Alternative Resolutions

Visit our Website at www.texasadr.org

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

February 2006 **Winter Issue** **Vol. 15, No. 1**

CHAIR'S CORNER

by Michael S. Wilk, Chair, ADR Section

Recently, the ADR Section council sent a letter to the justices on the Supreme Court of Texas, thanking them for their order of June 13, 2005 approving Ethical Guidelines for mediators. In our last newsletter, we published the Ethical Guidelines and an article of the history leading to the court's order. We noted that the Ethical Guidelines are aspirational unless you are a credentialed mediator with the Texas Mediator Credentialing Association. In this Chair's Corner, I want to point out that the last paragraph of the court's order is mandatory and not aspirational. The last paragraph of the June 13, 2005 order provides:

> Moreover, counsel representing parties in the mediation of a pending case remain officers of the court in the same manner as if appearing in court. They are subject to the Texas Disciplinary Rules for Lawyers and any local rules or orders of the court regarding the mediation of pending cases. They should aspire during mediation to follow The Texas Lawyer's Creed – A Mandate for Professionalism. Counsel shall cooperate with the court and the mediator in the initiation and conduct of the mediation.

This mandate for cooperation includes assisting and cooperating in scheduling the mediation and in representing the client during the mediation in a manner conducive to settlement. A successful mediation requires trust of the mediator, communication between the parties and their counsel, and ultimately compromise. Lawyers who are trained and taught to represent their clients zealously within the bounds of the law may not appreciate that hard-nosed litigation practices are less effective than respect and sensitivity in resolving a dispute by agreement. Mediators should make attorneys participating at mediations aware that the Supreme Court of Texas's order requires counsel to cooperate with courts and mediators in the initiation and conduct of mediations.

The Supreme Court of Texas has taken no action to require credentialing and/or registration of mediators, relying instead on aspirational ethical guidelines that the ADR Section adopted to ensure the continued quality of mediators and mediation in Texas. At the same time, the court expects counsel for parties in mediation to conduct themselves as officers of the court, subject to the disciplinary rules to cooperate in the mediation process.

The members of the ADR Section should be proud of the section's role leading to the entry of the June 13, 2005 order, thankful for the decision made by the Supreme Court of Texas, and proactive in using the order to improve the mediation process.

In this Issue

ARBITRATOR DISCLOSURE: STANDARDS & GROWING CHALLENGES

By John K. Boyce*

"Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside the lion." — Samuel Gompers, American labor leader

A. INTRODUCTION

With major arbitration providers reporting double-digit increases in the number of matters arbitrated year after year, there is no question that arbitration is here to stay. But with the increase in matters arbitrated, there has also been an increase in the number of disputes about the conduct of the arbitrations, especially disputes regarding arbitrators' alleged failures to disclose facts about themselves or their backgrounds that would have, or arguably should have, resulted in their disqualifications.

There are probably several reasons for the increasing number of disclosure disputes. One of these reasons has been alluded to above: Given the increase in the number of arbitrations, one would expect an increase in the number of disputes relating to the conduct of the arbitral proceeding. Additionally, the nature of arbitration means that disputes over the arbitrator's disqualification are more likely than would be the case in litigation. Courts are the realm of the generalist, with the local judge handling every case filed in his court. In contrast, the arbitration is the realm of the specialist, and one of its primary advantages is that the parties have their dispute heard by a person picked for his expertise and experience. However, because the arbitrator's expertise is usually based on his work in the field, the chances are increased that he will be asked to handle a matter involving a party or a lawyer he knows or with whom he has worked in the past. Finally, the fact that an arbitrator's award may be reviewed substantively only on narrow grounds may also increase the incentive to create a disclosure issue, even where none exists. While a disappointed litigant may have a court's decision reviewed on appeal on many possible grounds, the limited number of grounds on which an arbitrator's decision may be reversed means that a disappointed party to an arbitration has an incentive to find some ground to assail the award.[1]

Interestingly, and despite the obvious importance of pre-arbitration disclosure and disqualification to the integrity of the arbitration process, neither the Federal Arbitration Act nor the original version of the Uniform Arbitration Act (adopted in many states) sets forth any guidelines for pre-arbitration disclosure, concentrating instead on when an award can be set aside. [2] However, if arbitration is to remain a fair and equal contest, and not become a feast for lions (as Gompers was worried that it might), adequate disclosures must be made at the earliest possible time. The purpose of this article is to compare and contrast some of the different regimes governing the disclosure of information by arbitrators and to consider their effectiveness.[3]

B. DIFFERENT DISCLOSURE REGIMES

1. The American Arbitration Association

An important disclosure regime to consider is the one used by the American Arbitration Association ("AAA"), which is both easy to understand and difficult to administer. Under the AAA's Code of Ethics for Arbitrators in Commercial Disputes ("Code of Ethics"), an arbitrator is obligated to disclose "any interest or relationship likely to affect impartiality or which may create an appearance of partiality."[4] The AAA's matter-specific arbitration rules contain similarly general disclosure provisions.[5] The Code of Ethics provides some guidance about matters that might reasonably be seen to affect the arbitrator's partiality, such as the existence of a financial or personal interest in the litigation[6] or past dealings between the arbitrator and a party.[7] But the general language means that arbitrators, for the most part, are left to their own devices in deciding what to disclose, though the Code of Ethics does specify that "[a]ny doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure."[8]

2. The Revised Uniform Arbitration Act

In addition to not defining the scope of disclosure that is required, the AAA's Code of Ethics does not have the force of law.[9] To address this problem, and to give a statutory basis for the requirement that certain disclosures be made by an arbitrator before the arbitration begins, the Commissioners on Uniform State Laws, in 2000, enacted the Revised Uniform Arbitration Act (2000) ("RUAA"). The RUAA, which to date has been adopted only by ten states,[10] provides generally that arbitrators are required to disclose "known facts that a reasonable person would consider likely to affect the impartiality of an arbitrator," including whether the arbitrator has "a financial or personal interest" in the arbitration or if he has an "existing or past relationship" with any of the parties, counsel, witnesses, or other arbitrators.[11] In many respects, the RUAA's provisions look a lot like the provisions found in the AAA's Code of Ethics, but ultimately, the disclosure requirements of the RUAA are vaguer than are the requirements of the Code of Ethics. While the Code of Ethics specifies that arbitrators are to disclose if they have knowledge of the facts of the case and/or any matter that the contract between the parties or the governing rules require to be disclosed,[12] the RUAA does not specifically mention either of these things. Consequently, though the RUAA has the force of law that a court presumably can enforce, it does not provide arbitrators with much in the way of specific guidance regarding what should be disclosed.

continued on page 3

ARBITRATOR DISCLOSURE: STANDARDS & GROWING CHALLENGES
continued from page 2

3. California

Going in an opposite direction from the AAA and the RUAA is California, which has enacted a series of statutes and rules governing the disclosures that arbitrators must make to the parties before an arbitration begins. The California Legislature has evidently decided that more disclosure is preferable to a general rule that boils down to an admonition to "disclose what is relevant," and has enacted legislation that requires arbitrators to disclose much specific information.[13] In addition, the Legislature requires arbitrators to disclose all the information set forth in the rules governing arbitrators adopted by California's Judicial Council,[14] which are described as establishing the "minimum standards of conduct for neutral arbitrators."[15] These rules, in turn, list fourteen further categories of information (many with multiple subcategories) that must be disclosed,[16] and require even more information if the arbitration involves a consumer matter.[17] Finally, arbitrators are required to disclose any information that would, by statute, result in the disqualification of a judge,[18] which adds thirteen reasons for which the arbitrator may be disqualified, some of which overlap the specific provisions of the statutes governing arbitrators[19] and some of which do not.[20] These rules are binding and cannot be waived in favor of some other disclosure regime.[21]

The sweep of these disclosure rules is considerable, especially because many of them require listing all kinds of information regarding prior proceedings in which the arbitrator participated with one or more of the parties or their lawyers.[22] Additionally, the disclosure requirements are onerous because they apply broadly to almost any kind of person who could be characterized as an "arbitrator."[23] Failure to make a disclosure required under any of these provisions could support a finding that the arbitrator's award was the product of "corruption," and is therefore subject to being set aside.[24]

C. ANALYSIS

Each of the regimes set forth above has advantages and disadvantages. For example, the AAA's regime has the virtue of being self-policing, and the lack of definite rules governing what should and should not be disclosed ought not to result in any lesser measure of disclosure, at least by the honest and careful arbitrator. Indeed, the very basis of the AAA's broad "disclose what is important" rules is the assumption that arbitrators have the character and integrity necessary to make necessary disclosures, even if doing so could result in their not being hired. However, this same lack of specificity can also give rise to problems. For example, should the arbitrator disclose that he knows one of the party's lawyers? What if he only knows him because they were on the same side of a case twenty years ago? What if they go to the same church? What if they went to the same church twenty years ago? What if their children went to the same church twenty years ago? Clearly, the question of where to draw the line between disclosure and nondisclosure can be a difficult one, particularly where one of the parties might later have the incentive to find information that it will then claim should have been disclosed and should have resulted in the disqualification of the arbitrator.[25]

California has gone in the opposite direction, calling for the most specific and comprehensive up-front disclosure of any jurisdiction. Again, there are advantages to such a regime: If an arbitrator discloses everything on the list, all of the parties to the arbitration can feel confident that they have a competent but truly impartial arbitrator. However, as is the case with any list that attempts to be comprehensive, the California disclosure rules ultimately recognize the impossibility of anticipating every set of facts that might lead one to question the arbitrator's partiality. Accordingly, in addition to all of the very specific disclosures required, California has inserted several catch-all provisions similar to the disclosure requirements imposed by the AAA (i.e., requiring an arbitrator to disclose anything else that might make someone suspect his partiality, even if it is not otherwise listed.)[26] In light of this, one may ask whether California's detailed disclosure rules are really an improvement or even the "safe harbor" they attempt to be. They certainly require more paperwork in every case, but it is not clear that they are likely to result in the disclosure of more relevant information, at least to the extent that matters that arbitrators in California are required to disclose are the same kind of matters that an honest and careful arbitrator would disclose under any set of disclosure rules.

Finally, the RUAA takes something of a middle ground. Having the force of law, the RUAA's disclosure provisions are not self-policing as are the AAA's ethical rules governing disclosure. The fact that the RUAA requires certain disclosures implies that this legal obligation can be enforced by the courts of the state where the arbitration occurs, but the lack of specificity about what is to be disclosed means that we will have to wait and see how courts that are asked to enforce its disclosure provisions decide when a reasonable person would, for example, find that some matter would likely "affect the impartiality of an arbitrator."[27] In addition to the current lack of certainty about what legal obligations the RUAA will impose, another downside of the RUAA is that it creates a new opportunity for gamesmanship. Some parties may turn every arbitration into a trip to the courthouse to litigate the scope of the arbitrator's disclosure obligations, frustrating one of the fundamental advantages of arbitration, the lack of court involvement. Finally, until the RUAA is adopted by all or most of the jurisdictions in the country, questions regarding the scope of disclosures may depend on the jurisdiction where the arbitration is pending, a situation that can result in further confusion regarding an arbitrator's obligation to disclose.

D. CONCLUSION

So where are we headed? The enactment of California's rules and the RUAA over the past five years suggests that we are moving towards a regime of more specific mandatory disclosure rules for arbitrators, which will take more time, paperwork, and money. Whether this ultimately enhances the integrity of arbitration or just creates another hoop for arbitrators — and another procedural arrow in the quiver of the dissatisfied litigant — remains to be seen.

continued on page 4

REQUESTING IDEAS FOR NEWSLETTER "FACELIFT"

The editorial board of *Alternative Resolutions* is considering a "facelift" for the newsletter. We are considering whether the newsletter should have a more "modern" look and whether there are any other changes that would benefit our readers. Now is the time to send us your thoughts on the following questions:

- Does the newsletter need a "facelift"?
- If a "facelift" is in order, what should it look like?
- Should there be any new columns that appear regularly in the newsletter?
- If so, what should they be, and would you be willing to write or find articles for the column?
- What is the newsletter getting right? What is the newsletter missing or getting wrong?

Please send your answers to these questions, along with any other comments you may have, to Walter Wright at ww05@txstate.edu and/or Robyn Pietsch at rpietsch@central.uh.edu.

ARBITRATOR DISCLOSURE: STANDARDS & GROWING CHALLENGES
continued from page 3

***John K. Boyce** has practiced law 28 years, the majority of time in San Antonio, in the areas of corporate, commercial, and business transactions and litigation. He is a graduate of the University of Texas School of Law. He is a former registered investment advisor.*

Mr. Boyce currently sits on the arbitration panels of the American Arbitration Association, (its Large and Complex Case subsection), the International Institute for Conflict Resolution and Prevention (CPR), the National Arbitration Forum (NAF), and the National Association of Securities Dealers (NASD). He regularly hears a variety of commercial, investment, and securities disputes.

ENDNOTES

[1] An extreme example of this is found in a recent Georgia case. Power Servs. Assoc., Inc. v. UNC Metcalf Servicing, Inc., 338 F. Supp. 2d 1375, 1377 (N.D. Ga. 2004). The arbitrator disclosed before the arbitration that his law firm represented subsidiaries of one of the parties in a large number of cases, past and present. The parties went ahead with the arbitration, and the arbitrator returned an award. *Id.* at 1377-78. Subsequently, the party that lost discovered (through a Google search) that the arbitrator had represented the parent of its opponent in an antitrust suit filed in 1964. Id. at 1378. The court found that the arbitrator's failure to disclose this representation from 40 years earlier did not support the invalidation of the award. *Id.* at 1378-81.

[2] James L. Knoll, *Disqualification of Arbitrators: What Does an Arbitrator Need to Disclose?*, BRIEF, Winter 2003, at 12, 13.

[3] A discussion of the procedural aspects of the disqualification of arbitrators based on contents of their disclosures is generally beyond the scope of this article.

[4] AAA Code of Ethics for Arbitrators in Commercial Disputes (hereinafter "Code of Ethics"), Canon II.

[5] *See, e.g.*, Construction Industry Arbitration Rules, Regular Track Procedures, R-17(a) (arbitrator shall disclose to the AAA "any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence"); National Rules for Resolution of Employment Disputes, Rule 11(b) (requiring arbitrator to disclose "all information that might be relevant to the standards of neutrality"). The AAA has over 50 distinct codes and sets of rules governing different kinds of arbitrations and mediations, all of which have disclosures rules that differ in their particulars. The quoted disclosure rules are representa tive, and are found in two of the most commonly used sets of arbitration rules.

[6] Code of Ethics, Canon II(A)(1).

[7] *Id.* Canon II(A)(2).

[8] *Id.* Canon II(D). From personal experience, the author knows that the AAA requires disclosure in ways not specifically called for by any ethical canon or rule. In cases where a particular arbitrator is being considered, he will be sent a Notice of Appointment containing fourteen questions intended to elicit the disclosure of information that will have a material effect on the arbitrator's objectivity and impartiality. For example, question #1 is, "Do you or your law firm presently represent any person in a proceeding involving any party to the arbitration?" A "yes" answer to any of these questions requires further written explanation. If a response raises serious questions about disqualification, the AAA will disqualify the arbitrator, while more discretionary issues are submitted to the parties.

[9] Code of Ethics, Preamble.

[10] Alaska (Alaska Stat.§§ 09.43.300 et seq.), Colorado (Colo. Rev. Stat. Ann. §§ 13-22-201 et seq.), Hawaii (Haw. Rev. Stat. §§ 658A-1 et seq.), Nevada (Nev. Rev. Stat. §§ 8.206 et seq.), New Jersey (N.J. Stat. Ann. §§ 2A:23B-1 et seq.), New Mexico (N.M. Stat. Ann. §§ 44-7A-1 et seq.), North Carolina (N.C. Gen. Stat. §§ 1-569.1 et seq.), North Dakota (N.D. Cent. Code §§ 32-29-3.01 et seq.), Oregon (Or. Rev. Stat. §§ 36.600 et seq.) and Utah (Utah Code Ann. §§ 78-31a-101 et seq.).

[11] Revised Uniform Arbitration Act (2000) § 12(a) (hereinafter "RUAA").

[12] Code of Ethics, Canon II(A)(3), (A)(4).

[13] Cal. Civ. Proc. Code § 1281.9(a)(3)-(6).

[14] *Id.* § 1281.9(a)(2).

[15] Cal. R. Ct., App. Div. 6, Std. 1(a)).

[16] *Id.* Std. 7(d)(1)-(14).

[17] *Id.* Std. 8(b). A good overview of these rules is found in Keisha I. Patrick, *A New Era of Disclosure: California Judicial Council Enacts Arbitrator Ethics Standards*, J. Disp. Res. 271 (2003).

[18] Cal. Civ. Proc. Code § 1281.9(a)(1).

[19] *Compare* Cal. Civ. Proc. Code § 170.1(a)(4) (requiring judges to be disqualified if they are within a third-degree family relationship with a party), *with* Cal. R. Ct., App. Div. 6, Std. 7(d)(1) (requiring arbitrators to disclose a family relationship with a party).

[20] Cal. Civ. Proc. Code § 170.1(a)(7) (unique requirement that judge be disqualified if some physical impairment renders him "unable to properly perceive evidence" or "unable to properly conduct the proceeding"); Cal. R. Ct., App. Div. 6, Std. 7(d)(13) (unique requirement that an arbitrator disclose membership in any organization that "practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation").

[21] Azteca Constr., Inc. v. ADR Consulting, Inc., 18 Cal. Rptr. 3d 142, 148-50 (Ct. App. 2004) (parties could not waive application of California law in favor of disclosure rules set forth in AAA rules governing construction arbitration).

[22] Cal. Civ. Proc. Code § 1281.9(a)(3), (4); Cal. R. Ct., App. Div. 6, Std. 7(d)(4), (5).

[23] Michael v. Aetna Life & Cas. Ins. Co., 106 Cal. Rptr. 2d 240, 245-46 (Ct. App. 2001) (statute applies to insurance appraisers). *But see* Credit Suisse First Boston Corp. v. Grunwald, 400 F.3d 1119, 1132 (9th Cir. 2005) (NASD rules, enacted pursuant to federal law, preempt California's state disclosure rules).

[24] *Compare* Michael, 106 Cal. Rptr. 2d at 248 (failure to disclose may constitute corruption; ultimately holding that no disclosure was required, and so award was confirmed), *with* Azteca Constr., 18 Cal. Rptr. 3d at 151-52 (vacating award because disclosure permitted party to disqualify arbitrator).

[25] In this era, which lays a heavy emphasis on disclosure, the author's approach has been "disclose until it hurts."

[26] Cal. Civ. Proc. Code § 170.1(a)(6)(A)(ii), (iii); Cal. R. Ct., App. Div. 6, Std. 7(d)(14) .

[27] Interestingly, such cases that may, in turn, help illuminate what degree of disclosure is required under the AAA's similarly-worded disclosure regime.

A DISCHARGED UNION MEMBER ASKS "SHOULD I HIRE AN ATTORNEY?"

By Nicholas J. Enoch[1]

An issue that occasionally faces labor lawyers is what to do with a union employee who seeks to get his or her attorney involved in the grievance/arbitration process commonly incorporated into collective bargaining agreements ("CBA") between an employer and a union. In order to properly address this situation, it is of critical importance to understand the nature of the grievance/arbitration procedure and, in particular, the not-so-well understood fact that the aggrieved employee is not a party to that process.

I. The grievance does not belong to the aggrieved employee; it belongs to the Union.

Labor law empowers employees to form unions to promote their collective interests. Under this statutory framework, unions and employers enter into CBAs. In collective bargaining, individual employees obtain the benefit of the greater power of collective representation, but must relinquish their contractual freedom to negotiate their own job conditions. The union's task is to accommodate the overlapping and competing demands of varied interest groups, surrendering or compromising some demands to achieve others.[2] Similarly, collective bargaining requires employers to relinquish their right to negotiate individually with employees and instead to bargain in good faith with a collectively constituted entity.[3]

When grievances (or disputes) arise as to the interpretation and enforcement of a CBA, the vast majority of CBAs provide for arbitration. Most agreements also provide for formal or informal procedures prior to the final step of arbitration, including attempts to resolve grievances at the shop level.

The subject of the grievance proceeding may be the employer's treatment of the bargaining unit as a whole, such as the failure to comply with provisions regarding wages and hours, or the treatment of an individual or group of individuals, as in the case of discipline or discharge. In either case, because grievances generally arise under CBAs between unions and employers that provide the union with control of grievances, the union (and not the individual) is generally the formal party initiating, pursuing, and resolving the grievance.

In contract administration, as well as in contract negotiation, the union's duty of fair representation regulates its relationship to bargaining unit members. The duty of fair representation attempts to balance the union's prerogatives with the rights of the bargaining unit member. While placing some limits on the union's conduct, the doctrine does not provide a bargaining unit member with "an absolute right to have his grievance taken to arbitration."[4] The courts recognize that "the collective bargaining system as encouraged by Congress... of necessity subordinates the interests of an individual employee to the collective interests of all employees."[5] So long as the union is acting in good faith, without discrimination, and is not arbitrary, the union may compromise the grievances of some workers in the interests of the union as a whole,[6] or may refuse to pursue grievances it deems to lack merit.[7] In addition, the duty does not require that the union provide a lawyer,[8] or permit a private lawyer,[9] to advocate with regard to a particular grievance.

Union control of the grievance sometimes leads to conflict between the union and the employee or employees who are complaining that the employer has violated their rights. After all, "[t]he interests of individual employees sometimes may be compromised for the sake of the larger bargaining collective."[10] As Judge Richard D. Cudahy has noted, the union may very well have "a somewhat different perspective than the individual employee it represents in a grievance matter."[11] In grievances, "the union represents the majority of employees, even while it is representing a single employee in a grievance process. Thus even during an individual grievance procedure, the union's own credibility, its integrity as a bargaining agent and the interests of all its members may be at stake."[12] As a result, it is a commonly shared belief of most unions that "the participation of an employee's privately retained counsel in the grievance process could bypass the union and undermine the policy of exclusive representation,[13] thereby causing harm to the other represented employees.

II. The role (or lack thereof) of an employee's personal attorney in the grievance/arbitration process.

In many, but certainly far from all, grievance matters, unions use lawyers as their representatives or advisors for part or all of the process. When they do so, the lawyer represents the union, not the aggrieved employee. Thus, "[i]t is well-established, as a matter of law, that an attorney handling a labor grievance on behalf of a union does not enter into an 'attorney-client' relationship with the union member asserting the grievance."[14]

Because it is the union that represents the individual grievant at an arbitration, the latter has no independent right to be represented by private counsel or to present evidence. Accordingly, either party may object to the presence of an attorney purporting to represent an individual grievant. The attorney may then be asked to leave the proceedings,[15] or to remain silent and not participate.[16]

The rationale for the union's exclusive authority to retain counsel derives both from the existence of collective right in the

continued on page 6

A DISCHARGED UNION MEMBER ASKS "SHOULD I HIRE AN ATTORNEY?"
continued from page 5

union and the absence of a countervailing right for the individual. Control of the grievance process includes determining the advocate with regard to the grievance, as well as which arguments and concessions are made. For these reasons, unions typically seek little, if any, assistance or insight from an aggrieved member's privately retained attorney.

III. Should an aggrieved employee hire an attorney?

If and when an aggrieved employee ought to hire a personal attorney is a decision that most unions do not get involved in. In fact, unions do not have unlimited power to control the employee's access to a personal lawyer. For example, in *Seymour v. Olin Corp.* the employee alleged that the union refused to process his grievance unless he agreed not to consult with an outside attorney he had retained.[17] The Fifth Circuit held that this allegation, if proven, would constitute a breach of the duty of fair representation.[18] It found little collective interest in prohibiting consultation with counsel. The court noted that "[a] union's interest in acting as exclusive spokesman [and its] ability to represent all its employees is not compromised by the mere fact that an employee is consulting with an attorney regarding matters related to his discharge."[19]

That being said, the author of this article believes that an aggrieved employee's decision making process ought to be guided by the following four factors:

First, does the employee have a cognizable legal claim against the company in addition to or different from what is being pursued by the union through the grievance process? Thus, for example, if an employee is terminated because of his or her race, religion or sex, the employee almost certainly should consult with private legal counsel. If the answer is "no" (*e.g.*, the employee was terminated for alleged work-related misconduct) then one has to wonder what purpose, if any, would be served by hiring a private attorney.

Second, does the employee have a bonafide legal concern arising out of the same set of facts being addressed through the grievance process? For example, was (s)he terminated for conduct which, if proven true, would also constitute a serious criminal offense (*e.g.*, a physical assault of a co-worker, possession of illegal drugs, etc.)? If the answer is "yes," the employee should almost certainly consult with private legal counsel.

Third, does the employee have a "cognizable" legal claim against the company? Because unionized employees, generally speaking, earn more than most workers, it should not be too difficult for a terminated employee to find a lawyer eager to pursue a "novel" legal claim against the company (and/or the union) purportedly falling outside the purview of the CBA. If an employee is in such a position, this author strongly encourages the employee to proceed with caution. For as the old adage goes, "[a] lawyer is always willing to spend your last dollar to prove he's right."

Fourth, does the lawyer have any real experience or expertise in advising union member clients? If so, has (s)he achieved any tangible success while representing aggrieved union members or has (s)he simply run up large bills opining about the union's handling of a particular grievance? As is so often the case, if the answer is the latter, then again one has to wonder what purpose, if any, would be served by hiring a private attorney.

IV. Conclusion.

Experience has shown that the grievance/arbitration process provides a fair and relatively prompt disposition of the vast majority of disputes concerning the employment relationship. If an employee consults with an attorney who says them otherwise, the employee should be skeptical. If the employee consults with an attorney who promises a successful disposition of a particular dispute with an employer through the pursuit of "novel" legal claims outside the grievance/arbitration process, the employee should be afraid. For "[t]he fact that a lawyer advised such foolish conduct, does not relieve it of its foolishness...."[20]

ENDNOTES

1. **Mr. Enoch** is a shareholder with the Dallas/Phoenix law firm of Lubin & Enoch, P.C. Mr. Enoch's law firm engages in all phases of complex labor and employment law representation and litigation with an emphasis on representing labor unions in all sectors of the national economy.

2. *See, e.g.*, NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) ("power [is] vested in the chosen representative to act in the interests of all employees," and "the complete satisfaction of all who are represented is hardly to be expected").

3. *See generally*, Labor Management Relations Act of 1947 as amended, 29 U.S.C. §185(a)(5) & (d); Railway Labor Act of 1926 as amended, 45 U.S.C. §152 First .

4. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

5. *Id.* at 182.

6. Griffin v. Air Line Pilots Ass'n, Int'l, 32 F.3d 1079, 1083 (7th Cir. 1994).

7. *Vaca*, 386 U.S. at 191.

8. *See, e.g.*, Steed v. United Parcel Service, Inc., 512 F.Supp. 1088, 1091 S.D. W. Va. 1981) ("The Court finds no merit in the plaintiff's insistence that he was entitled to counsel during the grievance process."

9. See, e.g., Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985) ("[N]o court has adopted the rule that employees are entitled to independently retained counsel in arbitration proceedings, or that the exclusion of such attorneys from arbitration violated the duty of fair representation.")

10. Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1176 (7th Cir. 1995).

11. *Id*.

12. *Id.*

13. *Castelli*, 752 F.2d at 1484.

14. Gwin v. National Marine Eng'rs Ben. Ass'n, 966 F.Supp. 4, 7 (D.D.C. 1997)(citing, Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985. *Accord*, e.g., Carino v. Stefan, 376 F.3d 156, 161 (3rd Cir. 2004); Aragon v. Pappy, Kaplon, Vogel and Phillips, 214 Cal.App.3d 451, 461 & n.7, 262 Cal.Rptr. 646, 652 & n.7 (1989); *Niezbecki v. Eisner & Hubbard*, P.C., 186 Misc.2d 191, 197, 717 N.Y.S.2d 815, 821 (N.Y. Civ. Ct. 1999).

15. See supra footnote 9.

16. Ray J. Schoonhoven, ed., Fairweather's Practice and Procedure in Labor Arbitration §7.IV at 207 (1999); Theodore J. St. Antoine, ed., The Common Law of the Workplace: The Views of Arbitrators §1.26 at 18 (1998).

17. 666 F.2d 202, 207 (5th Cir. 1982).

18. Id. at 210.

19. Id. at 209.

20. Hanscom v. Marston, 82 Me. 288, 298, 19 A. 460, 462 (1890).

DIRECT BENEFITS ESTOPPEL IN THE ARBITRATION CONTEXT: THE SUPREME COURT OF TEXAS DECIDES *IN RE WEEKLY HOMES, L.P.*

By Steven M. Fishburn*

What are the circumstances under which a party to a contract containing an arbitration clause may compel arbitration of a dispute involving a nonparty to the agreement? The Supreme Court of Texas held, in *In re Weekley Homes, L.P.*,[1] a case of first impression on the issue of direct benefits estoppel, that a plaintiff benefiting from a building contractor's substantial actions in compliance with the provisions of a contract could not equitably claim that the arbitration clause in the contract did not apply to her as a nonparty.[2]

A summary of the facts is that Ms. Von Bargen and her husband were living in a house that Ms. Von Bargen's father, Vernon Forsting, had contracted with Weekley to build. Ms. Von Bargen was her father's only child, his sole beneficiary, and also a beneficiary of a trust he had established on her behalf ten years before Forsting signed the home contract. Ms. Von Bargen and her husband, though, were the primary contacts with Weekley, and they negotiated directly with Weekley on a number of issues before and after the house's construction. The Von Bargens paid a deposit, made custom-design choices, selected the floor plan, and signed a letter of intent identifying them as "purchasers."[3] When the home was completed, Forsting transferred the home to the Forsting Family Trust, a trust of which Ms. Von Bargen was the sole beneficiary and of which Forsting and Ms. Von Bargen were the only named trustees. Unfortunately, a number of problems subsequently arose, and Forsting sued Weekley for breach of contract, breach of warranty, negligence, and statutory violations. Ms. Von Bargen sued separately for personal injuries, alleging that Weekley's negligent repairs had caused her to have asthma. At the trial-court level, Weekly moved, under the Federal Arbitration Act (FAA), to compel arbitration of all of Fortsting's and Von Bargen's claims. The trial court held that the FAA applied to the claims raised by Forsting, but because Von Bargen did not sign the purchase agreement, the court refused to compel her to arbitrate. The Fifth Court of Appeals denied Weekley's request for relief from the trial court's decision, so Weekley filed a petition for writ of mandamus with the Supreme Court of Texas.[4]

Prior to this case, the Supreme Court of Texas, in *In Re FirstMerit Bank, N.A.*, had held that a party who does not sign a contract, but who does sue on it, subjects itself to the terms of the contract, including its arbitration clause, and the non-signing party can be compelled to arbitrate.[5] According to the court, if a party sues on the contract, that party must pursue all claims, both tort and contract, in the same action.[6] On the face of it, Von Bargen might have avoided compulsory arbitration because she sued in tort rather than on the contract and could have pursued the personal-injury claim by waiving any contract-related claim in an election of remedies. However, as the court reasoned, there are ways in which a nonparty can benefit from a contract other than through suing on it.[7]

The court laid the foundation of the argument for direct benefits estoppel[8] by first recognizing that Texas accepted the principle of promissory estoppel in *Moore Burger, Inc. v. Phillips Petroleum Co.*[9] The court extended its argument by citation to *Trammel Crow Co. No. 60 v. Harkinson*, which held, "When a promisor induce[s] substantial action or forbearance by another, promissory estoppel prevents denial of that promise if injustice can be avoided only by enforcement."[10] The court described direct benefits estoppel as a situation in which "a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contract's burden, such as the obligation to arbitrate disputes."[11] With these underpinnings, the pivotal parts of the court's argument for direct benefits estoppel in *Weekly* rested on two prongs: (1) a nonparty deliberately seeking and obtaining substantial benefits from a contract; and (2) the non-party's conduct during the performance of the contract.[12]

The court identified the substantial benefits received by Von Bargen (intertwined with or a result of her conduct) as her residing in the home, directing the custom-built features of the home, demanding repairs under the contract, and conducting settlement negotiations. Furthermore, as the court pointed out, Von Bargen, a trustee for the Forsting Family Trust, was also a beneficiary of that trust. When a suit is brought by or against a trust based on a contract, the beneficiaries are bound by the outcome of that suit whether they join or not. Any recovery as result of the suit on the contract would directly benefit Von Bargen. In the words of the court, "once Von Bargen deliberately sought substantial and direct benefits from the contract, and Weekley agreed to comply, equity prevents her from avoiding the arbitration clause that was a part of that agreement."[13]

continued on page 8

NEW YORK STOCK EXCHANGE SEEKS ARBITRATORS

The New York Stock Exchange (NYSE) has asked the ADR Section to advise its members that NYSE is seeking applications from arbitrators. Applicants must have five years of experience in a chosen profession and attend a securities-related arbitration training course. There is no requirement that NYSE arbitrators be attorneys. Training courses are conducted periodically by NYSE and other self-regulatory organizations like the National Association of Securities Dealers.

Although NYSE is located in New York, it conducts arbitration hearings in approximately forty-six cities throughout the country. In these cities, NYSE appoints arbitrators who live in the immediate and surrounding areas. Arbitration panels consist of three individuals, two with no ties to the securities industry and one from the securities industry. Arbitrators receive an honorarium of $400.00 per day, and the chairperson receives an additional $75.00.

Interested individuals should contact Mr. Jeffrey S. Weintraub, an attorney with NYSE's Arbitration Department, at (212) 656-2046 or jeweintraub@nyse.com. For more information, visit NYSE's website at http://www.nyse.com, then click on *Regulation* (left side of the screen). The link for *Dispute Resolution/Arbitration* will appear.

DIRECT BENEFITS ESTOPPEL IN THE ARBITRATION CONTEXT: THE SUPREME COURT OF TEXAS DECIDES *IN RE WEEKLY HOMES, L.P.*

continued from page 7

The court closed the door on Von Bargen and on her argument with a bit of wry humor, concurring "with the federal courts that when a nonparty consistently and knowingly insists that others treat it as a party, it cannot later 'turn its back on the portion of the contract, such as an arbitration clause, that it finds distasteful.' A nonparty cannot both have his contract and defeat it too."[14]

***Steven M. Fishburn** is a recent graduate of St. Mary's University Law School receiving a Juris Doctor degree in 2005 and is a licensed attorney. He also has an undergraduate degree from the University of Texas at Austin, a M.B.A. from St. Edward's University in Austin, and a M.A. in Legal Studies from Southwest Texas State University (now Texas State) in San Marcos, Texas. He is employed in Austin as an air quality planner.*

ENDNOTES

1. In re Weekley Homes, L.P., 2005 Tex. LEXIS 817 (Tex.1 Oct. 28, 2005).
2. *Id.* at *7.
3. *Id.* at *1.
4. *Id.* at *2.
5. In re FirstMerit Bank, N.A., 52 S.W.3d 749, 755-56 (Tex. 2001).
6. *Weekley*, 2005 Tex. LEXIS 817, at *5 [citing Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992) (holding DTPA claim was factually intertwined with contract claim and thus subject to arbitration clause)].
7. *Id.* at *2.
8. *Weekly*, 2005 Tex. LEXIS 817, at.*7; In re Kellog Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005) (discussing the court's adoption of the federal court's phrase, "direct benefits estoppel" from the case of Bridas Sapic v. Gov't of Turkm., 345 F.3d 347, 361-62 (5th Cir. 2003).
9. *Weekley*, 2005 Tex. LEXIS 817, at *6 (citing Moore Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 937 (Tex. 1972).
10. *Id.* at *7 (quoting from Trammel Crow No. 60 v. Harkin son, 944 S.W.2d 631, 635 (Tex. 1997).
11. *Kellogg*, 166 S.W.3d at 739.
12. *Weekley*, 2005 Tex. LEXIS 817, at *6.
13. *Id.* at *8.
14. *Id.* at *9.

SUBMISSION DATE FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

Issue	Submission Date	Publication Date
Spring	April 29, 2006	May 5, 2006
Summer	June 30, 2006	July 15, 2006
Fall	October 30, 2006	November 30, 2006
Winter	January 15, 2007	February 15, 2007

SEE PUBLICATION POLICIES ON PAGE 29 AND SEND ARTICLES TO:

ROBYN G. PIETSCH, A.A. White Dispute Resolution Center, University of Houston Law Center, 100 Law Center, Houston, Texas 77204-6060, Phone: 713.743.2066 FAX:713.743.2097 rpietsch@central.uh.edu

CALIFORNIA COURT OF APPEALS RULING ON ENFORCEABILITY OF A MEDIATED SETTLEMENT AGREEMENT

*By Anna Bartkowski**

The California Court of Appeals recently issued an opinion on the enforceability of a mediated settlement agreement in Goodrich Corp. and Universal Propulsion Company, Inc. v. Autoliv ASP, Inc. and OAE Aerospace, Inc., 2005 WL 535370 (Cal.App. 1 Dist., Mar 8, 2005).

Plaintiffs Goodrich Corporation ("Goodrich") and Universal Propulsion Company, Inc. ("UPCO") (collectively "Plaintiffs") entered into an asset purchase agreement, whereby Autoliv ASP, Inc. ("Autoliv") agreed to sell Plaintiffs the assets of a business. The business was located on a property in Fairfield, California, owned by OAE Aerospace, Inc. ("OEAA") (the "Subject Property"). UPCO and OEAA also entered into a lease agreement that included an option to purchase the Subject Property. UPCO took possession of the property in December 2000 at the commencement of the lease term.

OEAA also leased from the United States Air Force a site immediately adjacent to the Subject Property (the "Air Force Property"). The business on the Subject Property and the Air Force Property included mixing, manufacturing, testing, and disposing of solid propellants and their ingredients. In September 1999, prior to the Plaintiffs taking possession of the two properties, the Regional Water Quality Control Board ("RWQCB") had certified a clean-up and abatement order pertaining to both property sites.

UPCO exercised its purchase option on the Subject Property on December 4, 2001, but OEAA refused to transfer title of the Subject Property to UPCO. A disagreement arose pertaining to the assumption of liability for preexisting contamination of the two properties.

UPCO asserted that it never agreed to assume full liability for prior environmental contamination and filed a complaint for specific performance, breach of contract, and declaratory relief on March 7, 2002. Plaintiffs also sought an injunction prohibiting defendants from seeking to evict UPCO, alleging that because of the exercise of the option, the relationship between UPCO and OEAA was that of vendor and vendee, and that UPCO had no further obligation to pay rent.

OEAA cross-complained against UPCO, alleging causes of action for declaratory
relief, reformation, breach of contract, and ejectment. The cross-complaint included allegations that if UPCO purchased the property, it would have to assume all environmental liabilities of both the Subject Property and the Air Force Property. Defendants argued that the purchase price of the property was substantially below fair market value, reflecting a "negotiated recognition by OEAA and UPCO of the future obligation for and expense of any required environmental remediation… and UPCO's assumption of that obligation and expense if the purchase option was exercised." OEAA further alleged that since UPCO took possession of the property, it had discharged and released hazardous substances that would require additional remediation; that UPCO had ceased payment of rent on March 4, 2002, but had continued to occupy the property; and that UPCO's failure to pay rent was a breach of the lease agreement.

After an all-day mediation on March 24, 2003, the parties signed a handwritten memorandum of settlement that was intended to settle all issues raised in the action, and was intended to be "binding and admissible for purposes of a motion to enforce [the] agreement pursuant to Code of Civil Procedure, Section 664.6." It provided that the purchase of the Subject Property "shall be consummated and closed on terms and conditions set forth in the [purchase option agreement] except as modified by [the] agreement of settlement." OEAA was required to pay "all environmental remediation costs associated with the Subject Property, and the Air Force Property...." "UPCO [was required to] contribute to the remediation of the environmental liabilities on the Subject Property to defray the costs thereof on a dollar for dollar basis up to and not to exceed the following amounts: $300,000 in 2003, $300,000 in 2004, and $400,000 in 2005." The parties were to file dismissals with prejudice of the complaint and the cross-complaint upon an executed formal settlement agreement. UPCO was also required to install a "test cell" within six months so that its future activities would not discharge any contamination onto the Subject Property.

The parties subsequently exchanged correspondence and drafts proposing the terms of a formal settlement agreement. They continuously disagreed concerning various terms of the settlement and, ultimately, were unable to reach agreement on the provisions.

Plaintiffs moved for judgment under C.C.P. §664.6, which authorizes a court to enter judgment pursuant to the terms of a settlement. After briefing and a hearing, the trial court entered an "Interlocutory Judgment Pursuant to C.C.P. §664.6," on February 20, 2004. The terms of the Interlocutory Judgment

continued on page 10

CALIFORNIA COURT OF APPEALS RULING ON ENFORCEABILITY OF A MEDIATED SETTLEMENT AGREEMENT

continued from page 9

included that defendants place into escrow a grant deed conveying the Subject Property to UPCO in fee simple; that defendants pay all environmental remediation costs associated with the Subject Property and the Air Force Property; that "Plaintiffs ... contribute to the remediation of the environmental liabilities on the Property to defray Defendants' costs thereof on a dollar-for-dollar basis up to and not to exceed the following amounts: (a) $300,000 in 2003; (b) $300,000 in 2004, and (c) $400,000 in 2005; that Plaintiffs install a test cell within six months of the date of the judgment; that the parties release each other from their claims of every nature, known or unknown, including future claims; and that the court will retain jurisdiction of the action until the judgment's terms and conditions concerning the sale of the Subject Property to UPCO are fully complied with or until further order of the court."

Defendants appealed the Interlocutory Judgment based upon the contention that the memorandum of settlement could not form the basis for a judgment under section 664.6 due to lack of mutual assent. According to Defendants, there was no meeting of the minds on three essential terms of the agreement: (1) the extent of UPCO's obligation to pay rent for the period after it exercised its option, (2) the extent of UPCO's obligation to reimburse OEAA for environmental remediation, and (3) the imposition of deed restrictions on the Subject Property. Defendants contended that the uncertainty and lack of mutual understanding with respect to these terms rendered the settlement unenforceable.

According to California law, "A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." Weddington Productions, Inc. v. Flick (1998) 60 Cal.App.4th 793, 810; see also Timney v. Lin (2003) 106 Cal .App.4th 1121, 1127. "California law is clear that there is no contract until there has been a meeting of the minds on all material points" Elyaoudayan v. Hoffman (2003) 104 Cal.App.4th 1421, 1430. "The parties' outward manifestations must show that the parties all agreed upon the same thing in the same sense" Civ.Code, §1580. "If there is no evidence establishing the manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation" Civ.Code, §§1550, 1565 & 1580; Weddington, 60 Cal.App.4th at p. 811. Furthermore, "where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable" Cal. Lettuce Growers v. Union Sugar Co. (1955) 45 Cal.2d 474, 481.

Both the complaint and the cross-complaint put at issue the question of whether UPCO would be obligated to assume concurrent liability for environmental cleanup and to indemnify OEAA for expenses arising under any environmental orders. To resolve this disputed issue, the memorandum of settlement provided that "UPCO will contribute to the remediation of the environmental liabilities on the subject property to defray the costs thereof on a dollar for dollar basis up to and not to exceed the following amounts: $300,000 in 2003, $300,000 in 2004, and $400,000 in 2005." In the course of the attorneys' attempts to reduce this settlement to a formal agreement, it became clear the parties had not agreed to the "same thing." Defendants proffered a document providing that UPCO's contribution to the remediation would not exceed the combined total of the yearly payouts, i.e., if UPCO's proportionate share of the costs exceeded the maximum payout in one year, the additional costs would be paid in the succeeding year. Plaintiffs, however, took the position the costs would not roll over.

In defense of its position, Defendants proffered evidence in the form of a document from the general counsel of Autoliv, who had attended the mediation. In it, he stated: "To my understanding, Goodrich and UPCO agreed to contribute up to a maximum of $1,000,000.00 toward the remediation, with the Goodrich/UPCO payments to be made on a matching dollar-for-dollar basis up to this maximum figure. The Goodrich/ UPCO payments were also, in my understanding, to be spread over three (3) years to assist the cash flow position of UPCO."

In reply, Plaintiffs did not submit any evidence of their understanding of the term, but argued that the meaning of the provision is "remarkably clear" and the words must be given their "ordinary meaning." Plaintiffs contended the language was susceptible to only one interpretation, that "UPCO will contribute certain amounts in certain years. Had it been their intent, the parties could have stated that any unspent amount from the previous years' contribution was required to be made available in later years. But they did not...."

The appeals court contended that, had there been one clear, unambiguous meaning, the Defendants could not escape from their obligation to comply with the terms of the agreement. However, the court found that the language was not "remarkably clear," nor that its "ordinary meaning" was unambiguous. To the contrary, the provision was found susceptible to the interpretations advanced by both parties. Accordingly, the agreement could not be reduced to judgment because the intentions of the parties could not be ascertained and the agreement was found to be void and unenforceable.

**** Anna Bartkowski** is a business owner and entrepreneur with over ten years of experience in managing several commercial property and service-related businesses in the Houston and Austin areas. She is currently a paralegal at an Austin law firm and a graduate student at Texas State University seeking a Master of Arts degree in Legal Studies with a concentration in Alternative Dispute Resolution. She completed Texas State's Mediation Certificate Program in May 2005 and would like to thank Professor Walter Wright for his support and encouragement to participate in the field of Mediation.*

There is no revenge so complete as forgiveness

Josh Billings—US Humorist (1818 - 1885)

The ABA, AAA and ACR Adopt the Revised Model Standards of Conduct for Mediators in August/September 2005

By Lisa Weatherford*

Editor's Note: Space limitations do not allow the inclusion of the Model Standards of Conduct for Mediators (2005); however, several websites have posted the Standards, and some have also provided the Reporter's Notes, the various drafts, a must-see side-by-side comparison of the original and revised versions, and other documents.[1]
www.abanet.org/dispute/home.html
www.abanet.org/litigation/documents/
www.moritzlaw.osu.edu/dr/mosc/
www.acrnet.org/about/initiatives/QualityAssurance/JCMSCM.htm

In August 2005, after three years of meetings, conferences, and careful consideration of public input, a Joint Committee of representatives from the American Bar Association (ABA), the American Arbitration Association (AAA), and the Association for Conflict Resolution (ACR) approved a final draft of the revised Model Standards of Conduct for Mediators and submitted it to the sponsoring organizations for approval. The ABA House of Delegates was the first to adopt the revised Standards on 9 August 2005, the ACR followed on 22 August 2005, and finally, on 8 September 2005, the AAA granted approval. The Joint Committee was made up of two representatives from each entity and a reporter—none of whom were on the committee that drafted the original 1994 Standards.[2]

The 1994 collaboration was not the first time that the ABA and the AAA had worked together to draft ADR standards. An earlier successful joint effort between the AAA and ABA produced the 1977 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (revised in 2004). The 1994 Model Standards of Conduct for Mediators were developed by a team of representatives from the AAA, the Dispute Resolution Section of the ABA, and the organizations that later merged to become the ACR,[3] an effort that spanned 1992-1994 and produced an ethical code that guided mediators for eleven years. The first Joint Committee was influenced by several existing state ethics codes for neutrals, in particular those of Florida, Hawaii, Texas, Colorado, and Oregon, as well as those of several independent mediation and arbitration organizations.[4] The 1994 Standards were highly influential, and were adopted by several state programs (entirely or partially) as a guide for mediator conduct, and many educational texts, including law school casebooks, reference the 1994 Standards in mediator ethics discussions.[5] However, although the Dispute Resolution and Litigation Sections of the ABA approved the original Standards, they were never submitted to the ABA House of Delegates for formal organization-wide recognition. The 2005 Standards enjoy the distinction of being the first general ethical standards for mediators to be considered by the ABA House of Delegates, which increases the significance of the August 2005 decision to adopt them.[6]

The Joint Committee first convened in September 2002 to draft the principles that would guide the process, and met in March 2003 to establish procedural guidelines. The Reporter sent letters to more than fifty ADR organizations in July 2003, inviting them to designate a liaison to the Committee to facilitate communication between the Committee and the organizations; however, anyone who was affected by the Committee's efforts was encouraged to participate in and contribute to the process. A website was created to make it easy for the public to comment, and during 2003 and 2004, the Joint Committee attended the annual conferences of the ACR, and the Dispute Resolution Section of the ABA. The Committee met in executive session twice in 2003 and four times in 2004, and posted the first proposed revised Model Standards on its website in January 2004. After months of analysis and discussion of public reaction to the revision, it released the Model Standards (September 2004). Again, the public was invited to comment, after which the Committee met to consider the suggestions. Finally, in December 2004, the "final" draft was posted, although some changes were made to it before the Committee reached agreement on the July 2005 document that was subsequently submitted to the sponsoring organizations for approval.

Although the Committee retained the basic nine-standard structure of the original 1994 document, and quite a bit of the language, it recognized that mediation practice (and mediators) had changed significantly since the original Standards were drafted, and that the revision should reflect those changes.[7] In general, it believed that the 1994 Standards could be improved by:

- Clarifying the formatting;
- Distinguishing the level of guidance provided to the mediator by the targeted use of the verbs "shall" and "should;"
- Shaping the Standards so they guide the mediator's conduct rather than the conduct of other mediation participants;
- Providing guidance for mediator conduct in situations when the operation of two or more Standards might conflict with one another; and
- Updating the Standards to reflect the current state of mediation practice.[8]

continued on page 12

The ABA, AAA and ACR Adopt the Revised Model Standards of Conduct for Mediators in August/September 2005
continued from page 11

The revision incorporates the desired improvements without expanding the length significantly, despite longer sections and the addition of a brand-new section called "Note on Construction." This new section is "designed to provide clarity to the interpretation and application of the Standards, both individually and collectively,"[9] and was added after the Committee decided to eliminate the Standard/Comment construction of the 1994 version. In general, the Note on Construction defines the scope of the words "mediator," "shall" and "should," as used in the Standards; explains the limits of the Standards in regard to conflict with other rules and regulations, clarifies potential ambiguities; and points out that although they do not carry the force of law, the Standards might be considered a "standard of care for mediators" by regulatory authorities.[10] Before the idea of the additional section was conceived, the Committee had intended that the Reporter's Notes would serve as an "interpretive resource for the Standards."[11] Later, it determined that the Model Standards would be most effective if they operated "as a single, self-contained, defining document."[12] Consequently, the Committee rejected the idea that the interpretation of the Standards should in any way be dependent on the Reporter's Notes.

Nevertheless, the Reporter's Notes, compiled after each Joint Committee session throughout the three-year revision process, provide an interesting and invaluable "legislative history" that chronicles the evolution of the Standards from the original 1994 guideline to the final draft of the revision that was submitted to the sponsoring organizations in August 2005. Of particular interest are the explanations behind the committee's decisions: how it determined what should be included or excluded, how particular clauses should be phrased, and how public input was received and processed (what was persuasive or not). The Reporter's Notes also explain the Committee's expressed goal or intention when it modified or drafted a particular section or clause. Finally, they provide a thought-provoking look into a laborious process, and evoke appreciation for the difficult choices the Committee had to make.

In the years since the 1994 Standards were drafted, mediation and other ADR processes have experienced exponential growth, and that growth naturally complicates the process and creates new ethical issues. Although the 2005 Committee was cognizant of potential areas of conflict, and clearly attempted to address them, it is inevitable that there will be disagreement about ethical standards, even among mediators! It is beyond the scope of this article and this writer's qualifications to provide an analysis of those parts of the new Standards that are likely to provoke conflict and serious dialogue, but some of the hot-spots were identified during the drafting process—revealed in public reaction to the original and revised versions. How would you answer these questions?

Are unequal fee arrangements ethical? That is, can one party pay the entire cost of the mediator's services without jeopardizing the mediator's impartiality or the integrity of the process?

Can a mediator give or accept small gifts of appreciation? Or agree to allow one party's agent to buy lunch for all participants?

May a mediator provide other services to a party after mediation, or establish a different kind of relationship with that party afterwards? For instance, can the mediator in a case serve as mediator in a subsequent case involving a party to the original procedure? Could a psychiatrist/mediator render psychiatric care to the party? What about an accountant/mediator who later provides income tax assistance to a participant in an earlier mediation?

If you answered "no" to any of the questions, you may not be aware that the Model Standards of Conduct for Mediators (2005) allow those practices with certain qualifications, so it is well worth a practitioner's time to review them. You might not agree with the changes, but you may be compelled to rethink your perspective on many ethical questions.

Although the Model Standards of Conduct for Mediators (1994) did not carry the force of law, they guided legislators in several states, influenced the ethical standards of many professional organizations, and incited both praise and criticism. Now that they have been formally adopted by three powerful and influential organizations, the 2005 Standards could easily become "the most widely approved standards of conduct for mediators."[13]

****Lisa Weatherford*** *holds an M.A. in English from New Mexico State University and is a second-year student in the graduate Legal Studies Program at Texas State University in San Marcos. Lisa has taught college-level composition, business writing, literature, and public speaking, and has worked in retail, hospitality, petroleum, insurance, and archaeology. She has completed the Basic Mediation requirement, and has earned the Advanced Family Mediation certificate.*

ENDNOTES

[1] As of submission deadline, the AAA had not yet updated its website to reflect adoption of the 2005 Standards; the 1994 version is still posted. See www.adr.org.

[2] The representatives on the 2002-2005 Joint Committee for the Model Standards of Conduct for Professional Mediators were Terry Wheeler and Sharon Press from ACR; Eric Tuchman and John Wilkinson from AAA; and Wayne Thorpe and Susan Yates from the ABA Dispute Resolution Section. Joseph Stulberg of the Ohio State University Moritz College of Law served as Reporter.

[3] The Academy of Family Mediators (AFM), the Conflict Resolution Education Network (CREnet), and the Society of Professionals in Dispute Resolution (SPIDR) merged in January 2001 to form the ACR.

[4] John D. Feerick, Toward Uniform Standards of Conduct for Mediators, 38 S. Tex. L. Rev. 455, 459-60 (1997) (The ethical codes of the following organizations were reviewed during the 1992-1994 drafting process: American Arbitration Association/American Bar Association; American Arbitration Association and National Academy of Arbitrators and Federal Mediation and Conciliation Service; American Bar Association Center for Professional Responsibility; American Bar Association; Society of Professionals in Dispute Resolution; Academy of Family mediators; Association of Family and Conciliation Courts; and Center for Dispute Settlement at the Institute of Judicial Administration).

[5] Dennis Drasco & David Hoffman, A.B.A., Report: Model Standards of Conduct for Mediators 1 (August 2005), at www.abanet.org/litigation/documents/. (This report accompanied the Model Standards submitted to the ABA House of Delegates for approval).

[6] In February 2001, the House of Delegates approved the Model Standards of Practice for Family and Divorce Mediation, which are structurally similar to the Model Standards of Conduct for Mediators (1994), but were developed for family mediation practitioners.

continued on page 26

ANY PROPOSALS FOR THE 80TH TEXAS LEGISLATURE IN 2007?

While it may seem premature to begin thinking of proposals to make to the 80th Texas Legislature in 2007, now is truly the time, at least if you want the proposals to be initiatives of the Alternative Dispute Resolution Section of the State Bar of Texas. The organized bar is now requesting proposals for the 80th Legislature. If you have any proposal ideas, please send them to the ADR Section's chair-elect, John Fleming, as soon as possible at jfleming@austin.rr.com.

ARBITRATION AND ADR PAMPHLETS

In response to an upsurge in consumer arbitration and the controversy it has provoked, the Section has recently sponsored and underwritten a new pamphlet titled "Consumer Arbitration in Texas." Its purpose is twofold: first, to outline the basic process of consumer arbitration for the benefit of the general public, and second, to publish the Section's "Best Practice Guidelines," enacted in June 2005, to insure that arbitration is fair to the consumer.

Also, in response to requests of ADR providers through the state, the Section revised its pamphlet, "Dispute Resolution-Texas Style," last published in 1997. This pamphlet focuses on the specific dispute-resolution procedures contained in the Texas Alternative Dispute Resolution Procedures Act of 1987.

Both pamphlets will be distributed to the Texas Legislature, all Texas Dispute Resolution Centers, and most county, district, and appellate judges in Texas. It also should be available soon on the websites of the ADR, Consumer Law, and Litigation Sections.

2006 ADR Section Calendar

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 Austin. Please note our calendar:

Council Meetings

April 8, 2006
10:00 a.m.—3:00 p.m. Location to be Determined—Houston

June 16, 2006
2:30 p.m.—4:30 p.m. State Bar Annual Meeting—Austin

October, 2006
9:00 a.m.—3:00 p.m. Location to be Determined

January, 2007
10:00 a.m.—2:00 p.m. State Bar Annual Meeting—Austin

HOUSTON COURT OF APPEALS ENFORCES MEDIATED SETTLEMENT AGREEMENT

By Danielle Bardgette*

When does a trial court abuse its discretion by entering an order that differs from the terms of a mediated settlement agreement in a family case? The Houston Court of Appeals considered this question in a recent case, *In the Interest of N.R.C. and L.A.C.*[1]

Rachel and David, parents of two minor children at the time of their divorce in the early 1990s, signed a mediated settlement agreement ("Agreement") regarding the joint managing conservatorship of their daughter, the only child who was a minor at the time of this appeal. The Agreement set out a "Step Up Process" defining the nature and length of Rachel's periods of possession of the daughter, which would gradually increase at the daughter's discretion.

David's attorney, on June 1, 2004, appeared before the trial court for entry of an order based on the Agreement. David and his attorney signed the proposed order, but Rachel, who was not present for the hearing, did not sign it. The trial court signed the order, and roughly a month later, Rachel filed a motion to correct it, contending that it differed from the terms of the Agreement. The order did, in fact, differ from the Agreement with respect to (1) the location for surrender of the daughter for Rachel's periods of possession, (2) the method of notice for Rachel's periods of possession, and (3) the terms of alternate dispute resolution. Nevertheless, following a hearing, the trial court denied Rachel's motion because she had failed to appear for the June 1, 2004 hearing. On appeal, Rachel alleged that the trial court had abused it discretion by entering an order that differed from the Agreement.

The Houston Court of Appeals noted that a trial court may refer a suit affecting the parent-child relationship to mediation.[2] In this type of case, a mediated settlement agreement is binding on the parties if the agreement (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.[3] If a mediated settlement agreement complies with these requirements, a party is entitled to judgment based on the agreement notwithstanding Rule 11 of the Texas Rules of Civil Procedure or another rule of law.[4] The trial court has no authority to enter a judgment that varies from the terms of this type of mediated settlement agreement, although the trial court has authority not to enforce terms of a mediated settlement agreement that are illegal or against public policy.[5]

The appellate court found, Rachel and David's case, that the Agreement complied with the law because it contained a prominently displayed, bold-faced, and underlined statement that it was not subject to revocation, it was signed by both Rachel and David, and it was undisputed that their attorneys were not present at the mediation. Although the Agreement was filed with the trial court, that court nevertheless entered an order that differed from the Agreement. There was no evidence that the relevant terms of the Agreement were illegal or against public policy. The court of appeals reasoned that even if Rachel wrongfully failed to attend the hearing at which the trial court signed the order, the applicable statute contained no exception allowing the trial court to enter an order that differed from the Agreement. Thus, the trial court did not have the discretion to enter an order that differed from the Agreement. The appeals court reversed and remanded the trial court's order with instructions that the trial court correct the order in a manner consistent with the appellate court's opinion.

* *Although she is a Texas native,* ***Danielle Bardgette*** *attended college at Beloit College in Beloit, Wisconsin, where she obtained a B.A. in Art History. Currently, she is a candidate for a Master of Arts degree with a major in Legal Studies at Texas State University in San Marcos.*

ENDNOTES

[1] No. 14-04-00891-CV, 2005 WL 2875367 (Tex. App.—Houston [14th Dist.] Nov. 3, 2005 (no pet. h.) (mem. op.).

[2] Tex. Fam. Code Ann. § 153.0071(c) (Vernon 2002).

[3] *Id.* § 153.0071(d).

[4] *Id.* § 153.0071(e); *see* In Re Circone, 122 S.W.3d 403, 406

[5] (Tex. App.—Texarkana 2003, no pet.).

Hope is the thing with feathers. That perches in the soul. And sings the tune Without the words, and never stops at all.

Emily Dickinson US poet (1830—1886)

FORT WORTH COURT OF APPEALS CONSIDERS MEANING OF "MEDIATED" AND "MEDIATED SETTLELMENT AGREEMENT" IN TEXAS FAMILY CODE

By Harold L. Hardy II*

In a recent case,[1] the Fort Worth Court of Appeals considered whether a mediated settlement agreement requires mediation. In doing so, the court dealt with the meaning of "mediated" and "mediated settlement agreement" in the Texas Family Code ("Code").

In this case, Jim and Jane Lee negotiated a settlement of their divorce without the presence of counsel or a third-party mediator. Their agreement, which they both signed, contained the following language on the first page: "PURSUANT TO SECTION 6.602 OF THE TEXAS FAMILY CODE, THIS AGREEMENT IN [SIC] NOT SUBJECT TO REVOCATION." After reaching their agreement, but before their divorce became final, Jim tried to revoke his consent to the agreement. The trial judge ruled that the agreement was binding as it met the requirements of Section 6.602 of the Code.

The appellate court noted that Section 6.602(b) of the Code provides, in relevant part, that "[a] mediated settlement agreement is binding on the parties if the agreement: (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; [and] (2) is signed by each party to the agreement . . . ."[2] Section 6.602(c) provides, "If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law."[3]

The court, recognizing that the Code does not define "mediated" or "mediated settlement agreement," reasoned that, "[w]hen terms are not defined in a statute, we apply their ordinary meaning. . . . A court will not construe a statute in a manner that will lead to a foolish or absurd result when another alternative is available."[4] After looking at both a lay definition[5] and a legal definition[6] of mediation, the court ruled that a "mediated settlement agreement" cannot arise unless the parties to go through a mediation process that includes a mediator.[7] In this case, because the parties had not fulfilled this aspect of creating their agreement, the agreement they reached was not binding on the parties as provided in Section 6.602 of the Code; therefore, Jim was free to revoke his consent to it under section 7.006(a) of the Code.[8] The appellate court affirmed the parties' divorce but remanded the case to trial on all remaining issues.[9]

***Harold L. Hardy II** currently is in his second year of law school at Thomas M. Cooley Law School in Lansing, Michigan. Harold plans to graduate in May 2007 with a concentration in Litigation and General Practice. He plans to pursue a career in prosecution or private practice in the area of family law. Harold received a Master of Arts degree with a major in Legal Studies from Texas State University in San Marcos, Texas, and he received a Bachelor of Arts degree in Journalism from Angelo State University in San Angelo, Texas.*

[1] Lee v. Lee, 158 S.W.3d 612 (Tex. App.—Forth Worth 2005, no pet.).

[2] *Id.* at 613 (citing Tex. Fam. Code Ann. § 6.602(b) (Vernon Supp. 2004-05)).

[3] *Id.* (citing Tex. Fam. Code Ann. § 6.602(c) (Vernon Supp. 2004-05)).

[4] *Id.* (citing Boyd v. Boyd, 67 S.W.3d 398, 403 (Tex. App.—Fort Worth 2002, no pet.)).

[5] Mediation is "intervention between conflicting parties or viewpoints to promote reconciliation, settlement, compromise, or understanding." *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1402 (1981).

[6] Mediation is "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." *Id.* (citing BLACK'S LAW DICTIONARY 1003 (8th ed. 2004)). For reasons unknown to this author, the court did not refer to the following definition of mediation found in the Texas ADR statute: "Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them." Tex. Civ. Prac. & Rem. Code Ann. § 154.023(a) (Vernon Supp. 2006).

[7] *Lee*, 158 S.W.3d at 614.

continued on page 26

DELAWARE TRIAL COURT DENIES MOTION FOR MEDIATOR'S TESTIMONY

By Anna Bartkowski*

A Delaware trial court supported the importance of mediation confidentiality in *Princeton Insurance Co. v. Vergano*.[1]

In April 2000, Susan Vergano underwent excisional lymph node biopsy surgery at a hospital operated by Christiana Care Health Services, Inc. The purpose of the surgery was to remove lymph tissue and determine whether it was cancerous. During the surgery, Dr. Robinson inadvertently severed Vergano's spinal accessory nerve.

Vergano and her husband, as co-plaintiff, brought a medical negligence action in Delaware Superior Court against Dr. Robinson and his professional corporations, his insurer, Princeton Insurance Company, and Christiana Care Health Services, Inc. (collectively, the "Malpractice Defendants"). In the complaint, Vergano alleged that she had suffered permanent and incapacitating injuries as a result of Dr. Robinson's malpractice. Specifically, Vergano claimed the severing of her right spinal accessory nerve resulted in chronic and severe pain and little, if any, right shoulder function, as well as inability to perform daily functions or care for her husband and children.

In the joint pre-trial stipulation, Vergano's Statement of Claims Including Damages described the following injuries: "immediate, chronic and unrelenting nerve pain in her right neck, jaw, shoulder and arm ... [inability] to shrug her shoulder, raise her arm or employ her shoulder or arm for lifting even light objects. [S]he is unable to hold a can of soda, a cup of coffee, or a baby's bottle in that hand."

The trial in the Malpractice Case was scheduled to begin on January 26, 2004. The record evidence developed in the litigation indicated that the Malpractice Defendants harbored a great deal of skepticism regarding Vergano's claims of pain and impairment but were unable to come up with a plausible basis to deny that Dr. Robinson had committed malpractice by severing Vergano's spinal accessory nerve.

Shortly before trial, the parties agreed to mediate their dispute before Vincent Bifferato. The agreement to do so was voluntary, as the amount of damages sought by Vergano exempted the case from Delaware Superior Court's mandatory mediation process under its Rule 16.1, a process that expressly protects the "confidentiality of the conference." Nonetheless, the parties made broad contractual promises to each other not to reveal statements made during the mediation, not to seek to use such statements in court, and not to attempt to use the mediator as a witness. After two sessions of mediation, the parties agreed to settle Vergano's claims for $945,000.

The day after the mediated settlement was reached, James Drnec, who had served as one of the attorneys for Christiana Care Health Services in the Malpractice Case, secretly videotaped Vergano at a community event dancing while holding a beer. Believing Vergano to be engaged in physical activity inconsistent with her claims of pain and impairment, Drnec then took the tape (the "Drnec Video") to the Malpractice Defendants. Princeton Insurance conducted additional surveillance on Vergano for several days, again without her knowledge, and observed her doing normal activities like driving and shopping

The Malpractice Defendants then reneged on their settlement, claiming that they possessed evidence that Vergano had defrauded them. They brought an action seeking a declaration to that effect and rescission of the settlement agreement. Vergano opposed the claim and demanded specific performance of the settlement agreement and other damages for the Malpractice Defendants' failure to consummate the settlement agreement.

The Malpractice Defendants presented two motions in limine to the Court: the first sought the admission of the testimony of Nancy Fullam, Vergano's former attorney in the Malpractice Case; and the second motion was to admit the testimony of Bifferato, the mediator. The Malpractice Defendants wanted Fullam and Bifferato to give opinion testimony that the conduct of Vergano observed on the Drnec Video was inconsistent with Vergano's claims of pain and impairment.

This article will not address the first motion in limine because that motion was based on the crime/fraud exception to attorney-client privilege and did not request Fullam's testimony about anything that occurred during the mediation. Instead, this article will discuss the trial court's treatment of the second motion in limine, which requested that the mediator's testimony (that Vergano's behavior in the Drnec Video was inconsistent with the claims she asserted in the Malpractice Claim and the mediation) be admitted at the trial of the Malpractice Defendants' fraud claim.

The court looked to the Delaware Superior Court Rule addressing judicially required mediation, which includes a specific mandate of confidentiality:

continued on page 17

UPDATE ON *IN RE POLY-AMERICA, L.P.*

In the Fall 2005 issue of *Alternative Resolutions*, we featured two articles written by the attorneys for the opposing sides of *In re Poly-America, L.P., Ind. and d/b/a Pol-Tex International, and Poly-America GP, L.L.C., Relators*, No. 04-1049, pending in the Supreme Court of Texas. The case concerns the enforcement of mandatory arbitration clauses in two employment agreements. After the publication of the two articles, the Supreme Court of Texas granted a hearing on the relators' application for a writ of mandamus. That hearing took place on January 25, 2006. We will keep our readers posted on further developments in this case.

DELAWARE TRIAL COURT DENIES MOTION FOR MEDIATOR'S TESTIMONY
continued from page 16

> 3) All Memoranda, work products, and other materials contained in the case files of ADR practitioner or the Court related to the mediation are confidential. Any communication made in or in connection with the mediation which relates to the controversy being mediated, whether made to the ADR Practitioner or party, or to any person if made at a mediation conference, is confidential. The mediation agreement shall be confidential unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except: (A) Where all parties to the mediation agree in writing to waive confidentiality; (B) In any action between the ADR Practitioner and a party to the mediation for damages arising out of the mediation; or (C) Statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation conference.[2]

The court also pointed out that in the Delaware Voluntary Alternative Dispute Resolution Act or "Voluntary ADR Act," the General Assembly acknowledged its understanding of the importance of confidentiality to the mediation process, by incorporating a provision protecting confidentiality in the same manner as the relevant Superior and Chancery Court Rules. [3]

The court directed attention to the Prefatory Note in the Uniform Mediation Act that "[t]he law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason, a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings."[4] The court also noted that in addition to the strong public policy protecting the confidentiality of the mediation process, the parties in the Malpractice Case executed a mediation agreement, which explicitly provided:

By signing this agreement, we indicate our awareness that mediation sessions and all material prepared for mediation is confidential. Each party agrees to make no attempt to compel the mediator's testimony against the other, nor to compel the mediation to produce any documents provided by the other party, nor to compel the other party to testify regarding statements made in mediation sessions. In no event will the mediator disclose confidential information provided during the course of the mediation or testify voluntarily on behalf of any party . . . .

In his opinion, Vice Chancellor Strine generated a compelling argument for the continued sanctity of confidentiality in mediation, pointing out that it promotes a broad discussion of potential resolutions for the matters being mediated. Without the expectation of confidentiality, he reasoned, parties would hesitate to propose solutions out of concern that they would later be prejudiced by their disclosure.

Strine found that the Malpractice Defendants had not proposed reasons strong enough to overcome the public policy favoring mediation confidentiality or the parties' contractual agreement not to use mediator testimony. Instead, he found that the mediator's testimony would be of minimal relevance to the Malpractice Defendants' fraud case and that other admissible evidence was available to make the same point that the Malpractice Defendants hoped to make with the mediator's testimony. Strine concluded that confidentiality considerations precluded the mediator's testimony, and he denied the Malpractice Defendants' second motion in limine.

***Anna Bartkowski** is a business owner and entrepreneur with over ten years of experience in managing several commercial property and service-related businesses in the Houston and Austin areas. She is currently a paralegal at an Austin law firm and a graduate student at Texas State University seeking a Master of Arts degree in Legal Studies with a concentration in Alternative Dispute Resolution. She completed Texas State's Mediation Certificate Program in May 2005 and would like to thank Professor Walter Wright for his support and encouragement to participate in the field of Mediation*

ENDNOTES

[1] 883 A.2d 44 (Del. Ch. 2005).
[2] Del.Super. Ct. R. Civ. P. 16.1(*l*)(3).
[3] Del. Ch. Ct. R. 174(c).
[4] Uniform Mediation Act, National Conference of Commissioners on Uniform State Laws (Final Draft 2001), available at http://www.mediate.com.

BUILDING PEACE IN ARGENTINA: THEORY AND A CONCRETE APPLICATION

By Dra. María Alba Aiello de Almeida and Dr. Mario de Almedia*

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

In today's society, violence appears to be a generalized phenomenon, a sign of our times. Peace is rare. However, we believe it is the responsibility of everyone, particularly of mediators, to work for the wellbeing of humanity. Because of this belief, we have begun a project to establish peace in our country, Argentina.

General and specific objectives.

We know that peace often is considered something arduous and unattainable; however, we are convinced that it is attainable. To prove our point, we have outlined a project to guide us in building peace.

Our project's general objective is to *transfer to the community the instruments of peace*. The purpose of pursuing this objective is to create a state of coexistence in which human beings share with each other the possibility of fulfilling themselves as persons. This objective can involve all men and women of good will who are disposed to embark on a road that leads to a destination of peace.

The specific objectives of our project are to stimulate interest in the peaceful resolution of conflict; to achieve joint participation in the resolution of personal, family, and social disputes; to encourage listening, critical thinking, and problem solving; to develop citizens' capacity to work for justice; to enhance citizens' respect for each other and each others' ideas; to foster concern for nature; and to provoke a renewed interest in human rights and the critical analysis of structural violence.

Two pillars to support the objectives.

The project's objectives are supported by two pillars: *basic contents* and *work methodology*.

The basic contents are those matters upon which we must reflect individually and as a group, into which we must delve scientifically and/or technically, and about which we must learn as much as possible. We prepare to approach the basic contents from the perspective of living together in peace. The basic contents consist of such matters as deepening our understanding of human nature, reviving essential human values, revaluing the family and its role, discovering human rights in all their dimensions, encouraging citizen participation in public matters, and developing transversal bonds among individuals and groups.

The work methodology seeks to develop social actors with determined skills and attitudes. The skills include critical reflection, a spirit of cooperation, a capacity to understand others, and creativity in solving conflicts. The attitudes include respect for others, self-esteem, open-mindedness, concern for justice, an appreciation of ecology, and a capacity to visualize a different kind of world. The work methodology includes working through participative and creative dialogues, generative listening, and reflective and interpretive questioning.

Where and how to carry out the objectives.

We believe the objectives can be carried out locally—in schools, neighborhoods, unions and other organizations. Eventually, the objectives can be carried out at the level of the Argentine provinces, at the level of our nation as a whole, in MERCOSUR, and even the rest of Latin America.

The objectives can be carried out in two steps. First, by preparing mediators (called "mediators for peace") who can provide training and accompany groups as they develop their skills and attitudes. Second, by determining the core subjects of interest to the groups, and developing projects around those subjects. The groups can determine their subjects and projects by using participative dialogues and generative listening.

A concrete application to achieve the objectives.

A project that we supported at the San Luis Gonzaga School, in the Autonomous City of Buenos Aires, is a concrete application of our project's objectives. At this school, owned by nuns of the religious order of San José, the director and nuns are determined to develop, among the students and the educators, a genuine concern for improving the present quality of life and building a better future. They believe that students are not only the recipients of education, but also its protagonists.

The project that the school has developed seeks to provide the students with knowledge and socially valid tools for resolving problems in their present lives and for being leaders in a better world. While the project focuses primarily on the students' work, it also provides support and skills to the teachers. The students' parents also are actively involved.

continued on page 19

BUILDING PEACE IN ARGENTINA: THEORY AND A CONCRETE APPLICATION
continued from page 18

The students and teachers channel their work through various types of activities:

- **Working in small groups.** Every two weeks, with a teacher present, designated students organize "classroom assemblies." During each assembly, the students reflect on a subject of interest to them and that is related to building peace. They make proposals, evaluate projects, and generate concrete actions.
- **Working in large groups.** From time to time, the students and teachers convene larger groups to confront extraordinary situations that arise in the students' coexistence. The groups, consisting of students from each grade, reflect on the problems they have detected, and they propose solutions for creating a better school. The larger groups also work on the specific subject of peace.
- **Integrating projects into school festivals.** The school's festivals integrate activities that promote human rights, citizens' responsibilities, and the critical evaluation of our culture.
- **Training in participatory democracy.** With the motto, "On the road to Peace, no one is left behind," the school conducted workshops that consisted of students from the fifth, sixth, and seventh grades. Each workshop group prepared logos related to the motto, then selected two logos to represent the group's work. Students from the first through fourth grades participated in a large working group that generated six ideas for murals related to peace. Secondary students organized an election to select one logo and one mural of peace for the entire school. After balloting, the school held a party for the surrounding neighborhood that exhibited the logos and murals and announced the winners. The winning mural was painted on the walls of the school.
- **Integrating diversity.** The school assumes that diversity is an educational requirement, and it thinks of itself as an inclusive institution that attends to diversity, generating transversal bonds as instruments of peace. The school's educational proposal includes students with learning disabilities. It also includes students with special educational needs based on emotional problems and socio-cultural disadvantages. The students with special needs are assisted by teachers who help integrate the students into regular classrooms.
- **Serving the poor.** The children and their families have organized a service-learning project. One project activity is called "solidarity night." Each month, students and parents from one grade prepare meals, and on a Wednesday night, they deliver the meals to almost two hundred people who live in the streets of the city of Buenos Aires. Twice each year, at Easter and Christmastime, the school organizes a party for the same people. Through these activities, the students learn to participate in the resolution of problems, improve their interpersonal communication skills, and commit to values of democracy and solidarity.
- **Integrating classroom projects.** The school recognizes the classroom as one of the most critical places for thinking about and creating a new kind of school. So at each level of their education, the students study a specific subject related to the theme of building peace. Three-year-olds and first, second, and third grades work on the subject, "Let us grow learning to live together." The subject for four-year-olds and fifth-graders is, "Let us grow taking care of the planet." For five-year-olds and sixth-graders, "Let us grow from poetry" is the theme. For fourth-graders, the theme is, "Let us grow preparing ourselves for the promise of fidelity to the flag and for First Communion." And for seventh-graders, the theme is, "Let us grow learning the Constitution, helping the Garrahan House, and studying the question of education."
- **Integrating administrative personnel and teachers.** The administrative personnel and teachers work continuously to attend to diversity, to plan strategies to enhance student and parental participation, and to increase participation of the surrounding community.

Through the school's project of building peace, the students have developed a Decalogue that they carry with them throughout the day:

1. Accept each other as we are.
2. Listen to each other.
3. Understand each others' motives.
4. Dialogue and reflect with respect.
5. Support each other and share.
6. Be responsible for each others' needs
7. Be attentive to social changes.
8. Encourage and thank each other.
9. Forgive each other.
10. Express positive words and feelings.

A project like the one at San Luis Gonzaga School can guide us in building peace and provide hope that we all will enjoy a better future.

**** Dra. María Alba Aiello de Almeida** is an attorney-mediator from Buenos Aires, Argentina. She is the academic secretary of Consultora Equipo I.M.C.A., an interdisciplinary nonprofit organization that promotes the use of alternative methods of dispute resolution throughout Latin America. She is co-author of three books and author of numerous articles on the subject of mediation. She received her law degree from Universidad del Salvador. She is a frequent speaker on mediation topics throughout South America. For further information about Consultora Equipo I.M.C.A. and its project for Building Peace, visit the organization's website at http://www.equipo-imca.com.ar.*

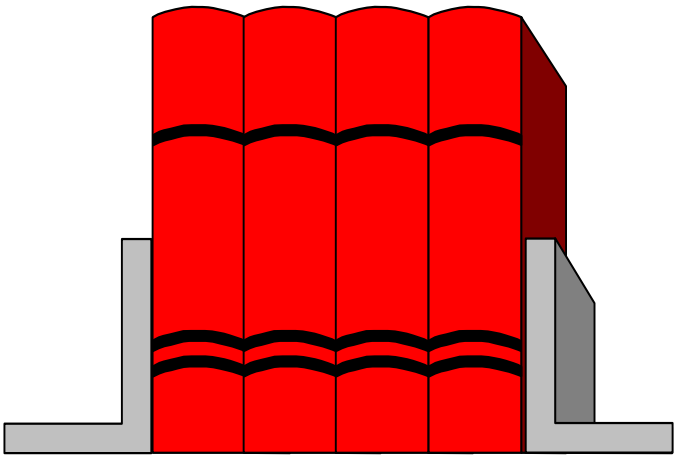
****Dr. Mario de Almeida** is an attorney-mediator from Buenos Aires, Argentina. He is the President of Consultora Equipo I.M.C.A. He is a co-author of three books and author of numerous articles on the subject of mediation. In addition, he has been a professor of Labor Law in the Department of Economic Sciences at the Universidad Nacional de Lomas de Zamora and an adjunct professor of Labor and Social Security Law at the Department of Economic Sciences at the University of Buenos Aires. He received his law degree from the Department of Law and Social Sciences of the University of Buenos Aires.*

Walter A. Wright translated this article from Spanish to English, and he accepts full responsibility for any translation errors.

ENDNOTES

1. Garrahan House is a facility that houses young patients and their parents who live more than sixty miles away from Buenos Aires, and who, because of medical treatment, must stay in the city overnight or for extended periods of time.

BOOK REVIEWS



BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE

By Roger Fisher and Daniel Shapiro
Viking, Penguin Group, 2005

Reviewed by Cecilia H. Morgan*

For many of us who mediate regularly and always watch for new ADR books to hone our own skills and to coach our colleagues and clients, this is that next must-read. Beyond Reason: Using Emotions as You Negotiate ("Beyond Reason") is the next book in the series that started with Getting to Yes by Roger Fisher and William Ury (Penguin Books, 1981), followed by Getting Together: Building Relationships as We Negotiate by Roger Fisher and Scott Brown (Penguin Books, 1988) and continued with Getting Past No: Negotiating Your Way from Confrontation to Cooperation by William Ury (Bantam, 1991). These earlier books focus primarily on dealing with the substantive problem in any negotiation, but they give little weight to the emotions that are always present.

Getting to Yes suggests separating people from the problem – being respectful of the people and hard on the problem. The book effectively gives us the structure and the language to analyze the substantive problem.

Getting Together: Building Relationships as We Negotiate, as indicated by the title, focuses on improving the relationships between the parties during negotiation. It provides good advice for those of us who mediate relationship-dependent cases such as probate, divorce, child custody, business divorce, and employment cases – when enhancing the relationship is as important as solving the problem.

Getting Past No: Negotiating Your Way from Confrontation to Cooperation focuses on how to get a "yes!" when the other person keeps saying "no!". It counsels the negotiator to concentrate on getting what he wants and to reach agreements that satisfy all parties' needs. Agreements are reached when people control their own behavior and focus on the other parties' needs.

The missing facet of each of these earlier books is a step-by-step system to deal with the emotional underlay (or sometimes overlay!) in every negotiation. The authors recognize and respect that emotions matter in any negotiation. According to the authors, there are five core concerns that motivate people: appreciation, affiliation, autonomy, status, and role. Recognizing these core concerns, the effective negotiator/mediator can generate helpful emotions in themselves and others. In many legal negotiations/mediations, the mediator is often told that the parties don't want a "touchy-feely, warm, fuzzy" experience; however, first-hand experience shows that many disputes arise out of emotions such as revenge, retaliation, retribution, vengeance, jealousy, envy, and greed rather than a dollar-and-cents analysis of the balance sheet of the business. Instead of ignoring emotions, Beyond Reason encourages us to consider emotions a great asset and an enhancement to the negotiation.

Recognizing that everyone wants to be appreciated, the authors encourage the negotiator to understand the other person's point of view, to find merit in what others think, feel or do, and to actively communicate that understanding through words and actions. The authors use illustrations to show that appreciation doesn't mean giving in.

Affiliation describes the sense of honest "connectedness" with another person or group and how to feel close to others while dealing with inherent differences. Working together becomes easier and more productive when affiliation is enhanced. The authors discuss structural and personal connections. Structural connections include common memberships in professional organizations. When talking about personal matters, the emotional distance between the parties is reduced.

Everyone wants autonomy! When autonomy is impinged upon, negative emotions are experienced. Joint brainstorming is encouraged as the practical process to recognize our own, as well as the other negotiator's, autonomy.

Individuals want to be recognized for their high standing in their particular arena. Acknowledging that people want status and treating others with appropriate respect often translates into people respecting the negotiator/mediator more.

The fifth core concern is role. In summary, in any negotiation, choose your fulfilling role. The role can be temporary or permanent, but should be fulfilling. The authors note that an unfulfilling role leaves us feeling trivialized and unengaged. The chapter on role is not descriptive of the role a mediator might play in a negotiation.

The last half of the book focuses on additional advice regarding how to deal with particularly strong, negative emotions by using these five core concerns. Rather than focusing only on process and substance in preparation for a negotiation, Beyond Reason also describes how to prepare for the emotions. The conclusion includes a simple review of the seven elements of negotiation introduced in Getting to Yes and a glossary of the terms used throughout this series of books. I found the analytical table of contents at the very end of the book to be a good checklist to place in my personal mediator's negotiation notebook. So many negotiation books regard negotiation as purely rational. Beyond Reason highlights that the emotions that come to the table can either be used constructively or destructively. Based upon research and first-hand experience in negotiation, the book is an easy read.

continued on page 21

Book Review
continued from page 20

***Cecilia H. Morgan** is an ADR professional who works with JAMS The Resolution Experts in Dallas, Texas. She mediates and often re-mediates others' failed mediations. She also regularly arbitrates and speaks on ADR processes.*

BLINK: THE POWER OF THINKING WITHOUT THINKING

By Malcolm Gladwell
Reviewed by Kay Elkins-Elliott*

Our mind, or at least a big part of it, is a mystery. From this premise, author Malcolm Gladwell introduces the reader to the world of research on the brain, particularly the part that cannot be accessed consciously. His reason for reporting on the power of the unconscious mind is that while we cannot know exactly *how* it reaches a snap judgment, we can improve its accuracy. He recounts stories of the amazing power of the unconscious part of the brain in order to learn what the logical, rational part cannot discover, and also to cite mistakes made by the unconscious "rapid cognition."

The book, "blink," has been on the New York Times nonfiction bestseller list for many weeks, but why would a mediator want to read it? The book's author is a journalist, not a cognitive scientist, so his writing is journalistic, perhaps merely a summary of research on the intuitive mind. For me, the book has value precisely because the non-scientist can understand it. Mediation is often about overcoming cognitive barriers to settlement. Those barriers are not always rational—indeed they are sometimes lurking in the part of the brain we have the least access to. In reviewing the book, I will focus on a few examples of the brilliance and errors of intuition as lessons for mediators.

In each chapter, Gladwell explores clear examples of the genius of intuition. In many, the "Don't Think – blink" decisions could be explained by the concept of "thin slicing." The best example is the notorious Getty experience of purchasing a Greek marble statute for $10 million after extensive attempted scientific proof of its authenticity. For over a year, Getty's team of expert attorneys, geologists, historians, and art experts used sophisticated technology: a core sample was analyzed by using an electron microscope, electron microprobe, mass spectrometry, X-ray diffraction, and X-ray fluorescence. However, prior to purchase, three art experts disagreed with the lawyers and scientists. An art historian took one look at the statue's fingernails and knew it was not from 530 B.C. An expert on Greek sculpture saw it and knew instinctively that something was amiss. A former director of the Metropolitan Museum of Art noted the first word that came to his mind after viewing it: "fresh." "Fresh" is not the right reaction to have to a two-thousand-year-old statue. After purchase, the statue was sent to Greece for inspection. The head of the Acropolis Museum took one look and blanched. The head of the Archeological Society in Athens immediately felt *cold*, as if "there was glass between me and the work." Another Greek expert reported a feeling of "intuitive repulsion." Getty spent $10 million based on one conclusion. The art experts came to the opposite conclusion. Then the Getty case began to fall apart, and the Getty catalog now describes the statue as "About 530 B.C., or modern forgery." In two seconds, each of the art experts had felt an intuitive repulsion that was an accurate and appropriate rapid cognition. In a single glance, in a *blink*, they knew what sophisticated machines did not know. They were looking at a fake.

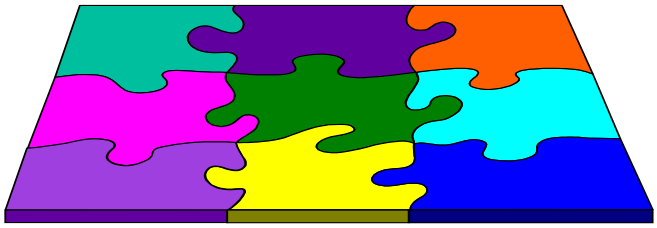
Many other examples of rapid cognition are given to illustrate and even deconstruct the strange and mysterious methods of our minds. To recount more of them would dilute the appeal of the book for you – the potential reader. I hope you will choose to explore the intriguing world of cognitive science for yourself and will find some useful tips that are helpful to you. Here are two examples that will help me in my mediation practice.

The famous family psychologist, Dr. John Gottman, has devised a special affect scale (SPAFF) for predicting the future divorce of a couple based on the emotions that flit across their faces during a one-hour video of them talking about a contentious subject. His prediction rate is extremely accurate. One non-verbal cue he looks for is rolling of the eyes – a sure sign of contempt. If this occurs at a certain rate within a given time period, he knows they will divorce. Other non-verbal cues are coded in the SPAFF. For mediators, more attention and awareness of the importance of these micro expressions of underlying emotions, during verbal cues that may contradict them, could be very useful in addressing hidden agendas and strong emotions. The book is replete with examples of microscopic details, the "thin slice" of data, that shows what is really going on in conflict much more accurately than a mass of carefully assembled words in a legal brief. Our unconscious mind knows what this "thin-slice" means and will go to the most telling detail unerringly.

Conversely, we all harbor implicit associations in our brain, based on cultural conditioning, that get in the way of accurate decision-making. Psychologists use the implicit-association test (IAT) to measure bias that skews accurate perception and can cause inaccurate conclusions. The bias toward height has been quantified: an inch of height is worth $789 a year in salary. Gladwell tells us that we are not helpless in the face of our first impressions, though they are powerful. Just because something is out of our awareness doesn't mean it is out of our control. We can, for example, deliberately flood the brain with positive information about the subject of our negative bias and change our response on the IAT. Useful examples are given that could help mediators deliberately improve their neutrality and objectivity.

The most important lesson of "blink" is that our unconscious thinking is, in one critical respect, no different from our conscious thinking: in both, we are able to develop our rapid decision making with training and experience. This book can be the beginning of a new set of skills or just an interesting read about the fascinating work of the brain. I will use its information, linked with gifts from social scientists, in the classroom as well as at the mediation table.

**** Kay Elkins-Elliott**, J.D., LL.M., M.A., is a Credentialed Distinguished Mediator, the ADR Coordinator for Texas Wesleyan University School of Law and Texas Woman's University, and a Co-Editor of the State Bar of Texas ADR Handbook, 3d Ed.*



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.

This quarter's *Ethical Puzzler* is submitted by Robert A. Black of Beaumont.

"Last year, I had an interesting situation occur. After a long and arduous court-ordered mediation, a malpractice case settled. The plaintiff, a professional, was unhappy with the settlement but nevertheless agreed to it. A Rule 11 Agreement was drafted requiring all parties "to keep the fact of settlement and the terms of settlement confidential."

After receiving the proposed settlement papers several weeks later, the plaintiff attempted to back out of the settlement. Plaintiff contended that he did not agree to confidentiality, as broadly as it was defined in the settlement papers and that the effect of confidentiality was not fully explained to him by his counsel or the mediator. Plaintiff refused to execute the settlement documents and returned the settlement check to defendant.

"The mediator should not voluntarily testify in Robert's case, and if subpoenaed to do so, he should move to quash. "

The defendant filed a Motion to Enforce the Rule 11 Agreement and contacted the mediator about appearing as a witness at the hearing on the Motion to Enforce. The defendant also wanted any notes reflecting confidentiality discussion with plaintiff.

Questions:

1. Under what circumstances can the mediator testify (voluntarily, by agreement of all parties, by subpoena, by order of the court) in a court-ordered mediation?
2. If compelled to testify, about what matters can the mediator testify?
3. Under any circumstances, are the notes discoverable (as opposed to the Rule 11 Agreement)? In this case, the mediator's notes conclusively proved the point of one of the parties.

If ordered to testify by the court after asserting confidentiality privileges, what does the mediator do?

Sid Stahl (Dallas): While the questions relating to this Puzzler appear to focus exclusively on confidentiality issues, it seems to me that there may be a more fundamental issue, viz., whether there can even be a contested evidentiary hearing on a Motion to Enforce a Rule 11 Agreement. The Texas Supreme Court spoke in a very loud and clear manner in the cases of Padilla v. LaFrance, 907 S.W. 2d 454 (Tex. 1995) and Mantas v. Fifth Court of Appeals, 925 S.W. 2d. 656 (Tex. 1996) that both Rule 11 Agreements and Mediated Settlement Agreements may be withdrawn at any time prior to entry with the court, and any effort to enforce such agreements is dependent upon a subsequent effort to enforce a binding contract.

Assuming that in this instance the defendant ultimately is able to have a hearing and attempt to obtain the mediator's testimony, there are several important aspects of the confidentiality issue. Unfortunately, as most ADR professionals know, Texas courts have carved out many exceptions to what is otherwise very clear broad and unambiguous language of Chapter 154. Section 154.053 clearly seems to contemplate that confidentiality may be waived with the language "….unless the parties agree otherwise…" Therefore, it seems quite clear that the mediator could testify if all parties (including the mediator) agree. It is where all do not agree where the problem lies. (As a mediator, if everyone in mediation wanted me to testify, I would be inclined to do so.)

As noted, many Texas courts have now eroded the broad, unambiguous language of Section 154.053 of the statute. Most notable are the recent and disturbing decisions in Avary v. Bank of America, N.A., 72 S.W.3d (Tex. App. – Dallas 2002, pet. denied) and Alford v. Bryant, 137 S.W.3d 916 (Tex.App. – Dallas 2004, pet. denied). Some comfort can be taken that the exceptions to the broad protection of confidentiality seem to relate to allegations that a new cause of action arose during the course of the mediation rather than matters involving the underlying dispute being mediated.

Therefore, it seems that a mediator can testify (1) if all parties waive confidentiality, or (2) if a mediator is a witness to a new tort committed during mediation as per Avary and Alford. Hopefully, a mediator's notes would be discoverable only in a factual scenario like those seen in the Avary and Alford cases. The last question – what does a mediator do after being ordered to testify – begs the issue. Failure to testify after being ordered to do so will likely result in a contempt action. Obviously, a more relevant question is what you should do to have the order rescinded. I have been issued a subpoena to testify only once during my sixteen years as a mediator. In addition to seeking assistance from my colleagues in the Association of Attorney-Mediators, I sent the attorney who issued the subpoena a copy of the Mediation Agreement that he, his client and all other participants signed prior to the mediation. I pointed out the language in which all agreed to make no effort to subpoena me under any circumstances and contractually agreed to pay my attorney's fees in resisting such efforts. He withdrew the subpoena.

Gary McGowan (Houston):

1) The mediator should not voluntarily testify in Robert's case, and if subpoenaed to do so, he should move to quash. I have filed two such motions in the last fifteen years and succeeded in quashing the subpoena both times. Nevertheless, if all parties and counsel agree to waive the mediation

continued on page 23

Ethical Puzzler
continued from page 22

privilege (an unlikely event in Robert's case), then the mediator could testify, so long as everybody understands that such testimony opens the door to full discovery of what occurred during the mediation. In my case, I have testified in support of a class action settlement (to demonstrate vigorous, arms-length negotiation), both live and by affidavit with the insistence and agreement of the parties.

2) The mediator should not be compelled to testify. If he is, he can only give "name, rank and serial number" – i.e., he can say the case was mediated, when and who attended. Anything else is beyond the pale.

3) The notes should be no more discoverable than a mediator's oral recollection of what was said during the mediation.

4) Respectfully decline to testify and ask for a ruling of civil contempt, which can be immediately appealed. If the judge gets rough and orders criminal sanctions, mandamus would be in order. If the sanctions hold, God help us.

Having said the above, we all need to be aware that situations may arise where the mediation privilege and confidentiality will not apply. For example, if a client pulls a gun and shoots his lawyer in private caucus, does anyone doubt that the mediator can and will be compelled to testify about the shooting? The court will, no doubt, engraft a "crime" exception to mediator privilege and confidentiality. In one of my cases, a federal judge held that common-law fraud committed in the mediation process trumps privilege and confidentiality, permitting discovery from party A about what it told the mediator to be passed on to party B. But the same court refused to permit discovery of the mediator, accepting my argument that the policy concerns underlying the ADR Act would be unduly compromised by such discovery.

Jack Q. Tidwell (Odessa):

1) I do not believe a mediator can testify under any circumstances other than by direct order of the court.

2) If compelled to testify, then I think the mediator has got to be honest in what he says, but I cannot imagine a mediator not feeling that everyone understood what was going on when the Rule 11 Agreement was signed. It is sometimes possible that the mediator is not in attendance when the client and the attorney are discussing the Rule 11 Agreement. Of course, in that situation, the mediator could not testify at all because he or she would have no knowledge.

3) I do not think under any circumstances the notes are discoverable. As a matter of fact, my notes would not be discoverable at all because I always destroy my notes once the Rule 11 Agreement is signed. I feel that this is one way I can maintain the confidentiality of the mediation.

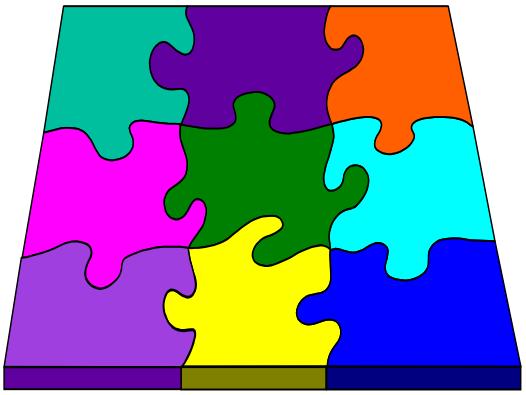
4) If ordered to testify before the court after asserting confidentiality, I feel that the mediator has no choice but to testify. After all, we are still officers of the court, we have to obey the lawful orders of the court, and I feel we have no choice but to comply.

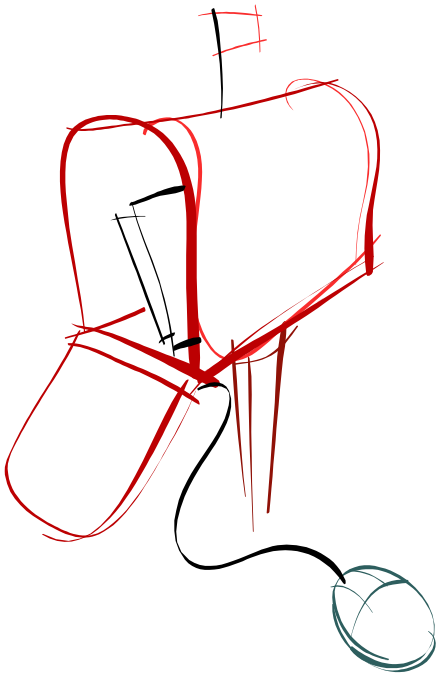
Jane A. Stephenson (Dallas): Simply put, if I were the mediator in this case, I would not discuss the mediation with anyone. Even if the parties agreed for me to testify, I would only do so if subpoenaed. If subpoenaed, I would appear in court but not divulge anything about the mediation, unless the judge specifically ordered me to talk. Likewise, I would not give up any of my notes without a court order.

Mr. Black's situation is a mediator's nightmare. Confidentiality is the backbone of the mediation process. In hopes of preventing a similar experience, my mediation practice, Conflict Management Partners, LLC., has a standard policy wherein the mediator informs the parties verbally and in writing of the confidentiality rule prior to, during, and upon conclusion of the session. It is stated in the mediation services agreement; and the parties agree to abide by the mediation rules, which include confidentiality, before mediation commences. Additionally, the mediator emphasizes confidentiality during mediation joint session and in caucus. As a further precaution, especially in court-ordered mediation, prior to the mediation, the parties sign a consent form agreeing to confidentially and to not call the mediator as a witness. Finally, any and all mediator's notes are destroyed immediately after mediation. Confidentiality aside, the settlement agreement form provides that the parties agree to return to mediation prior to pursuing other available remedies, if any dispute arises concerning the interpretation or implementation of the agreement. I would remind the parties of this provision and encourage them to return to mediation.

COMMENT: Confidentiality, conflicts of interest, competency, and contingent fees – these are the four "C" words that seem to come up time and time again in our real-life Ethical Puzzlers. These concepts and the rules of ethics that embrace them are the foundation of a principled mediator's practice. Our panel of this issue's contributors demonstrate in a practical, scholarly, and ethical way that the leading mediators in Texas are aware if the issues, aware of the rules, and able to respond in a practical, competent, ethical fashion should they be placed in a similar situation.

Do you have an ADR experience (in any ADR process) you'd like to share with the Ethical Puzzler? If so, please send it to me via fax at (214) 368-7258 for consideration by one of our "panels of experts."





ADR on the Web

By Mary Thompson*

WHAT IT MEANS TO BE SORRY: THE POWER OF APOLOGY IN MEDIATION

By Carl D. Schneider

Recent trends in the conflict resolution field have lead to an increased focus on the topic of apology and forgiveness as an important element of negotiation, settlement and reconciliation. Carl Schneider's article offers both theory and practical approaches regarding the dynamics of apology in mediation.

Carl Schneider is a mediator and trainer based in Maryland. His article, "What It Means To Be Sorry: The Power of Apology in Mediation" first appeared in *Mediation Quarterly*.

Schneider describes an apology as having three basic elements:

- Acknowledgement that harm has come to the other party
- An indication that the offending party has been affected personally by what happened (an experience of shame, guilt, etc)
- Offering of the apology without defending the behavior or expecting forgiveness

Schneider references author Aaron Lazare's observation that an apology is basically "an exchange of shame and power between the offender and offended." In other words, through an apology, the wronged party regains a kind of balance of power.

Schneider describes characteristics of our legal system that serve as barriers for offering apologies:

- A tendency to avoid any implication of blame
- A focus on winning and defense
- Distinctions in degrees of culpability which serve to rationalize or excuse wrongful acts

In the context of mediation, Schneider suggests that mediators may be able to help facilitate the ritual of apology through:

- Being mindful of the importance of and opportunities for apology in the mediation session
- Using individual sessions to help the parties find the words for an apology
- Using the joint session to facilitate the conversational exchange that makes the apology effective

As mediators, we have all seen apologies offered cynically and purely as negotiation strategy. But we have also seen the value of a good-faith apology: a breakthrough in an impasse, increased trust, a reduced monetary demand, and often a better-quality, more satisfying settlement. Apology is an important topic for practitioners in today's conflict resolution field, and Schneider's informative article offers some key insights into this often-overlooked dynamic underlying the negotiation process.

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

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

PROMOTING QUALITY OF PRACTICE - THE TMCA WAY!

By Kay Elkins-Elliott*

The Texas Mediator Credentialing Association held its first annual Symposium promoting quality mediation in Texas on Saturday, November 19, 2005 before a large and enthusiastic group of mediators in Austin. The exciting, information-packed day began with the Credentialing Express breakfast, a great chance to meet, greet, and compare notes with colleagues. Suzanne Mann Duvall, Chair of the Board of Directors of TMCA, a former Chair of the ADR Section of the State Bar, who represents the Section on the Board, graciously welcomed everyone. The participants were then treated to a thoughtful and thorough overview by the Board representative for the judiciary, Judge John Coselli, a former chair of the ADR Section, of the TMCA's history as an initiative built on years of work by many prominent Texas mediator groups. As the only voluntary, multi-disciplinary credentialing association in Texas, the TMCA maintains a publicly accessible list of mediators who have been granted credentials, and provides a forum for the acceptance of grievances against credentialed mediators, who have committed to uphold the TMCA Code of Ethics and Standards of Practice.

The members of the TMCA Board of Directors explained their part in promoting the value and benefits of mediator credentialing to their constituencies, for example, the public, the courts, government agencies, attorneys, dispute resolution centers, colleges and universities, mediation trainers, and mediators from all disciplines. Judge Coselli's plan for the courts includes educating the judiciary on the advantages to the consumer of using credentialed mediators, and urging judges to appoint them in court-ordered mediations. The TMCA consumer representative, LaCrisia Gilbert, the ADR coordinator for the Dallas civil courts, believes that consumers will be looking for the best mediators and sees her task as educating the public on the value of using mediators with credentials that attest to their commitment to ethical standards. The TAM representative, John Blades, is encouraging all TAM members to be credentialed because he believes it gives mediators credibility and enhances professionalism. Suzanne Duvall promotes credentialing by members of the State Bar of Texas ADR Section through public presentations, networking, presenting workshops at mediator conferences and getting testimonials from credentialed mediators. Other board representatives and their constituencies are Shelly Hudson, representing Dispute Resolution Centers Directors Council; Jan Summer, representing the Center for Public Policy Dispute Resolution, the University of Texas School of Law; Kay Elkins-Elliott, representing Education; and Mike Schless, representing the Association of Attorney-Mediators, all of whom direct their efforts to raising awareness of the benefits of credentialing within their particular groups. Mike Schless, also a former chair of the ADR section, said it succinctly: "If you want more visibility, credibility, and business, credentialing is a way to achieve that!"

One of the highlights of the day was a sophisticated marketing workshop facilitated by Professor Linda Golden, an internationally acclaimed marketing professor, researcher, and consultant, from the University of Texas at Austin School of Business. "Mediation is a business in which everyone is a potential target market," is her "Golden Rule." Dr Golden facilitated small groups of the audience in answering key questions on their own marketing efforts such as "Who is my real target market?"

The Ethics Jeopardy Game– Who Wants to Be an Ethical Mediataire (i.e., Mediator Extraordinaire)? moderated by Ross Stoddard, provided an opportunity to apply the TMCA Code of Ethics, the main focus of the symposium. Although the moderator was hilarious, the message was serious. The ethical dilemmas posed to attendees who were the contestants in the game could only be answered by referring to the Code of Ethics. Ross stumped each expert and everyone could see that for mediators, ethics is an ongoing learning process.

The program ended with a provocative, simulated cross-cultural mediation facilitated by Professor Walter Wright, Texas State University, that provided more complexity and ambiguity. It demonstrated some of the moral, cultural, and ethical problems that arise and require rapid cognition and action from the mediator. The day ended with an opportunity to renew credentialed status at the symposium.

Throughout the day, mediators networked, exchanged information, collaborated on solving problems in their practice and received information on training, continuing education courses, partnering with other professionals and upcoming mediator conferences. In their words:

"It was great to meet people at various stages of their mediation careers. Ethics, quality, accountability, all in one place, how could I stay away!"

"What a pleasure to see that mediation is thriving as a profession. The symposium was a great opportunity to renew my familiarity with colleagues and rules."

"The TMCA is truly an association that stands behind the mediator on a multi-faceted level; marketing, education, and credentialing."

The TMCA board is working to continually improve the value of credentialing for the mediation community, the judiciary and for the consumer. If you, the members of this section, have any input for us regarding changes that would help us to fulfill that mission, we invite your suggestions and comments. Please

continued on page 26

2006 CALENDAR OF EVENTS

40-Hour Basic Mediation Training ★ Houston ★ March 14, 18. 2006 ★ ***University of Houston Law Center A.A. White Dispute Resolution Center*** ★ For more information call Robyn Pietsch at 713.743.2066 or www.law.uh.edu/blakely/aawhite

Negotiation Workshop ★ Austin ★ March 23-26, 2006 ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

The Association of Attorney-Mediators Annual Meeting and Advanced Attorney-Mediator Training ★ Little Rock, Arkansas ★ March 31/April 1, 2006 Please visit the web site at www.attorney-mediators.org for more information or contact the AAM National Office at 1-800-280-1368

Basic 40-Hour Mediation Training ★ Houston ★ April 20-22 continuing 27-29, 2006 – 2 Thursdays: 4:30 P.M. – 8:30 P.M., 2 Fridays and Saturdays: 9 A.M. – 6:00 P.M.; ***Worklife Institute*** ★ Trainers: Diana C. Dale and Elizabeth F. Burleigh ★ For more information call 713-266-2456, Fax: 713-266-0845 or www.worklifeinstitute.com.

Advanced Mediation & Ethics ★ Austin ★ May 18-21, 2006 ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

Basic 40-Hour Mediation Training ★ Austin ★ May 21-25, 2006 ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

40-Hour Basic Mediation Training ★ Houston ★ May 30, 31 & June 1-4, 2006 ★ ***University of Houston Law Center A.A. White Dispute Resolution Center*** ★ For more information call Robyn Pietsch at 713.743.2066 or www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation Training ★ Austin ★ June 5-9,. 2006 ★ ***Center for Public Policy Dispute Resolution - The University of Texas School of Law*** ★ For more information call 512.471.3507 or Check out this website for more information: www.utexas.edu/law/cppdr

Family Mediation Training ★ Austin ★ August 24-27, 2006 ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

Conflict Resolution ★ Austin ★ October 12-15, 2006 ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

Basic 40-Hour Mediation ★ Austin ★ January 24-28, 2007, 2006 ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

Negotiation ★ Austin ★ March 1-4, 2007 ★ ★ ***Texas Woman's University*** ★ For more information call 940.898.3466 or www.twu.edu/lifelong

FORT WORTH COURT OF APPEALS CONSIDERS MEANING OF "MEDIATED" AND "MEDIATED SETTLELMENT AGREEMENT" IN TEXAS FAMILLY CODE

continued from page 15

[8] *Id.* Section 7.006(a) of the Code provides, in relevant part: "To promote amicable settlement of disputes in a suit for divorce . . ., the spouses may enter into a written agreement . . . . The agreement may be revised or repudiated before rendition of the divorce . . . unless the agreement is binding under another rule of law." Tex. Fam. Code Ann. § 7.006(a) (Vernon 1998).

PROMOTING QUALITY OF PRACTICE - THE TMCA WAY!

continued from page 25

contact the author at k4mede8@swbell.net or contact any other board member, and your comments will be treated seriously and confidentially.

For information on becoming credentialed, visit the TMCA website, www.txmca.org., or contact the Secretary of the Board, Dr. James Gibson, at 936.294.1717. Let's all do it today – the TMCA way!

** **Kay Elkins-Elliott** is a Credentialed Distinguished Mediator, the TMCA Board Member for Education, and the ADR Coordinator for Texas Wesleyan University School of Law and Texas Woman's University.*

The ABA, AAA and ACR Adopt the Revised Model Standards of Conduct for Mediators in August/September 2005

continued from page 12

[7] See Drasco & Hoffman, supra note 5, at 2.

[8] Id.

[9] Joseph B.Stulberg, Reporter's Notes 7 (September 9, 2005).

[10] See Model Standards of Conduct for Mediators, 2005 (Note on Construction).

[11] Stulberg, supra note 9.

[12] Id.

[13] Dennis Drasco & David Hoffman, A.B.A., Executive Summary 1-2 (August 2005), at www.abanet.org/litigation/documents/. (This document accompanied the Model Standards submitted to the ABA House of Delegates for approval).

2005-2006 Officers and Council Members

Officers

Michael S. Wilk, **Chair**
Hirsch & Westheimer, P.C.
700 Louisiana, #2550
Houston, Texas 77002
(713) 223-5181
(713) 223-9319 FAX
mwilk@hirschwest.com

John Charles Fleming, **Chair-Elect**
2305 Sunny Slope
Austin, Texas 78703
Office (512) 463-9971
FAX (512) 322-3981
Cell (512) 826-6855
jfleming@austin.rr.com

Jeff Kilgore, **Secretary**
Kilgore Mediation Center
2020 Broadway
Galveston, Texas 77550
Office (409) 762-1758
FAX (409) 765-6004
mediate4u@yahoo.com

Cecilia H. Morgan, **Treasurer**
C/O JAMS, Suite 610
8401 N. Central Expressway
Dallas, Texas 75225
Office (214) 739-1979 or
JAMS (214) 744-5267
FAX (214) 739-1981 or
JAMS (214) 720-6010
Cell (214) 850-6433
cmorgan@jamsadr.com

William H. Lemons
Immediate Past Chair
Law Offices of William H. Lemons
Travis Park Plaza, Suite 210
711 Navarro Street
San Antonio, Texas 78205
Office (210) 224-5079
FAX (210) 224-5091
Cell (210) 313-1663
whlemons@satexlaw.com

Robyn G. Pietsch,
Newsletter Editor
University Of Houston Law Center
AA White Dispute Resolution Center
100 Law Center
Houston, Texas 77204-6060
(713) 743-2066
(713) 743-2097 FAX
rpietsch@central.uh.edu
rpietsch55@aol.com

Council Members
Term Expires June 2006

Claudia Dixon
3400 Carlisle, Suite 240, LB 9
Dallas, Texas 75204
Office (214) 754-0022
FAX (214) 754-0378
Cell (214) 821-7637
claudiadixon@sbcglobal.net

Kathy Fragnoli
The Resolution Group
4514 Cole Avenue, Suite 1450
Dallas, Texas 75205
Office (800) 290-4483
FAX (214) 522-9094
KFragnoli@aol.com

Josefina Rendon
909 Kipling
Houston, Texas 77006
Office (713) 644-0787
FAX (713) 521-9828
Josrendon@aol.com

Prof. Walter A. Wright
Legal Studies Program
Department of Political Science
Texas State University (POSI)
601 University Drive
San Marcos, Texas 78666
Office (512) 245-2138
FAX (512) 245-7815
ww05@txstate.edu

Council Members
Term Expires June 2007

Leo C. Salzman
Law Offices of Leo C. Salzman
P.O. Box 2587
Harlingen, Texas 78551-2587
Office (956) 421-2771
FAX (956) 421-2790
lcs@leosalzman.com

Robert L. Kelly
Kelly & Nevins, L.L.P.
222 Sidney Baker South, Ste.410
Kerrville, Texas 78028-5983
Office (830) 792-6161
FAX (830) 792-6162
rkelly@kelly-nevins.com

Robert W. Wachsmuth
Glast, Phillips & Murray, P.C.
The Court Building, Suite 400
219 East Houston Street
San Antonio, Texas 78205
Office (210) 244-4100
FAX (210) 244-4199
Cell (210) 273-2681
rwachsmuth1@gpm-law.com

Council Members
Term Expires June 2008

John K. Boyce, III
Attorney and Arbitrator
Trinity Plaza II, Suite 850
745 E. Mulberry Avenue
San Antonio, Texas 78212-3166
Office: (210) 736-2222
FAX (210) 735-2921
jkbiii@boycelaw.net

Jay A. Cantrell
Jay A. Cantrell, P.C.
1101 Scott Avenue, Suite 6
Wichita Falls, Texas 76301
Office (940) 766-3305
jay@jcantrell.com

Thomas C. Newhouse
Professor of Law
University of Houston Law Center
100 Law Center
Houston, Texas 77204-6060
Office (713) 743-2147
FAX (713) 743-2256
tnewhouse@central.uh.edu

Mike Patterson
Mike Patterson Mediation
515 S. Vine Avenue
Tyler, Texas 75702
Office (903) 592-4433
FAX (903) 592 7830

mike@mikepattersonmediation.com

Susan B. Schultz
The Center for Public Policy Dispute Resolution
727 E. Dean Keeton
Austin, Texas 78705
Office (512) 471-3507
sschultz@law.utexas.edu
Cell (210) 273-2681

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, Suite 610
Dallas, TX 75225
214-739-1979 - 214.744.5267 (JAMS)
214.739.1981 FAX
cmorgan320@sbcglobal.net

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2006 to June 2007. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____ Public Member_____ Attorney_____

Address_____ Bar Card Number_____

City_____ State_____ Zip_____

Business Telephone_____ Fax_____

E-Mail Address:_____

2005-2006 Section Committee Choice_____

ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

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

Selection of Article

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

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

Preparation for Publishing

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

Future Publishing Right

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

ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

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

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

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

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

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

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

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

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

ALTERNATIVE DISPUTE RESOLUTION SECTION

STATE BAR OF TEXAS
P.O. BOX 12487
CAPITOL STATION
AUSTIN, TEXAS 78711

PRSRT STD
U.S. Postage
PAID
Permit # 506
Temple, Texas