The case of Harry vs Monty actually had a good ending. After a daylong appellate mediation, a serious impasse developed in the parties' negotiations. As a last-ditch strategy, the appellate mediator suggested that the two principals continue their settlement negotiations with no one in the room other than the mediator. In that face-to-face bargaining atmosphere, the two salesmen found their professional niche and began to negotiate with one another as if they were selling hardware supplies. In less than an hour, the two men had closed the gap and signed a settlement agreement. The two men then shook hands, apologized for being stubborn about their positions, and said they would like to talk about some future business deals. As everyone was leaving the conference room, the two men were busily catching up on past events that had touched their families during the four years they had been separated by the litigation.

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B. Procedures and Outcomes of TVPs.

An aggrieved party usually initiated a TVP by sending an informal letter to a Pancha or other prominent villager. The letter briefly stated and explained the nature of the dispute and asked for the TVP's assistance in finding a solution. The letter could be sent a week before, or sometimes only hours before, the Panchayat was assembled. The five members of the TVP organized a meeting to discuss the dispute. Younger men attended, but they did not participate in the TVP's discussions. Women never attend meetings unless they were called as witnesses.

TVPs were asked to decide issues such as title to land or division of personal property. They were also asked to mediate disputes and sometimes to formulate punishments. TVPs, while administering justice, kept in mind kinship and class considerations. TVPs viewed a dispute as part of the environment from which it grew, and so the individuals, their families, the community, and the history that led to the dispute were on trial.

The decisions arrived at by the Panchas often focused on compromise. For example, a TVP might resolve a murder case by marrying the daughter of the murderer to the son of the victim. In essence, a life was exchanged for a life; the bride was given to the husband and his family. In addition, the wife's dowry was considered monetary compensation for the murder.

C. British Destruction of TVPs.

The British introduced their own legal system when they conquered India, which affected the traditional administration of justice in villages. The British imposed the trial system and established criminal and civil courts that used formal rules of evidence. The British alleged that TVPs were dilatory, unenterprising, extra-legal, and without statutory warrant and authority. As a result of British pressure, the TVP system collapsed.

With no traditional alternative left, people began to resort to the formal judiciary, but obtaining justice became tedious and expensive. The formal judiciary was not very popular because parties found it difficult to understand the technical terminology of the British courts. In addition, the process required constant investment of resources, which many times resulted in total bankruptcy of an average family before it could attain justice. As a result, only elites who had resources could afford to use the formal judiciary system. In contrast, the expenses incurred for assembling TVPs had demanded at the most the provision of meals to the council head and the Panchas.

In 1907-1908, the British did make an attempt to revive TVPs, but these reestablished Panchayats did not succeed like the original TVPs. One of the reasons for their failure was that members were not the popular choice of the people; instead, they were nominated by bureaucrats. Today, most of the TVPs are limited to carrying out administrative functions such as building roads, keeping records of births and deaths, and giving licenses for building houses.

III. Castes and Caste Panchayats.

Although TVPs crumbled after the British conquest of India, the Caste Panchayats of the Nomads and the Vimuktas not only are organized today, but they are effective in administering justice. To better understand the Caste Panchayats, one has to understand the caste system prevalent in India.

A. The Indian Caste System.

The pattern of social classes in Hinduism is called the "caste system." The terms "jat" or "jati" are used instead of "caste" in some native languages in India. Apparently, the word "caste" is the English-language translation of the Portuguese word "casta," which literally means "breed or lineage." When the Portuguese arrived in India in 1498, they found what, to them, was a perplexing system of stratification and discrimination prevailing among Indians. Unable to explain this system to their rulers in Portugal, the first Portuguese sea-farers to India called it "casta."

The five major castes that were prevalent in ancient Indian society were the Shudras, the Vaishyas, the Kshatriyas, the Brahmins, and the Untouchables. The Shudras were considered a lowly caste; they included manual and agricultural laborers, artisans, and masons. The Vaishyas were merchants who engaged in trade, business, and other commercial activities. The Kshatriyas were warriors, and they protected the land. The Brahmins, who were priests and teachers, considered themselves to be of highest caste. The Untouchables performed the unclean tasks such as scavenging, cleaning up after funerals, cleaning carcasses, killing or hunting animals for food, working with animal skin and making leather, and handling other unclean materials; hence, they were considered "outcaste."[38]

Untouchables were given their name because the so-called higher-caste people would not touch them. The so-called higher-caste persons believed that the shadow caste by untouchables would pollute them. Untouchables were not allowed to enter areas where the so-called higher-caste people lived. Untouchables usually lived on the outskirts of villages. In modern times, the term "Untouchables" is not used because Mahatma Gandhi, in 1940, renamed them Harijans, which means "Children of God." Article 17 of the Indian constitution has abolished untouchability, and it forbids its practice. Although the caste system in India was abolished, it is still practiced in private lives. It especially raises its "ugly head" at the time of marriage.

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B. Distinctions between Caste Panchayats and TVPs.

Caste Panchayats are different from TVPs in two important respects. The members of Caste Panchayats belong to the same community or caste, while the TVPs are comprised of members who belong to different communities or castes. Caste Panchayats deal with disputes and problems arising within a particular caste or community, while TVPs deal with disputes irrespective of the caste or community to which a person belongs.

C. The Caste Panchayat: Another Ancient Institution.

Several kinds of evidence prove that Caste Panchayats were organized in ancient India. During the era of Buddha, religious councils were organized to resolve disputes. The Manusmriti also mention the organization of such councils. The Maharashtra Encyclopedia notes that Caste Panchayats also existed in South India and resolved disputes during Maratha and Muslim rule. In the olden days, Caste Panchayats had an unquestionable place in the villages and played a pivotal role of dispensing justice.

D. Membership in Caste Panchayats.

Every caste usually has its own Panchayat, which is appointed by the persons from that particular caste. The Caste Panchayat is composed of experienced individuals. By convention, membership in the council is not hereditary. However, there is always a tendency for the more-prosperous members of the caste to make their way into Caste Panchayats. Generally, persons of high integrity with unbiased minds are elected as council members.

Each Caste Panchayat consists of five members. The executive head of the Caste Panchayat, who guides and directs its secular affairs, has the authority to decide issues involving customs and practices. The five council members, known as Panchas, have the status of judges. Women rarely have the privilege of being appointed as Panchas, but there are certain communities among the Nomads and Vimuktas where women do serve as Panchas.

E. Operation of Caste Panchayats.

The operation of Caste Panchayats is different in every region of India. This article illustrates their operations by focusing on the Caste Panchayats of the Nomadic tribes and the Vimuktas in Maharashtra, which are similar to each other.

Maharashtra is a state located on the west coast of India. It has about eighteen Nomadic tribes and fourteen groups of Vimuktas, and there are about two hundred sub-castes among these Nomads and Vimuktas. Nomads, usually wanderers, come together at the time of a fair, or when a Caste Panchayat is organized, or when there is a marriage. People who are not from the caste are not allowed to participate in the get-togethers, nor can they be members of the Caste Panchayats, nor can they participate in marriage rituals.

Caste Panchayats deal with matters such as marriage, divorce, bills of release, relinquishment of rights or claims, and remarriage. Panchayats are organized near temples during religious festivals. Sometimes the members of Caste Panchayats are present at weddings or funerals, when the village folk get together. At such gatherings, a villager may begin talking about individuals who have been breaking or going against the customs of the community. Other times, a person who has been wronged brings up the issue; he may write a letter to the Panchayat or present the issue personally to the Panchayat. At this point, the Panchas organize the Panchayat

Because Caste Panchayats are informal institutions for delivering justice, they do not have any written rules or regulations. The Panchas usually sit in circular fashion on a raised platform surrounding a shady tree. The proceedings of the Caste Panchayat go on for two to four days. Disputes are resolved and the guilty are fined. In a Caste Panchayat, decisions are based on majority opinion. At times, persons having the status of attorneys represent parties. If they succeed in convincing the Panchas and get a decision in favor of their party, they then demand a meal for themselves and the Panchas. Among some Nomads and Vimuktas, the parties' representatives present cases in the form of traditional folklore. When a representative finishes reciting a folk tale, he analogizes the folk tale to the evidence in the case, and he uses the analogy to prove his assertions.

The following is an example of how an individual can be punished by a Caste Panchayat. If a man elopes with a woman from a different caste, the man's entire community ostracizes him. Nobody in the community attends marriages or funerals in the mixed-caste family, and nobody does business with the family. The Panchas issue notices about the eloped couple to members of the caste in other villages. The notices advise of the man's excommunication from the caste, so that caste members will avoid having any kind of relationship with the man and his new wife. If the man leaves his wife, he is taken back into the caste after expiation ceremonies are performed (one example of an expiation ceremony would be serving dinner or lunch to the Panchas and other folks from the community). The woman usually is not taken back into her community, and she has to live on her own.

Among the Caste Panchayats, one can observe a hierarchy of Panchayats. If a party does not find the decision given to him by the Caste Panchayat satisfactory, then that person can appeal to a higher-ranking Caste Panchayat. A party can still appeal to another higher authority, which is considered the last appealing body of the Caste Panchayat. This system resembles the judici-

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ary in India, where a person who does not receive a satisfactory verdict in a lower court can appeal to a High Court (highest court in each state) and later appeal to the Supreme Court of India if the party does not get a favorable decision in the High Court.

F. Popularity of Caste Panchayats.

The Nomads and Vimuktas have retained their own Caste Panchayats as units of dispute resolution. This form of settling disputes, which is an alternative to the courts, is not only popular but also effective. Instead of governmental bodies administering justice, the Caste Panchayats carry out this function. Although the idea of individualism has gained popularity among the people, Caste Panchayats even today have influence over the members of thier caste. They help the people to maintain harmonious relationships among the members of their communities.

The Nomads rarely file complaints in the courts. They relate with great pride that cases/disputes from their communities rarely go to courts. If a person from the community ever goes to court, the Caste Panchayats asks the person for an explanation and also fines the person for going to court. At times, the person is also excommunicated from the caste. The Caste Panchayat is the first and last resort of justice for the members of that community. This is probably because of the strong sense of "community sentiment" prevailing among the Nomads.

The Caste Panchayats have been able to function as a social unit quite distinct from the state because of physical and psychological separation of village from the town, where the police, lawyers, and judges operate the court system. The function of the Caste Panchayats is also possible because the nature of the community still allows the social boycott, or fear of outcasting, to operate as a potent coercive weapon.

IV. Conclusion.

With the ever-increasing burden of litigation in Indian courts, there is a dire need to revive the system of traditional dispute resolution in the villages of India. Because TVPs no longer exist in many places, village folk often have no alternative other than traveling miles to the cities to seek justice in courts. They give charge of their cases to a person who is stranger to them, whom they might not even trust. By the time litigants get a decision from a court, their financial resources are often depleted. It is also very difficult for poorer litigants to understand the legal jargon. In the re-instituted TVPs, the Panchas should be elected by the people from the villages so that each community is represented and so that the people will trust them. Women should be allowed to take positions as Panchas. In order to reduce unnecessary complexities in the working of the Panchayats, the government should make sure that the Panchas do not have any affiliations to political parties. The Panchas, acting as neutral parties, should focus on settling disputes in an amicable manner before the disputants go to courts. The Panchas should carry out their function of resolving disputes within the framework of the Indian Constitution and without overriding the rights guaranteed by the Constitution to the individuals. This reform would greatly help the people in villages in India, as obtaining justice would be less time-consuming, more affordable, and simpler. At the same time, the reform would reduce the courts' workload.

Chhaya P. Phatarpekar is an Indian attorney and a candidate for a Master of Arts degree with a major in Legal Studies at Texas State University in San Marcos, Texas. The author would like to thank Professor Walter Wright for encouraging her to write this article and also for critically reviewing the manuscript. The author is also thankful to Mr. V. N. Phatarpekar for providing her with some of the references on Caste Panchayats.

ENDNOTES

[1] http://india.punjabilit.com/national/national_tree.htm.
[2] http://som.csudh.edu/fac/lpress/devnat/nations/india/pondyoti.htm.
[3] http://www.indiansaga.info/history/aryans_occupation.html.
[4] Erin Moore, Conflict and Compromise: Justice in an Indian Village 117 (1985).
[5] Id.
[6] Moore, supra note 4, at 117.
[7] Moore, supra note 4, at 6.
[8] R. Kushawaha, Working of Nyaya Panchayats in India: A Case Study of Varanasi District 10 (Dr. L. M. Singhvi ed. 1977).
[9] Arjun Sharma, Caste, Class and Politics in Rural India: A Comparative Study of Village Panchayats, Bihar and West Bengal 34 (1993); see Laxman Mane, Upara 33 (4th ed.1993).
[10] Moore, supra note 4, at 4.
[11] Id. at 42.
[12] Id. at 41, 42.
[13] Moore, supra note 4, at 41.
[14] Id. at 42.
[15] Id. at 45.
[16] Id.
[17] Id. at 6.
[18] Sharma, supra note 9, at 114, Moore, supra note 4, at 6.
[19] Dowry is paid at the time of marriage by the bride's parents to the bridegroom in form of property, money or jewelry.
[20] Moore, supra note 4, at 43.
[21] Kushawaha, supra note 8, at 12.
[22] Id.
[23] Id at 12.
[24] Id. at 13.
[25] Shibani Roy & S.H.M. Rizvi, Tribal Customary Laws of North-East India 25 (1990).
[26] Id.
[27] Id.
[28] Id.
[29] Kushawaha, supra note 8, at 14.
30 Id. at 16.

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[31] Id.

[32] During British colonial rule in India, people belonging to certain castes were labeled as criminals. After independence, the Indian government liberated them from the label; they came to be known as Vimuktas, which means liberated.

[33] Prabhakar Mande, Gavgadyabaher 282 (1983).

[34] The Caste System and the Stages of Life in Hinduism, at http://www.friesian.com/caste.htm.

[35] Aharon Daneil, The Caste System (1999-2000), at http://adaniel.tripod.com/castes.htm; Allison Elliot, Caste and

[36] The God of Small Things (Fall 1997), at http://www.emory.edu/ENGLISH/Bahri/caste.htm. Jose Colaco, The Caste System of India at http://www.goa-world.net/magazine/caste.htm; Anand & Kulbir, The Caste System in India (2003) at http://www.anand.to/india/caste.html; The Caste System in India at http://codesign.scu.edu/HINDUISM/index.html.

[37] Jose Colaco, The Caste System of India at http://www.goa-world.net/magazine/caste.htm.

[38] Allison Elliot, Caste and The God of Small Things (Fall 1997), at http://www.emory.edu/ENGLISH/Bahri/caste.htm; Anand & Kulbir, The Caste System in India (2003) at http://www.anand.to/india/caste.html; Terence Callaham & Roxanna Pavich, Indian Caste System (The Varna and Jati System), at http://www.csuchico.edu/~cheinz/syllabi/asst001/spring98/india.htm; http://india.punjabilit.com/peopleofindia.htm; see also Tom O'Neill, Untouchable, National Geographic Monthly, June 2003, available at http://magma.nationalgeographic.com/ngm/0306/feature1/index.html.

[39] http://countrystudies.us/india/89.htm.

[40] Deepak Bagga, The Constitution of India 21 (1982).

[41] Jose Colaco, The Caste System of India at http://www.goa-world.net/magazine/caste.htm.

[42] Sharma, supra note 9, at 35.

[43] Manusmriti are religious scriptures that contain laws written c. 200 C.E.; in particular, these laws codified the Hindu caste system.

[44] Marathas were Marathi-speaking people of Central India, known for their ability as warriors and their devotion to Hinduism. Marathas helped to bring about the fall of the Mugal Empire, and they were the most-determined opponents of British supremacy in India.

[45] Mande, supra note 33, at 283.

[46] Naganath D. Kadam, Maharashtratil Bhatka Samaj: Sanskruti va Sahitya 52 (1995); Mande, supra note 33, at 273.

[47] Id.

[48] K. Gnanambal, Religious Institutions and Caste Panchayats in South India 106 (Dr. S.C. Sinha ed. 1973).

[49] Id.

[50] Id.

[51] Ramnath Namdev Chavhan, Jati Ani Jamati 109, 122 (1989).

[52] Kadam, supra note 46, at 52; Mande, supra note 33, at 273.

[53] Chavhan, supra note 51, at 122.

[54] For a discussion of Vimuktas, see footnote 31, supra.

[55] Shivaji Ambulgekar, "Vaidunchi Jat Panchayat," Lok Prabha Weekly, June 4, 2004, at 53.

[56] Mande, supra note 33, at 274.

[57] Id.

[58] Chavhan, supra note 51, at 3.

[59] Anil Avachat, Ase he Bhatke Ase he Vimukta 8 (1990); Ambulgekar, supra note 55, at 52; Chavhan, supra note 51, at 38.

[60] Chavhan, supra note 51, at 121.

[61] Id. at 31; Gnanambal, supra note 48, at 106, Avachat, supra note [59], at 8.

[62] Avachat, supra note 59, at 8, 17.

[63] Chavhan, supra note 51, at 3.

[64] Mande, supra note 33, at 275.

[65] Avachat, supra note 59, at 8, 17; Kadam, supra note 46, at 52; Ambulgekar, supra note 55, at 53.

[66] Chavhan, supra note 51, at 39.

[67] Mande, supra note 33, at 281.

[68] Chavhan, supra note 51, at 91.

[69] Id. at 86.

[70] Kadam, supra note 46, at 95; Ambulgekar, supra note 55, at 53; Avachat, supra note 59, at 17.

[71] Kadam, supra note 46, at 95; Ambulgekar, supra note 55, at 52; Avachat, supra note 59, at 17.

[72] Mande, supra note 33, at 282.

[73] Id. at 275.

[74] Id.

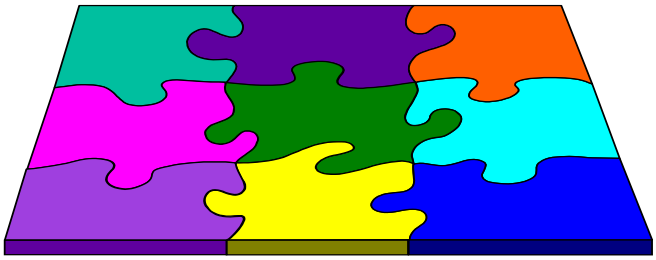
[75] Id.

[76] Id.

[77] Id. Among the Nomads, there is a "we-group" or "in-group" feeling towards the members of the same community, as opposed to a sense of "they-group" or "out-group" feeling towards members of other communities. This "community sentiment" is frequently seen among the Nomads in Maharashtra. Nomads developed a sense of alienation towards the higher-caste society, which did not allow mingling among castes. As a result, they developed a strong "society sentiment."

[78] See Moore, supra note 4, at 118.

[79] Id.



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 an experienced attorney with a well-deserved reputation for excellence in your profession. You are respected by both the bench and the bar. Although you have never been trained by a mediator, you have been asked to serve as a mediator on a few particularly difficult cases in your realm of experience. You have settled every case in which you have served as a mediator.

However, the plaintiff in your most recent case is having buyer's remorse and is seeking to repudiate the Mediated Settlement Agreement, alleging that it was signed under duress because her lawyer threatened to withdraw his representation of her if she didn't sign. In addition, Plaintiff has notified you that she intends to file and (unspecified) action against you if you don't support her claim. Both Defendant and Plaintiff's counsel has subpoenaed you to testify at a hearing on Defendant's Motion to enforce the Mediated Settlement Agreement.

What course(s) of action would you take from the time you receive the subpoena through the court's hearing?

Allen Butler (Dallas): Well, Suzanne – I am a confirmed coward. Here is what I would do:

Hire an attorney to represent me.
Instruct my attorney to contact the partied to determine whether the parties are waiving confidentiality under CP&R Code § 154.053)c). If they are (as the subpoena suggest) secure that in writing, along with the parties' confirmation that my qualified immunity from suit under CP&R Code § 154.055 applies to any testimony I give.
If the parties will not agree to waive confidentiality, I would instruct my attorney to move to quash the subpoena on the authority of CP&R Code § 154.053(c).

This is my best shot!

"...it is the awareness that there may be a problem that makes us proficient at what we do."

Courtenay Bess (Dallas): alth0ugh it is hard to imagine being n the position of never have had any mediator training, I will do my best.

As a practicing attorney, I would probably call my malpractice carrier and hope that I have a rider in my policy for acting as a neutral as well as an attorney. Either way, I may be told that until a claim is made, they appreciate the information, but I am on my own.

If I am lucky, in spite of my lack of training, I will hopefully have well placed friends with training who can advise me of what to do next. Ordinarily, I would offer to do a follow up mediation (probably at no charge) to see if we can fix the problem. However, due to the Plaintiff's threat of a claim against me, I may now have a conflict that would make that an unwise move. (As a aside, as an attorney-mediator, I would not talk to the Plaintiff directly without her counsel present or with his/her permission and I may avoid the threat altogether.)

If it was a court ordered mediation or I have a signed mediation agreement incorporating the rules of mediation, I would advise counsel (if we cannot work it out) that under the Rules, if I am subpoenaed, I will not testify, but will hire counsel and that they will be responsible for my attorney's settlement agreement (to which I am not a party or signer), there is little, if any, I can add to the discussion of whether there is an enforceable settlement agreement, even if I were willing to testify, which I am not!

If I am still unable to bring reason to the situation by visiting with counsel, I would call one of my better-trained friends for advice on what to do next. I would then (likely) be referred to one of the Association of Attorney Mediators members or perhaps Prof. Wayne Scott for advice and counsel on what to do next and then would follow that advice! As soon as the crisis passed, I would go get training and join the ADR Section of the State Bar, the Association of Attorney Mediators and/or the Texas Association of Mediators.

Robert L. Kelly (Kerrville): I would assert the mediation confidentiality privilege Section 154 of CPRC and refuse to testify to anything other than to the Mediated Settlement Agreement. If ordered to testify further, I would file a mandamus proceeding and challenge the ruling.

Wayne Scott (San Antonio): Note: Because of a double computer crash, Prof. Wayne Scott was unable to write his comments. The following is an excerpt from a conversation with me in which he generously shared his recommendations for the Puzzler's hapless mediator.

"The mediator should refuse to testify and file a Motion for Protective Order against such testimony. If the parties and their counsel insist, you should point out that, prior to the mediation, they signed a contract agreeing to pay all reasonable fees and expenses of the mediator (including

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Ethical Puzzler
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attorney's fees) incurred in opposing efforts to compel testimony or records from the mediator. If you don't have such a contract in place, you should.

If parties and their counsel still insist upon your testimony, resist vigorously and ask the Court to abate the hearing while you file a Writ of Mandamus. Under the Texas Civil Practice and Remedies Code 154.073 you, as a mediator, have an absolute right to resist and refuse to testify even if confidentiality can be waived by the parties under § 154.053. If the Court refuses to abate and instead orders you to think the situation over ion jail, have a *Writ of Habeas Corpus* prepared and on your person to be filed immediately."

Professor Scott also generously offered to represent pro bono any mediator who find him or herself in such a position as our mediator in this Puzzler, providing that such mediator call him immediately upon becoming aware that his testimony is sought and that the mediator agrees to pay all of Professor Scott's expenses.

✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶✶

Comment: The theme of this Ethical Puzzler might be (to "borrow" from a current television commercial) "can you hear me now?"

Readers of last quarter's issue of Alternative Resolutions were met with an in-depth analysis by L. Wayne Scott (in his article entitled "The Confidentiality of Mediations in Texas Has Been Questioned") of the Avery and the Afford cases in which the scope of confidentiality has been put in question by the Dallas Court of Appeals. Since his article appeared, the Avery case has been settled, arguably leaving bad law on the books, at least temporarily. In this Ethical Puzzler mediators were asked their practical, as well as, their ethical advice on what to do were they to find themselves in the same or similar position as the mediator in the Alford case. All our respondents gave valid and valuable responses.

Forewarned is forearmed. An additional suggestion might be to re-read Professor Scott's Article, the statutes, and the ADR Section Ethical Guidelines and then formulate a plan as to how you will deal with this problem should you be faced with it. It is not going to go away. We must be prepared to face it, both individually and as a member of the ADR community.

Mark Your Calendar!

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

Look for more information in

upcoming newsletters!

ALTERNATIVE DISPUTE RESOLUTION SECTION PROPOSES BEST PRACTICE GUIDELINES FOR ARBITRATION

By Walter Wright

In response to public concerns over the fairness of arbitration, the Alternative Dispute Resolution Section of the State Bar of Texas has proposed to adopt best-practices guidelines. These best practices were approved to be published for comment at the Section's Council meeting on January 8, 2005. The Section is seeking comments on this draft. The comments will be considered at an Arbitration Roundtable meeting, which will be held in late February or early March. Comments may be emailed to John Fleming at jfleming@austin.rr.com or by fax to 512-476-9259.

STATE BAR OF TEXAS ADR SECTION
BEST PRACTICES FOR CONSUMER ARBITRATION

DISCUSSION DRAFT

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 the consumer protocols established by the American Arbitration Association and 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.

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. 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.

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ALTERNATIVE DISPUTE RE SOLUTION SECTION PROPOSES BEST PRACTICE GUIDELINES FOR ARBITRATION

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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 predispute agreement to arbitrate should not require the arbitration to be confidential. Subsequent to the occurrence of a dispute, the parties may mutually enter into an agreement providing that the arbitration hearing, arbitration award, or both will be confidential.

ADR Section Calendar

2004-2005

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
Spring	March 15, 2005	April 15, 2005
Summer	June 15, 2005	July 30, 2005
Fall	September 15, 2005	October 15, 2004
Winter	January 15, 20056	February 15, 2005

SEE PUBLICATION POLICIES ON PAGE 23 AND SEND ARTICLES TO:

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"There is no way to peace; peace is the way."

A.J. Muste

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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:
Cecilia H. Morgan
State Bar of Texas ADR Section TREASURER
c/o JAMS
8401 N. Central Expressway
Dallas, TX 75225
214-739-1979 - 214.744.5267 (JAMS)
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cmorgan320@sbcglobal.net

I am enclosing $25.00 for membership in the Alternative Dispute Resolution Section of the State Bar of Texas from June 2004 to June 2005. 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:_____

2003-2004 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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