ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By Joe L. Cope, Chair, ADR Section

There is something different about us.

We're the Alternative Dispute Resolution Section of the State Bar of Texas.

Through the years, I've heard a number of discussions focusing on whether "alternative" is better or worse or just . . . different. The official definition remains the best.

Alternative: offering a choice.

Simply stated, dispute resolution professionals excel in offering choices to those who come to them for assistance with conflict.

Our courts – and the able lawyers who practice litigation – are an important and necessary part of the dispute resolution continuum. Yet, only a small portion of the disputes that make up our daily lives are resolved before judges and juries.

Many lawsuits settle as skilled attorneys conduct discovery, crystallize issues, and consider the costs and probabilities of success. Their appropriate counsel to their clients will often include options for settlement. If the parties continue to hold positions too far apart, both judges and attorneys turn to the provisions of the Texas ADR Act and to dedicated mediators and arbitrators for techniques designed to enable parties to better evaluate their cases and to make informed decisions. Court-annexed mediation, arbitration, and, importantly, private mediation of contested matters save the courts, and ultimately the taxpayers, millions of dollars each year. Plus, the parties to the conflict realize significant savings in litigation-related costs and time.

All of this is as it should be.

But we mustn't overlook the monumental amount of conflict sorted through and dispatched through the skill and expertise of our ADR professionals in private – non-court-related – dispute resolution processes.

While the mere presence of alternative dispute resolution methods brings many options, we, as ADR professionals, bring great diversity to our settlement tables. We are competent private judges as we arbitrate. We are excellent negotiators in convening the mediations and generating solutions. Some prefer a facilita-

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tive style, while others lean toward the evaluative. Still others set a course to transform the parties. This diversity adds to the choices available to the public.

The diversity we offer in our practice of alternative dispute resolution is important for another reason. We add tremendous value to the conduct of the personal lives and business interests of the parties who come before us. Not only are arbitration and mediation significant choices along the dispute resolution continuum, they are magnifications of creativity, insight, and possibilities with the potential to unlock even the most difficult problems. And on many occasions, providing a foundation to restore relationships and to build future collaboration.

The Section for Alternative Dispute Resolution plays an important role in bringing together this diversity and added value. The largest organization representing dispute resolution professionals in Texas, the Section is your constant voice in the present and in the future. We exist to serve you, to protect the integrity of our profession, and to advance the cause of peacemaking.

Following the excellent leadership of Susan Schultz, our immediate past chair, we will continue our efforts to solidify our committee system within the Section. We will increase our efforts to involve you, to hear your ideas, and to benefit from your experience and creativity. In the coming weeks, we will be finalizing the membership of our committees. If you have an interest in serving, please email me at copej@acu.edu. Committee openings are limited, so don't delay.

I hope this will be a great year for you both personally and professionally. Let me know how we can better serve you.

JUDGE JOSEFINA M. RENDÓN WAS THE 2011 RECIPIENT OF THE JUSTICE FRANK G. EVANS AWARD

By Walter A. Wright*

At the ADR Section's annual meeting in San Antonio on June 23, 2011, Josefina M. Rendón, Judge of the 165th Judicial District Court of Harris County, Texas, received the Justice Frank G. Evans Award, which is presented annually to recognize a recipient's exceptional efforts in furthering the use or research of alternative dispute resolution methods in Texas.

Judge Rendón earned a Bachelor of Arts degree in 1972 and a law degree in 1976, both from the University of Houston. When she graduated from law school, she worked in San Francisco for a year but soon returned to Texas. After practicing law in Houston for several years, she served three years as a commissioner on the City of Houston Civil Service Commission, then began her judicial career in 1983; she has served in some judicial capacity ever since. From 1983 to 1995, she was the judge of Houston's Municipal Court No. 5, where she presided over cases involving city ordinances and the transportation, penal, and education codes.

After taking her first mediation training in 1993, Judge Rendón started mediating cases, often as a volunteer at the Dispute Resolution Center in Harris County. In 1995, she left her full-time job as a judge and started dedicating most of her time to mediation, but she continued to serve as an associate municipal judge in Houston. From 1995 to 2008, she established a successful mediation practice and mediated over 1,200 cases. During those years, she mediated cases for the U.S. Equal Employment Opportunity Commission, U.S. Postal Service, Texas Education Agency, and Key Bridge Foundation, among others, in addition to receiving referrals from private parties and their attorneys. In 2008, she was elected judge of the 165th District Court of Harris County. Since 2009, she has presided over that court, where she hears a wide range of civil cases and is a dedicated advocate for ADR processes.

While Judge Rendón developed her mediation practice, she also developed an outstanding record of service to the ADR profession. In addition to speaking to multiple mediation and ADR organizations on a wide range of topics during the entire period of her private mediation practice, she served on the board of directors of the Texas Association of Mediators (TAM) from 1999 to 2007 and was TAM's president from 2005 to 2006. She also served on the Council of the ADR Section of the State Bar of Texas, the board of directors of the Houston Bar Association's ADR Section, and the board of directors of the Houston Chapter of the Association for Conflict Resolution. Since 2007, she has served on the board of directors of the Dispute Resolution Center for Harris County. Internationally recognized for her ADR expertise, she has spoken at conferences and conducted facilitated dialogues in Peru, Panama, Venezuela and Ecuador.

The ADR Section proudly added the 2011 recipient's name to a distinguished list of prior recipients of the Justice Frank G. Evans Award: Honorable Frank G. Evans (1994); Professor Kimberlee Kovach (1995); Bill Low (1996); Honorable Nancy Atlas (1997); Professor Edward F. Sherman (1998); C. Bruce Stratton (1999); Suzanne Mann Duvall (2000); John Palmer (2001); Gary Condra (2002); Honorable John Coselli (2003); Professor Brian D. Shannon (2004); Maxel "Bud" Silverberg and Rena Silverberg (2005); Michael J. Schless (2006); Cyndi Taylor Krier and Charles R. "Bob" Dunn (2007); Robyn Pietsch and Professor Walter A. Wright (2008); Michael J. Kopp (2009); and Cecilia H. Morgan (2010).

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SECTION CONVENES ANNUAL MEETING

The Alternative Dispute Resolution Section convened its annual meeting on Thursday, June 23, 2011 during the State Bar of Texas Annual Convention in San Antonio, Texas.

Chair's Report: Susan Schultz, outgoing chair of the Section, welcomed attendees and gave an overview of the past year:

- Membership continues to be strong at around 1100 members
- Our CLE program sponsored by the Texas Bar CLE provided practical tips on negotiation, peacemaking and conflict transformation. On January 28, 2011 in Houston, nationally recognized speaker and author Doug Noll presented *Tactical Interventions in Mediation: Preventing Bad Settlement Decisions and Impasse Minute by Minute* to a roomful of engaged participants. To make this CLE program accessible, we also offered and granted several scholarships.
- To highlight specific issues of interest and encourage more member participation, the Section revived the committee structure. Committees that were particularly active this past year included the International Dispute Resolution Committee and the Outreach and Legislative Committee.
- We continue to develop our website to inform members and allow for interaction. We added a members-only section to strengthen opportunities for dynamic online communications and education.

Recognizing the interrelationship of ADR organizations, representatives of our Section met twice with representatives of the TAM, TMCA, TMTR, and the AAM to start a dialogue about how we can best meet the needs of its members and the public.

Frank Evans Award: the Honorable Anne Ashby, chair of the Frank G. Evans Award committee, assisted by Walter Wright, announced Josefina Rendon as the 2011 recipient of the Frank G. Evans Award.

Outgoing Officers and Council Members: Susan Schultz presented Certificates of Appreciation to Council members who were completing their time of service: Sherrie Abney, John Allen Chalk, Tad Fowler, Jeffrey Jury, Raymond Kerr, and Beth Krugler.

Report of Nominations Committee: John Allen Chalk, Immediate Past Chair and Chair of the Nominations Committee presented that committee's report and a slate of candidates to serve as officers for the 2011-2012 operating year.

Joe L. Cope, Chair
Hon. Alvin Zimmerman, Chair-Elect
Susan Perin, Treasurer
Ronald Hornberger, Secretary
Susan Schultz, Immediate Past Chair

In addition, the following individuals were nominated to serve as Council Members:

Hon. Dwight Jefferson (1-year term)
Guy L. Hawkins (3-year term)
Robert C. Prather, Sr. (3-year term)
Hon. Susan S. Soussan (3-year term)
Hon. John J. Specia, Jr. (3-year term)

Upon motion by Chalk, the slate was accepted by acclamation.

Following the election, Joey Cope assumed leadership of the meeting as Incoming Chair. Prior to making a few brief comments about the direction for the Section in the coming year, Cope made a special

presentation to Susan Schultz for her outstanding work as chair for the 2010-2011 year. He made these remarks about his predecessor, "Susan Schultz has shown remarkable leadership through this past year. Her time as chair has been marked greatly by her passion to include others in leadership and in developing future leaders. We owe her a great debt of gratitude."

The annual meeting was followed with the CLE program featuring presentations from Patty Wenetschlaeger, Cecilia Morgan, Michael Schless, Michael Wilk, and William Lemons.

PEER MEDIATION IN PUBLIC SCHOOLS

A Viable Supplement to Exclusionary Disciplinary Methods

By David Velasquez*

I. Introduction

Mediation is by no means a new concept to public schools. Peer mediation, as it is most commonly known in the schools, has been the chief component of conflict resolution used by many schools since the early 1970's. It is a concept that was primarily introduced and developed in the United States by community groups comprised primarily of conflict resolution researchers, nonviolence advocates, anti-nuclear war activists, and members of the legal profession. These groups founded the first school peer mediation programs, whose names suggest their objectives and reach: Teaching Students to be Peacemakers, The Children's Project for Friends, Children's Creative Response to Conflict, and the Resolving Conflict Creatively Program.

Although these peer mediation efforts were launched by people of diverse societal backgrounds, all embraced, in one form or another, many of the values underlying mediation and conflict resolution: justice, caring, integrity, peace and cooperative learning. Subsequently, these efforts further inspired another group of community mediators, educators and religious leaders to come together in 1984 and form the National Association for Mediation in Education (NAME). NAME subsequently established a national communication network between the various mediation groups that eventually led to the establishment of over 10,000 school mediation programs.

Unfortunately, however, peer mediation has not yet been embraced by most public schools as the method of choice for reducing school violence – even though numerous government agencies and national organizations have endorsed its success in reducing school violence. Schools have instead predominantly relied upon exclusionary, disciplinary methods as their chief means for providing safe and conducive learning environments as is made evident by their long history of expelling and suspending students. As one school principal observed, in discussing suspensions: "You don't get it. We don't want to understand these kids; we want to get them out." [Ward Dissertation, at 20.]

Although exclusionary methods such as suspensions and expulsions provide quick remedies by removing problematic students from the classroom and general school environment, they tend to exacerbate student problems rather than resolve them. Instead of addressing the underlying issues that actually lead to disciplinary infractions, these traditional approaches merely punish the behavior. According to several studies, this in turn leads to high recidivism which actually makes the school environment less safe as suspensions and expulsions may foster a sense of resentment in the unruly student rather than teaching personal responsibility. However, with the growing pressures of a high stakes testing environment where teachers work and live in an age of instructional accountability, and with the increased community demands for safer schools, schools have embraced zero tolerance policies. Indeed, immediate punitive sanctions commonly are the cornerstone of student codes of conduct, even though there is considerable evidence that reactive and punitive practices often fail to provide an effective learning environment – with negative consequences for all, and not just for the students that are disciplined.

With all the complexities of modern-day American society, schools are more frequently receiving students that are ill-equipped with the social skills needed for coping with common student conflict. By implementing peer mediation as the chief component for addressing student conflict, schools will not only reduce school violence and other disruptive behaviors that these students bring to the schools, but also teach students valuable social skills that they will carry with them throughout their lives. Several studies have documented the ineffectiveness of traditional exclusionary disciplinary methods in reducing school violence; peer mediation is a sound alternative for public schools.

II. Why Schools Use Exclusionary Measures

In order to understand the reasons why schools staunchly use and support exclusionary measures, as opposed to other methods, one must first understand the history behind the practice. Exclusion is a practice that was adopted in direct response to the demands of the surrounding society. There is no doubt that American society places an enormous number of expectations on public schools that primarily include providing children with a safe and secure learning environment which promotes both academic and social success. It is therefore no accident that chief among the primary objectives recommended to local school boards by the National School Boards Association (NSBA) is that of ensuring and providing a safe environment for learning.

However, because of the ever-changing complexity of American society that has been characterized by an enormous increase in single-parent homes, or homes where both parents work, the challenge of providing children with a safe and secure learning environment has become a heavy and daunting task for schools to fulfill. The decline of the traditional, nuclear family unit has resulted in many children growing up in violent neighborhoods unsupervised and emulating the unhealthy and ill-suited behaviors of unlikely role models. Consequently, by the time these children enter the school system equipped with violent and other maladaptive behaviors, many of them introduce a threat to the safety of the school environment for which schools are ultimately held accountable.

As the designated leaders of their respective schools, school principals are ultimately held accountable for the success and failure of their schools. They are charged with the dual responsibility of ensuring that all students, irrespective of their social backgrounds or developmental levels, are educated in a safe and secure environment. School principals must therefore ensure that any and all necessary measures are quickly taken to address student behavior that is not only dangerous to students and staff, but also behavior that is a threat to the orderly and conducive learning environment of the school.

Since the enactment of the federal Gun Free Schools Act of 1994 and the Safe and Drug-Free Schools and Communities Act of 1994, both reflective of the salient nature of violence in and around school communities, the public pressure for school principals to take action in implementing programs designed to curb school violence intensified. This intensified public pressure to provide safe learning environments, aided also by the rash of school shootings that marred the 1990s – particularly those in Columbine, Colorado (a Denver suburb) – was reflected in their adoption of zero tolerance policies. With their adoption of zero tolerance policies, school principals were able to address their communities' demand for safe and secure schools, which at the time enjoyed widespread public and political support as a result of the country's concern for safety fueled by the media's widespread attention to all the school violence taking place at the time.

Preventing school violence, however, is not in and of itself the only societal demand placed upon the schools. With the pressures of high stakes state accountability testing high on the list of schools' daily concerns, compounded by those of the federal No Child Left Behind legislation, school principals must also ensure that *all* students, irrespective of their social and developmental backgrounds, meet minimum academic performance standards. Faced with this challenge, school principals must often balance the demands of the community with that of what is best for the students.

Thus, when faced with the prospect of having to expel a student who constantly disrupts the school environment, or poses a threat to the safety of other

students, school principals must often choose in favor of the rights of the student body, which often means rejecting outright policies advocated by researchers such as peer mediation. This is often a difficult task that involves striking a balance because parents who demand stricter and harsher rules, but then turn around and vigorously protest when their own children face punishment. In addition to striking a balance between suspending or expelling offending students and the rights of the student body, school principals must also contend with the needs of their teachers who frequently report dangerous and disruptive classroom behavior as their biggest obstacle to teaching. These complaints are also an important part of the equation that a school principal cannot afford to overlook since research indicates that one of the most significant barriers to improving the achievement of students is disruption, disorder, and misbehavior in our schools.

To survive and be successful, school principals must ensure that their schools are safe, secure, and orderly learning environments since it is well established by research that learning cannot occur in an environment of fear. However, school principals must also be well in tune with the demands of the community in order to meet the needs of all their students. With the growing trend of children entering the public school system without the necessary social skills to be successful, both academically and emotionally, school principals must be prepared to provide them with the skills training that will make them successful.

III. Why Exclusionary Practices Do Not Work: Violent Communities

As a result of highly publicized outbreaks of school violence, such as at Columbine High School in 1999, American society has been left with "deep scars" that have made communities seriously apprehensive about the real and perceived violence that goes on in the schools today. Consequently, in response to an alarmed community's demand for safer schools to address this misperceived epidemic of school violence, public schools in turn have adopted and implemented zero tolerance policies to address student misconduct. However, an important fact that was overlooked in this mass hysteria was that school violence is not a simple by-product of the public school system, but is instead a reflection of the schools' surrounding communities. In fact, all violence that takes place within the schools really "mirrors" what goes on in the surrounding community. The reality is that children are now, more than ever, frequently exposed to violent behaviors within their own communities.

Unfortunately, by the time that these students enter the public school system, they not only lack the essential social skills needed for success, but they often come equipped with inappropriate approaches to problem-solving that they use to resolve common school conflicts. Such ill-suited problem-solving skills are usually characterized by either verbal or physical aggression, which quickly brings these students into conflict with the school norms.

In order to understand school violence, and to better meet the needs of students entering the public school system, both the community and the schools must view the problem not as an independent and separate phenomenon, but rather as a manifestation of the behavioral trends that characterize so much of contemporary life in the United States. The reality is that children nowadays live in a society where violence permeates through every aspect of their lives. Whether at home, within their communities, or through the media in the form of movies, sports, or news, children are inundated by violence. When one takes into account the fact that the children are nowadays often being raised in impoverished neighborhood communities infested with drugs and violence, and for the most part unsupervised as a result of belonging to single-parent homes or homes where both parents work, one can understand the toll this takes on their socio-emotional development.

In fact, researchers have uncovered compelling evidence that parents and communities contribute to the development of the most severe forms of antisocial behavior by failing to provide necessary social skills and support, while often modeling inappropriate social interactions. To counter this new social and cultural phenomenon of the traditional family unit no longer being a child's primary teacher of moral responsibility, values and positive problem-solving skills, schools need to adopt better methods for addressing school violence and other forms of student

misconduct in order to truly address the social skills deficits that students bring to the schools.

Although exclusionary practices and zero tolerance policies are currently the rule rather than the exception, research has consistently demonstrated that these "hardball" approaches simply do not work effectively. With the social complexities brought about by the disappearance of the family unit, it has become evident that many of today's students require positive behavioral instruction rather than just punishment – which is not to deny that there is an important place for the implementation of firm and consistent discipline policies. Since expulsions and suspensions – the basic tools of exclusionary practices and zero tolerance policies – fail to provide the necessary social skills training that would modify the behavior that led to the infraction in the first place, these methods are ineffective for meeting the needs of misbehaving students because they ignore rather than address underlying personal and family problems. By adopting measures that provide disruptive students with the skills training — such as peer mediation — that decrease unwanted behavior, schools can reduce violence in their schools and improve the educational climate for all students.

IV. Peer Mediation: A Proven Method for Reducing School Violence

Today, students entering the public school system come ill-equipped with the essential social skills required for academic and social success. To offset the negative impact that modern society has had on children entering the public school system as a result of the disintegration of the traditional family unit and the negative influences that permeate through all aspects of their lives, schools can adopt peer mediation as a viable and proven method for reducing school violence and other forms of student misconduct. Due to the simple fact that students enter the school system with a social skills deficit, peer mediation is an appropriate and effective method for addressing disciplinary problems that frequently arise in the schools because of such deficits as it provides the skills training needed to eliminate the deficit.

Peer mediation is a conflict resolution process that was borrowed from the Alternative Dispute Resolution movement, and adapted for use within the school setting. It was widely introduced to the schools in 1984 by the National Association for Mediation in Education (NAME) as a viable method for reducing school violence. Despite its documented success in reducing school violence, it has not progressed far enough as a popular method for addressing the many disciplinary issues faced by public schools today.

Although peer mediation has not been as widely embraced as zero tolerance policies and exclusionary methods, it has been endorsed by government agencies at every level as well as by national organizations. During the peak of much of the publicized school violence that broke out during the 1990s (such as Columbine), then U.S. Attorney General Janet Reno identified mediation as an effective means for reducing school violence and encouraged schools to use it by citing several successful studies conducted in New York, Nevada, and New Mexico.

Numerous academic and state-sponsored studies have uncovered overwhelming evidence that the use of peer mediation is an effective tool for improving students' conflict resolution skills, reducing negative behavior, and improving school climate. A school principal whose school implemented a peer mediation program was impressed by the results he obtained, stating that his students "learned people skills that would benefit them throughout life, and that students learned alternatives to violence." But perhaps what makes peer mediation such an effective method for reducing school violence and other forms of student misconduct is what is at the core of the process, it provides therapeutic benefits because it allows for self-determination by students that enhances the development of the parties' problem-solving capacities, and their ability to craft individualized justice in their own terms based on their own interests and values.

V. Conclusion

With all the complexities of modern society where the family unit has essentially eroded away, public schools must embrace disciplinary methods that address the behavioral needs that students bring to the schools. By remaining entrenched in their beliefs

and adherence to zero tolerance policies, schools are ignoring the needs that students bring to the schools by failing to provide the social skills training that students lack in order to be successful. Since students commit infractions resulting from their lack of appropriate social skills, peer mediation is the most helpful and cost effective method for addressing the behavior as it substitutes an appropriate skill for one that is not. Finally, peer mediation is strongly supported as an effective and viable method for reducing school violence.

Appendix: Selected Bibliography of Student Peer Mediation Materials

Betty P. Brewer, *The Effects of Conflict Mediation Training On Attitudes Toward Conflict and Interpersonal Problem-Solving Strategies of Middle School Students*, {Dissertation 1998), available at:

http://scholar.lib.vt.edu/theses/available/etd-32398-221541

Dionne R. Ward, *A Study of Two Urban Middle Schools: Discipline Practices Used to Control Disruptive Behavior of Students*, (Dissertation 2007), available at:

http://scholar.lib.vt.edu/theses/available/etd-10172007-102056

Susan K. Theberge and Orv C. Karan, *Six Factors Inhibiting the Use of Peer Mediation in a Junior High School*, (7:4 April 2004, ASCA), available at:

http://www.schoolcounselor.org/files/7-4-283%20Theberge

Tricia S. Jones, *Conflict Resolution Education: The Field, The Findings, and The Future,* 22 Conflict Resol. Q. 1 (2004).

Jana Juvonen, *School Violence: Prevalence, Fear and Prevention*, (RAND 2001).

Nancy Amodei and Anthony A. Scott, *Psychologists' Contribution to the Prevention of Youth Violence,* The Social Science Journal 39 (2002).

Christine Christle et. al, *School Characteristics Related to the Use of Suspension,* in Education and Treatment of Children 509 (2004).

Stephanie M. Smith, *Peer Mediation: Resolution or Revolution?,* available at:

http://www.publications.villanova.edu/Concept/2002/stephaniesmith.html,

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Grandma Should Get a Voice Too: Mediation As a Tool For Dealing With Diminished Capacity Over Time

By Malorie Peacock*

I. Introduction

Courtrooms across the country deal with a wide-range of individuals seeking legal solutions to their problems every day, including those whom the court deems to lack the capacity to make decisions for themselves for a variety of reasons. Once a judicial decision regarding capacity is made, that decision is binding and has legal, social, and psychological implications for that individual. State statutes and common law create procedural rules, standards, and balancing tests that judges follow in order to determine whether an individual has diminished capacity. This legal-label, diminished capacity, simply put, means that the individual is legally unfit to make decisions for him or herself. However, many of these statutory and common law rules do not provide judges a solution for dealing with diminishing capacity over time, when a person is somewhere between diminished capacity and full decisional capacity. Defining diminished capacity is difficult for courts because often certain factors only indicate diminished capacity without offering a bright line test. Therefore, courts may appoint a guardian or executor to speak for the individual with diminishing capacity, even when capacity is not fully diminished, instead of allowing that person to have a voice in the process.

Mediation can give those with diminishing capacity over time a voice in the process without being adversarial and without a one-size-fits-all judicial ruling. Participation in mediation can prevent the ultimate need for litigation by presenting a forum for individuals with diminishing capacity to resolve their disputes and plan for the future if needed. Diminishing capacity over time affects many individuals but the elderly are affected at a particularly high rate because of their unique struggles with dementia and other aging-related issues. Alzheimer's disease is the most common form of dementia affecting over 5.3 million Americans and can offer a predictable and definite picture of slowly diminishing capacity over time. This paper will illustrate how mediation can deal with diminishing capacity over time by helping to avoid litigation and better serve the goals of the suffering person and family using Alzheimer's disease as a backdrop for the discussion.

II. Alzheimer's Disease: A Prevalent and Progressive Disorder

Alzheimer's disease affects millions of Americans, typically the elderly. Thirteen percent of Americans over sixty-five years of age have Alzheimer's disease. However, the disease can affect individuals as young as thirty years old. Typically, those who suffer from Alzheimer's disease begin to show symptoms in their mid-sixties. An individual with Alzheimer's can live from four to twenty years with the disease, with slow and tedious loss of brain and physical functions before the disease is fatal. Tom DeBaggio, an individual suffering from Alzheimer's disease, described it as "the closest thing to being eaten alive slowly."

In order to understand how mediation can better serve the goals of individuals with Alzheimer's disease, some basic knowledge about the symptoms and progression of the disease is required. Although the

disease is characterized in the public-eye primarily as memory-loss, it truly affects the gamut of brain functions from behavioral, memory, and thinking centers of the brain in the early stages to complete loss of physical awareness and control in the later stages. Over time, a individuals with Alzheimer's disease becomes less and less capable of making decisions, thinking ahead, and communicating thoughts. The symptoms of Alzheimer's disease gradually worsen over many years. The early stages of the disease are characterized by mild memory loss, but the late-stages of Alzheimer's come with a complete lack of ability to converse and lack of response to or knowledge of the environment. As the disease progresses, individuals ose the capacity to make medical health care decisions and to manage their financial affairs. Alzheimer's disease serves as a useful picture of how capacity can diminish over time because every individual with the disease experience the stages progressively over an extended period of time. Ultimately, the disease is fatal.

There are seven definable stages of Alzheimer's disease; however, the stages tend to operate on a continuum. A switch from one stage to the next is not easily recognizable because Alzheimer's disease presents itself in different ways for different people and because the stages and symptoms can blend together. In the early stages of Alzheimer's disease, the individual will already have difficulties with complex financial transactions due to difficulties with memory and concentration. However, up to and including parts of Stage Three of the disease, individuals can still articulate their opinions and preferences for their own care now and in the future.

Stage One of the Alzheimer's disease is symptomless. During Stage Two, "Very Mild Cognitive Decline", individuals begin to experience symptoms such as short memory lapses. Stage Three, "Mild Cognitive Decline", comes with greater memory and concentration impairment that is characterized by trouble planning and difficulty remembering things just read. After Stage Three, the individual with the disease will likely be unable to continue to make informed decisions regarding his or her care due to the progression of the illness. In Stage Four, "Moderate Cognitive Decline", forming and voicing opinions about future care and finances is much more difficult because during this stage individuals have difficulty with complex tasks, such as paying bills, and tend to forget their own personal history. By Stage Five, "Moderately Severe Cognitive Decline", and Stage Six, "Severe Cognitive Decline", individuals have severe memory gaps, need help with day-to-day activities, and begin to lose awareness of their surroundings. Ultimately, in Stage Seven, "Very Severe Cognitive Decline", control over bodily functions deteriorates, the individual loses awareness of his or her surroundings, and he or she dies.

Because Alzheimer's disease lasts for such a long period of time (commonly between four and twenty years), is ultimately fatal, and has no cure, individuals with the disease and their families must consider long-term plans well in advance of death. This prolonged timeline of diminishing capacity makes the disease challenging for the legal community and encourages families to seek legal advice and remedies way in advance of the more debilitating symptoms that accompany the disease. The family of the individual with the disease wants to do what is best for their loved-one and that individual wants to have an active role in his or her future planning. People, regardless of whether they have Alzheimer's disease, often have very specific and passionate views about the care they would like to receive in their old age, and they would like to have an active role in planning for that care.

People with Alzheimer's today are more likely to be diagnosed and treated at an earlier stage of the disease because of advances in technology and the increased awareness that dementia is not a normal part of aging. There are medicines and non-drug treatments that can help individuals manage the symptoms of the disease, but there is no cure. Thus, earlier diagnoses and treatment gives the individual with the disease and his or her family more time to plan and allows the individual to have a more active role in long-term planning. The involvement of the individual with diminishing capacity in his or her future planning is particularly available in the case of Alzheimer's disease because many affected individuals "retain decisional capacity at the onset of their illness" and may not completely lose capacity for many years. The plan is not hypothetical, as in the case of a living will, and the need for care is definitively predictable because of the prolonged course

of the disease, making planning for Alzheimer's disease unique. Depending on the age and general health of the individual with Alzheimer's disease, the road to Stage Three of the disease may be long or short, so it is important to have a legal process with options and malleability. The legal processes available should be able to change and grow with the disease in order to provide the suffering individual with the ability to participate as long as possible as well as to provide a custom solution based on his or her then-current needs.

Balancing the desires of the family members and that of the individual with Alzheimer's disease can be challenging for the legal system, because the system typically offers black-and-white results. In a court proceeding, there are winners and losers, those who get what they want and those who do not. For example, in a court guardianship proceeding, the judge appoints a guardian or does not, even though capacity is not an all-or-nothing proposition. The adversarial process may not be the ideal forum for dealing with legal issues that arise out of Alzheimer's disease which may include guardianship, powers of attorney, long-term care, financial planning, and advanced directives. Mediation can help individuals with Alzheimer's disease and their families plan for the inevitable and ultimately avoid the court system's black-and-white solutions while also giving those with Alzheimer's disease a more active voice in that future planning.

III. Diminish*ing* Capacity

As already noted, Alzheimer's provides a prime example of a medical condition that results in diminishing capacity over time. Because the disease takes years to progress and complete loss of capacity may not occur until Stage Three, it poses unique issues for the legal system and society. Alzheimer's disease operates in phases, is always progressive, and has no cure. Lawyers and judges are asked to deal with diminished capacity, in theses cases, as if the answer to the questions is clear-cut because our legal system rarely views decisional capacity as a dynamic process involving the interplay of a variety of variables that change over time. The statutory and common law rules regarding diminished capacity are not accommodating to those with Alzheimer's disease because they lack the fluidity needed to evaluate an individual whose capacity is diminishing over time. The lack of fluidity in the definition of decisional capacity can lead to a court deeming an individual with Alzheimer's disease to have diminished capacity, thereby blocking him or her from participating in further discussions about his or her future care. Mediation can offer a solution in the early stages of the disease when the individual's decision-making capacity is not so clear-cut and a ruling that the individual suffers from diminished capacity would greatly impede that individual's role in his or her future planning.

The judicial system treats all individuals with diminished capacity the same without offering those necessary flexible solutions that individuals whose capacity waivers over time need. This lack of flexibility effectively stifles the voice of a population who is still capable of making informed decisions. Often judges, lawyers, and the other parties respond to judicial proceedings by treating the incapacitated person in a paternalistic manner. For example, the rules of professional conduct require attorneys to deal with a client's diminished capacity as the lawyer sees fit. Thus, in an attorney-client relationship, the Model Rules of Professional Conduct require an attorney to try his or her best to "maintain a normal client-lawyer relationship" but if the risk of maintaining that normal relationship is too high, the lawyer may take "protective action". MODEL RULES OF PROF'L CONDUCT R. 1.14 (2009). "Protective actions" may include "seeking the appointment of a guardian ad litem, conservator, or guardian" and authorizing the attorney to disclose certain confidential information. The Model Rules of Professional Conduct, which lawyers and judges turn to for ethical and legal guidance, fail to offer any commentary regarding an individual with diminishing capacity over time by not offering any "clue[s] on how to assess [the] task-specific, partial, or intermittent incapacity" that characterize Alzheimer's disease. Mediation offers a way to deal with diminishing capacity in a less paternalistic manner because participation in mediation can occur without the binding, either-or judicial determination.

One commentator defines diminished capacity as "impairment by reason of mental illness, mental deficiency, physical illness or disability, advanced

age, chronic use of drugs, chronic intoxication, or other cause…to the extent the person lacks sufficient understanding to make or communicate responsible decisions." A. Frank Johns, *Older Clients with Diminishing Capacity and Their Advance Directives*, 39 REAL PROP. PROB. & TR. J. 107, 115 (2004). This and other definitions do not provide a very clear demarcation between when an individual can no longer make informed decisions. Some commentators even question the ability of a judge to make a definitive capacity judgment by evaluating the individual at one point in time. Within the definition given above, an individual in the early stages of Alzheimer's disease may qualify as an individual with diminished capacity even though technically his or her capacity is diminishing.

There is not a clear judicial test regarding capacity because courts have spoken in generalities that make consistent application of judicial tests difficult at best. Often, judges give more deference to their own beliefs or to expert witness opinions than to the comments and opinion of the individual being judged. This is because determining diminished capacity is necessarily a highly discretionary determination; there are no bright lines that demarcate competence and no precise degree of functional insufficiency signals incompetence. Diminished capacity is an instant in a person's life where he or she is legally considered to be no longer able to make decisions or understand consequences. Diminishing capacity, however, addresses the situation in which a person may have trouble making some decisions but not all. Furthermore, capacity, may wax and wane considerably over the course of time.

Because Alzheimer's disease comes in definable stages, each individual with Alzheimer's disease cannot be treated the same because each may show different symptoms at different times. While courts may attempt to tailor solutions to each individual, taking into consideration personal values and preferences is difficult – and arguably inappropriate – for a court. Additionally, the binding determinations that courts are required to making regarding capacity can eliminate the opportunity to make fundamental choices about fundamental personal and economic arrangements. Such a loss of autonomy can have very serious consequences, affecting mental health, sense of personal control, and physical well-being. Mediation offers a way in which the individual with Alzheimer's disease and his or her family can resolve the aforementioned legal issues without stripping the individual with the disease of his or her decisional autonomy. Persons with Alzheimer's disease are being diagnosed and treated earlier and earlier because of advancements in technology and general awareness that dementia is not normal aging, making the individual's involvement in planning for the future more realizable than ever before even if technically the individual's capacity is diminish*ing* over time.

IV. Mediation: An Alternative Approach

People with Alzheimer's are faced with an array of future legal battles because of their diminishing capacity and the inevitabilities of the disease. These legal battles can be solved ahead of time through mediation that effectively accounts for and considers the needs of an individual with diminishing capacity. Mediation can create that custom-fitted, cheaper solution for each individual with diminishing capacity and his or her family without risking erroneous deprivation of decisional autonomy through a judicial determination of diminished capacity that may occur in a court proceeding.

Lisa Brodoff, *Planning for Alzheimer's Disease with Mental Health Advance Directives*, 17 ELDER L.J. 239 (2010) notes a variety of future issues that may confront an individual with Alzheimer's disease, family, and lawyers who represent interested persons. These include:

"choosing in-home care options and out-of-home placements when the almost inevitable need arises; dealing with the possibilities of combative or sexually aggressive behaviors; paying the high and burdensome cost of long-term nursing home care with Medicaid planning, including agreeing to a Medicaid divorce if necessary to ease family financial burdens; consideration of possible future intimate relationships for oneself or one's spouse or partner; agreeing to participate in new Alzheimer's disease medication and treatment research studies, even if doing so could result in an earlier death or difficult side effects; and decisions about when driving privileges should be taken away."

Planning ahead for these and other inevitable decisions can make a huge difference in the future contentedness of the individual with Alzheimer's disease and his or her family. "Nursing home placement, extensive personal care needs, possible assaultive and compulsive behaviors, and loss of decisional capacity" make planning particularly important because it can give the future caregivers some reprieve and decrease the amount of potential future stressors. Planning ahead, with the input of the individual with Alzheimer's disease, can also help the family in the later stages of the disease find comfort in the knowledge that they are caring for their loved one in the way he or she preferred or at least in a way that the individual at one time understood.

These types of legal issues can certainly rack up billable hours if they needed to be solved in a courtroom. If legal issues are settled in a courtroom as they arise instead of planning for the inevitable at the mediation table, the proceedings could be tedious and expensive due to the particular financial strains that this disease places on individuals. Alzheimer's disease is expensive because of the duration of the disease and amount of daily care required. For care alone, individuals with Alzheimer's disease and their families can pay up to $100 per day for adult day care centers, over $50,000 per year for assisted living, or over $100,000 per year for nursing home care. For an in-home caregiver to help with non-medical needs, individuals with Alzheimer's and their families can expect to pay up to $20 to $30 per hour. Additionally, there is no way to determine ahead of time how long the individual will need each type of care. With so many guaranteed expenses, why tack on extra time, money, and uncertainty when mediation offers a quicker, cheaper, and more personal solution?

Mediation can better serve the legal needs of an individual with Alzheimer's disease than the court system because it allows for a wider array of potential solutions and allows the individual with the disease to be actively and productively involved. The mediator has an assortment of tools available that can help to deal with diminishing capacity and serve the needs of the parties better than in a court proceeding. Additionally, there are abstract benefits, outside of the mediation itself, which mediation can offer to an individual with Alzheimer's disease and his or her family.

Mediation in elder law focuses on what is best for mom or dad while at the same time minimizing family conflict. For the reasons indicated earlier, individuals with Alzheimer's disease need an approach that enhances and assists autonomy, and that respectfully considers their expressed preferences, maximizes their mental abilities, and empowers them despite cognitive impairments. Mediation provides this needed alternative approach by giving the parties, including the individual affected by Alzheimer's disease, the opportunity to hear all sides of the dispute, identifying their true goals, brainstorming possible solutions, and evaluating the efficacy of those solutions to ultimately reach a mutual agreement. While lawyers hear only one side of the dispute, and judges can only evaluate the dispute from an adversarial standpoint, mediators are in a unique position to deal with all sides of an issue from a neutral perspective.

Mediators have a wide variety of approaches that can help in dealing with an individual's diminishing capacity. Mediation can help to protect the individual from coercion and unsatisfactory agreements while also giving the individual the voice in the process that the judicial processes fail to provide. Mediation can be particularly beneficial for the large number of persons in the middle stages of the illness, when there may still be things that others can do to enhance and assist autonomy. Individuals with Alzheimer's disease need a subtle and more nuanced approach that the legal system is poorly equipped to accommodate. The mediator can provide a different approach while also doing small, subtle things to help the individual with Alzheimer's disease have a more active role in the discussions about his or her future. Mediation can provide a more amenable approach for dealing with those inevitable legal issues faced by persons with Alzheimer's disease and their families, including: the ability to compensate for possible power imbalances, suggesting possible resolutions, reframing the issues, and maintaining confidentiality.

A. Power Imbalances

The ability to compensate for possible power imbalances is a unique trait of the mediator. Because the mediator's goal is to help the parties come up with a solution that works for both sides in an accommodating and open environment, he or she is particularly aware of ensuring that one side is not coerced into a solution by the other. This coercion is often not intentional but occurs as a result of the power imbalance between the parties. The party with Alzheimer's disease has less power in this situation due to the additional mental challenges he or she may face because of the disease. Thus, the disease may lead the individual to lack confidence in his or her ability to participate, causing a feeling of powerlessness that is only exacerbated by the other party's adversarial position and demeanor.

The mediator can compensate for potential power imbalances ahead of time by accommodating the individual with the disease. The mediator can encourage the individual with Alzheimer's and his or her lawyer to bring a support person. The mediator can also allow the individual with Alzheimer's to speak first thereby preventing the party not suffering from potential diminishing capacity from influencing the discussion in a negative manner. By allowing the individual with diminishing capacity to speak first, the mediator allows the individual to present his or her untainted version of the story and forces the other side to hear the individual's true feelings about the situation.

The mediator should be knowledgeable about Altzheimer's disease. This knowledge can help the mediator to formulate an open and informed process, so as to best accommodate the individual with the disease. Such an approach will help the person with Alzheimer's disease feel more comfortable with the process, and account for the potential diminishing capacity of the individual without drawing the attention of the other party to any symptoms that the individual is experiencing. By accommodating the individual with diminishing capacity before the process even begins, the mediator can help that person feel less powerless and more able to actively and effectively participate in the mediation.

The mediator can also take actions during the mediation to compensate for a power imbalance that may arise. Individuals with Alzheimer's disease can experience the disease differently at different times and may be fine at certain times of the day and not at others. Possible actions may include utilizing mediator-initiated caucus sessions to allow the individual with Alzheimer's disease to feel less pressured and intimidated. A caucus session is a private and confidential meeting between the mediator and one of the parties. Individuals with Alzheimer's disease may have trouble forming and communicating coherent thoughts. This can frustrate both sides and hinder the process. By splitting up the parties, the mediator can use tailored communication techniques to help the party with Alzheimer's disease express him or herself in a less challenging environment. These techniques may include, allowing the person to think about what he or she wants to say without interruption, attempting to guess the correct word if the individual cannot come up with the right language, speaking slowly and clearly, and asking one question at a time and repeating if needed.

By allowing the person with Alzheimer's disease more time to process the conversation and to respond, the mediator can understand the individual's true voice, values, and motives in order to better relay that information to the other party. These techniques would be more effective in caucus because the other party may lose patience, interrupt, or criticize which can and often will frustrate the individual with the disease and make communication even more difficult for him or her by adding those additional stressors. Understanding an individual suffering from diminishing capacity requires patience, listening ability, and an ongoing dialogue. Utilizing caucus sessions helps the mediation move forward and can be effective at any stage of the disease as long as the mediator remains patient. This approach allows the mediator to accommodate diminishing capacity fluidly and functionally regardless of the type of dispute and again helps to avoid the situation in which the individual with Alzheimer's disease feels powerless. Therefore, whether the individual with Alzheimer's disease comes to the mediation at Stage One or Stage Three of the disease, the mediator can be prepared to deal with the potential differences in communication abilities and the resulting power imbalance between the parties. By planning

ahead and using caucuses to take quick but subtle action during the mediation if an issue arises, the mediator can give the individual with Alzheimer's disease that voice in the process that could be lost in a more adversarial and less accommodating setting – such as a judicial proceedings.

B. Promoting Solutions

Another approach that may benefit an individual with diminishing capacity is the mediator's ability to suggest possible resolutions which can make the process less adversarial. Generally, suggesting possible solutions allows the mediator to ask each side to consider options that may reconcile the interests of the parties and create an atmosphere for further negotiation. In the context of a mediation involving a person with Alzheimer's disease, suggesting possible resolutions can serve two major additional functions.

First, by suggesting solutions, the mediator helps the individual with Alzheimer's disease get a better understanding of the dispute at hand. Individuals with Alzheimer's often have trouble understanding complex conversations and transactions. By proposing potential end results, the mediator offers clear and concise explanations of the problem without all of the complications that can be confusing. For example, in a mediation regarding how to pay for long-term care the solution may be as simple as cashing in on a long-term care insurance policy, applying for Medicare or Medicaid contributions, and receiving contributions from the individual's family members. While this solution is succinctly stated and easy to understand, listening to people argue and negotiate about specific dollar amounts and percentages of contributions can get confusing and make the dispute seem more complicated than it is. If the dispute seems too complicated or confusing to the individual with Alzheimer's disease, that person may feel like his or her voice is unheard or that he or she cannot understand the dispute well enough to even speak up in the first place. When the mediator suggests a succinct solution like the one above, the individual with Alzheimer's disease can see the big picture without getting bogged down in the complicated details.

Second, suggesting possible resolutions may help the individual with Alzheimer's disease formulate his or her own ideas about solutions. Individuals with Alzheimer's can sometimes have difficulty organizing their words and thoughts logically. If no one in the room is presenting options that consider the viewpoints on a particular issue of the individual with diminishing capacity, it may be difficult for that individual to come up with ideas on his or her own and it may be more likely that he or she will agree to something disagreeable. By presenting options that take into consideration the interests of both sides, the individual with Alzheimer's disease can more easily assess the situation and consider alternatives to the other party's one-sided suggestions. The mediator effectively gives the individual with Alzheimer's disease the words to concoct his or her own solutions. This mediator tool helps to deal with diminishing capacity by facilitating the discussion of solutions that consider the needs of both sides and by allowing the individual with Alzheimer's disease to feel like someone in the room is considering his or her opinions and goals. The individual with diminishing capacity can, at times, be unable to communicate his or her needs and desires. By translating those needs, desires, opinions, and goals into potential solutions, the mediator helps the individual articulate his or her feelings but does so in a non-adversarial way thereby avoiding alienating the other party and keeping the discussion productive. Suggesting possible solutions allows the individual with Alzheimer's disease to better understand the dispute and prevents the mediation and ultimate agreement from being completely one-sided, thereby assisting the individual with the disease in voicing his or her opinion.

C. Reframing

Reframing is an the comments made during the mediation by both parties. Reframing is a technique whereby a mediator rephrases comments made by the parties to make the viewpoints of the parties more amenable to resolution and more reasonable to the opposition. Methods of reframing include: "rephrasing, focusing, proposing an option, moving from abstract to specific, going behind positions, stimulating new ideas, looking to the future, dealing with emotional outbursts, preempting, creating a

metaphor, being direct, Reframing allows the individual with diminishing capacity to be understood and included in the dispute with the recognition that paternalistic and ultimately makes for a more tailored solution that reflects the actual needs of the specific individual with Alzheimer's disease. The voices of all of those involved, which the mediation process amplifies and helps to reconcile, would be lacking in a court proceeding because court proceedings are not open dialogues but adversarial, winner-take-all fora. Many of the legal issues that individuals with diminishing capacity are facing involve important issues of self-determination and the rights of families to participate in the decision-making process, making the involvement of everyone a critical component to an equitable and correct result. Mediation offers a psychological benefit to the individual with diminished capacity and his or her family that a court proceeding could never match, the opportunity to work together.

Court processes can be long and tedious, whereas an agreement in mediation can be reached in a much shorter time period and can prevent the need for future litigation. Avoiding long and drawn-out court proceedings by mediating current and potential future disagreements instead of litigating can benefit the individual with diminishing capacity by making the solution timelier. Because the speed of the progression of the disease is unpredictable, a timely solution is critical to the person with Alzheimer's disease getting the necessary care. Moreover, obtaining an agreement in a short time period increases the possibility that the individual with Alzheimer's disease will be able to be involved in the decision-making process. As the disease progresses, he or she will be less able to adequately communicate about or understand the proceedings. As discussed above, after Stage Three of the disease, the mental functions of an individual with Alzheimer's disease have deteriorated to the point that meaningful participation by him or her is almost impossible. It is important to be able to move quickly, which mediation can do, because of all of the benefits of participation by the individual with Alzheimer's disease and because of the desire to give him or her a voice in the process.

Finally, mediation allows all the parties to be involved and can be inclusive of the entire family of the individual with diminishing capacity. This inclusivity has the benefit of setting up a future support system for the individual with Alzheimer's disease and allows for all interested parties to better understand the future wishes of that individual by hearing it for themselves. Mediation requires everyone to work together to reach a solution that everyone can agree upon. As a result, the process increases communication between the parties and the parties may be better able to work with each other to solve future problems by contributing to a better long-term relationship between everyone involved. Mediation creates an environment in which everyone can work together to find the best solution for the individual suffering from the disease. Harmony among those that care for the individual suffering from Alzheimer's disease will ultimately benefit that individual by creating a support system and by creating a plan of action that everyone has had a hand in fashioning with the hope that everyone will have a hand in carrying it out.

The benefits of mediating instead of litigating when a party suffers from Alzheimer's disease illustrate that mediation is a viable and a preferable option. Mediation can serve to solve current disputes, but more importantly, it can help to plan for the future thereby seeking to avoid the need for litigation altogether. By allowing for a flexible and creative resolution, giving the individual with diminishing capacity some autonomy, saving money and time, and allowing the family to be harmoniously involved, mediation offers a higher rate of a successful long-term care plan.

V. Conclusion

Mediation provides a person who suffers from diminishing capacity over time and his or her family a forum to deal with long-term issues – and failing to deal with them is not a realistic option. Alzheimer's disease is the most prevalent form of dementia affecting a group of people that are largely affected by diminishing capacity over time, the elderly. This paper used Alzheimer's disease as a case-study to evaluate the current system's response to diminishing capacity over time and how mediation provides a better method of dealing with issues arising out of that diminishing capacity.

In the current system, diminishing capacity is in legal limbo. Courts have trouble dealing with issues arising out of diminishing capacity because they must operate in a black-and-white, either-or context, even though capacity is fluid rather than static. In order to participate in a court proceeding, the court must evaluate an individual's decisional capacity. As explained above, individuals with diminishing capacity are deemed to have diminished capacity even when capacity is not fully diminished for many reasons including paternalism and a fear that individuals may not be properly cared for without that determination. Such a binding, legal decision often causes individuals with diminishing capacity to lose their voice in the process of planning for their future.

Mediation, in lieu of litigation can allow Altzheimer's patients the chance to participate in their future planning without the label of diminished capacity. While recognizing that the individual is suffering from diminishing capacity over time, mediation allows him or her to actively and productively participate. The benefits of mediating instead of litigating when a party is suffering from diminishing capacity over time come both from within the process itself and in the abstract. In the process itself, the mediator's toolbox gives the mediator the ability to encourage participation from the individual with diminishing capacity as well as offer a more flexible and fair solution. The particular mediator tools that can help achieve these goals include compensating for possible power imbalances, suggesting possible resolutions, reframing the issues, and maintaining confidentiality. In the abstract, mediation offers individuals with diminishing capacity the benefits that the court-system simply cannot provide including: a flexible and creative resolution, a feeling of autonomy, financial savings, and a quicker resolution. Additionally, mediation allows the family to be involved without being adversarial thereby setting up a framework for a future support system for the individual with diminishing capacity.

By focusing on the individual with diminishing capacity and his or her needs, mediation offers solutions and a level of participation that court proceedings cannot match. Mediation gives individuals with diminishing capacity a voice in the process without sacrificing the legal resolution that the individual and his or her family seeks. Thus, with mediation, grandma gets a voice, too.

Bibliography

Alzheimer's Association Web Page: Comprehensive Information About Altzheimer's.

William M. Altman et al, *Autonomy, Competence, and Informed Consent in Long Term Care: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1671, 1678 (1992).

Lisa Brodoff, *Planning for Alzheimer's Disease with Mental Health Advance Directives*, 17 ELDER L.J. 239 (2010).

Robert Fleming & Rebecca Morgan, *Lawyer's Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients,* 35 GA. L. REV. 735, 742 (2001).

Edie L. Greene, *Deciding to Let Others Decide: Judging the Need for Guardianship and Conservatorship*, 22 PROP. & PROB. REV. 47, 48 (2008).

A. Frank Johns, *Older Clients with Diminishing Capacity and Their Advance Directives*, 39 REAL PROP. PROB. & TR. J. 107, 115 (2004).

Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 640 (2002).

Catherine Anne Seal & Michael A. Kirtland, *Using Mediation in Guardianship Litigation,* 39 COLO. LAW. 37, 38 (2010).

Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 GA. L. REV. 785 (2001).

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A New Approach: Applying the Principles of Appreciative Inquiry (AI) in Mediation

By Stephen Pew* and Kay Elkins Elliott**

As mediators we are caught in our "own box of small minded thinking to define…what we do." Most of us have been trained to solve problems following one or more "methods" or "practices" from the "experts." We fill our "small box" with problem solving methods and implement them faithfully. We start with the problems and expectations that clients and lawyers bring us (which may be two different sets of goals, based on the incentives), we try to narrow the problems to a manageable set of issues (given the limited mediation time we have available) and then create doubt and risk to get the participants to make concessions through distributive or integrative bargaining or by appealing to their sense of fairness, justice or pragmatism.

In the end, if parties unhappily agree to some diminished common ground(compromise) we all declare a "Pyrrhic victory" and we got a settlement." When we gather as mediators, we debate the merits of different mediation methods, citing great mediators from "Getting to Yes" to the latest method from newsletters or the latest conference attended. We continue to look for new techniques and strategies to improve our skill set because we want to be the best we can be.

Something relatively new on the horizon is worth considering. Well-honed mediators can use critical thinking and appreciative inquiry methods to help clients craft innovative solutions and methods to resolve their own dilemmas from their own experiences, practices and strengths. The mediator's role is not to DO the problem solving but to create an environment where appreciation and inquiry can occur. Thus far we have not tended to be appreciative of the "unique gifts, skills and contributions" that clients bring to the process. We have tended to believe that only with lawyers and mediators doing most of the talking can problems reach resolution. We encourage parties, even very sophisticated ones, to give up their power to the experts and even to let the attorney do the talking.

This is an opportunity to apply a strategic planning method from industry that starts with appreciating the best strengths participants bring to any discussion. Appreciative Inquiry, as constructed by David Cooperrider, Ph.D., is: "*the study and exploration of what gives life to human systems when they function at their best. Appreciative Inquiry suggests that human organizing and change, at its best, is a relational process of inquiry grounded in affirmation and appreciation.* . Whitney D. Trosten-Bloom, The Power of Appreciative Inquiry (2003). For the most part Appreciative Inquiry (AI) has focused on how organizations and corporate structures address strategic issues and learn to use their strengths to bring about change. The principles of AI can also be applied to a mediation situation. Larry Bridgesmith, in his recent article in mediate.com, *Major League and Idea Entrepreneurs,* opens the window to those possibilities by pointing out that:

"The skills of mediators, if well developed, are precisely what idea entrepreneurs provide. A great mediator is a master in promoting self-determination which allows people stuck in their unhelpful thinking to take out, examine and improve their way of thinking about a problem, then change it for the better. Mediators hone the skills of reality testing in order to allow their clients to re-examine the confirmatory bias which has trapped them in unhelpful thought until a breakthrough is achieved. Great mediators are masters of the question."

Rather than solve problems or coach participants to consider alternatives, we might simply create an en-

vironment where the stage is set for participants to find appreciative ways to view the process. Consider the following tenets of AI as they might be applied to mediation:
To **appreciate** is:

To recognize the best in people and the world around us
To perceive those things which give life, health, vitality and excellence to living human beings
To affirm past and present strengths, successes , assets and potentials
To increase in value (that is, the investment has appreciated in value)

"*To **inquire** refers to acts of exploration and discovery. A quest for new possibilities, being in a state of unknowing, wonder and willingness to learn"* How many mediators create that environment? How many participants come to mediation with that mindset? In some cases involving church groups, elder care, workplace disputes, environmental problems and even business disputes, this approach could be added to the current methods being used.

To inquire is:

To ask questions
To study
To search, explore, delve into or investigate.

"*Questions must be affirmative and focused on topics valuable to people involved and directed at the central issues and success of the organization"* Given that we may be able to apply the principles of AI to mediation, let us examine how we might introduce these into the mediation process.

The first challenge is to approach the process from an appreciative direction -starting with the philosophical premise that we are not mediating "disputants." Instead, we are working with individuals who bring a wealth of information and talent to the mediation process, but who as yet have not been encouraged and facilitated to use appreciative strengths to find a mutually acceptable solution. This is a major philosophical shift from traditional mediation where participants often enter with a "hard bargaining" strategic mindset. As Bridgsmith points out, "*most people in need of the skills of a mediator would never allow themselves to be helped by a mediator. That's something for people who have failed, they protest."*

Subsequently mediators using an AI approach would create an environment where those attending the mediation do not have a mindset of failure but rather a mindset of appreciation for their past successes and searching for ways to apply their skills to this new challenge. It is interesting to see parallels in other approaches such as Solution Focused Therapy, Transformative Mediation, Narrative Mediation and Dialogue Processes. In all of these paradigms, the parties are not viewed as hopelessly locked in conflict they cannot resolve; instead they are viewed as temporarily locked in parts of their brain that have not yet found the possibilities for settlement and peace. This underlying assumption may appear, at first, to be at odds with the typical civil litigation setting but perhaps this is too limited a view. Many intellectual property cases have resulted in very creative outcomes when the lawyers, parties and mediators expanded the pie to include options for joint gain. Of course, not all cases will fit this approach.

From that viewpoint the mediator might direct her initial "inquiry" not to the problems the parties bring, but to their history of successful past negotiations or problem solving. We might open a discussion asking questions such as; tell us a story about a time when you were able to successfully negotiate differences. (In family mediation this might be between the couple; or in civil mediation, a time when a partnership with other companies was achieved. This may seem startling to the participants as they probably were informed or coached to lay out their grievances and demands, typical of the problem-focused approach and be prepared to "hard bargain." An environment of appreciation and inquiry begins the catalytic effects of combining appreciation and inquiry designed to facilitate change. As Bridgesmith points out, *"promoting self-determination which allows people stuck in their unhelpful thinking to take out, examine and improve their way of thinking about a problem."* In some cases this approach is already being used when a mediator asks a party, after prolonged and unsuccessful distributive bargaining over money, to imagine that the mediator

has a magic wand and can give the disputant anything she wants. This can produce an entirely different "interest" or need that haggling will never elicit. By asking the disputant to focus on a positive or a desire, the hidden motivation to settle may emerge. In one case, for example, the

plaintiff in a worker's compensation case said: "I would like to be able to wear a sleeveless dress again". Her arm had been severed, and then reattached, leaving her with 80% mobility. All of her medical expenses and back pay had already been settled. The negotiation over a lump sum for the 20% loss of mobility of one arm was the only issue, her attorney told her, which could be discussed. Since she wanted plastic surgery to make her "pretty again", the case was easily resolved by the payment of a lump sum and the plastic surgeon. The total amount of the payout was equal to the amount the insurance company had already put on the table.

Perhaps then the AI approach is not so different from the search for underlying motivations that many mediators conduct prior to brainstorming options. We call ourselves problem solvers – why not use any ethical method that promotes that goal?

Rather than ask participants to engage in a dispute about differences, we encourage them by asking them to tell stories that draw upon their own history of success in resolving differences and finding higher ground, which is an AI concept. If we look for common ground, it is found in a mud hole of differences. What they bring in common is an understanding of how they differ when they are at their worst. Resolution is more likely found on higher ground which can come from an appreciative approach based in inquiry about what works best when people are their best selves.

Note that this is different than a technique where the mediator asks family disputants to share a time when you were in love or how you felt about each other when you were first married. Such a technique to invoke memories of positive emotion may be successful in "softening" the disputants to be more amenable to compromise or compassion. Use of AI, however, is intended to engage *cognitive* processes of critical thinking and solution seeking by asking more productive questions that appreciate the resolution process. Whether it nurtures the "feeling" process is unknown. This is not intended to suggest that bitter emotions may not have to be addressed for cathartic reasons. Whether AI is a cognitive or emotional process, or both, is not the issue addressed here. We only note that these may be separate issues.

This process can create a context for all involved to go beyond merely being included in the process but indeed becoming the designers and architects of a resolution through mutual inquiry. When solutions to challenges come from the people who have to live with those solutions, it is more likely that they will have ownership of those solutions and that the solutions will be more sustaining. In this approach *"appreciative inquiry turns command and control cultures into communities of discovery and cooperation."(9)*. Or, as we might say in mediation, turns dispute and control bargaining into an environment of discovery and cooperation for mutually beneficial outcomes.

While the techniques of using AI in mediation are more detailed and require a working skill set of AI, the basic premise as outlined above builds the foundation for creating an AI environment where appreciative solutions come from thinking about resolution in a more helpful way than dispute and bargaining. This suggested technique is based on the way the mediator constructs the appreciative inquiry context of the discussion. Mediators facilitate thought leadership by invoking the participants own appreciative inquiries into their dilemmas.

In the next article, the authors will compare AI with three other approaches to conflict resolution: Narrative Mediation, Dialogue Processes and Transformative Mediation.

Additional Readings:

Hartelius, J.E.,Cherwitz,R., Promoting Discovery and Ownership: Graduate Students as Intellectual Entrepreneurs, Chapter 7 (2008)

Cooperrider, D.L., Barrett, F. & Srivastva,S., Social Construction and Appreciative Inquiry: A Journey in Organizational Theory in D. Hosking, P. Dachler, & K. Gergen (EDS); Management and Organization: Relational Alternatives to Individualism (1995).

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DOING BUSINESS THE NEW WAY: COLLABORATIVE LAW

By Sherrie R. Abney*

Introduction

Many parties who formerly engaged in trials at the courthouse are finding that the costs of full blown litigation have become financially and emotionally prohibitive. This situation has resulted in a search for methods to resolve disputes more quickly and economically. Collaborative Law, a new alternative dispute resolution procedure, first found success in family cases and is currently being applied in probate, medical error, employment, and business disputes. The process is not only useful in settling disputes; it can also be employed to prevent them. The collaborative process is not for everyone, but it can provide relief from the excessive burdens of litigation for the lawyers and parties who qualify to participate.

Litigation

Litigation cannot guarantee fair and equal treatment, or promote healing. In addition, arbitrary laws may require that a judge or jury deliver a verdict that does not actually provide "justice" for one or more of the parties. There are times when all parties will appeal a court's decision because none of them is satisfied with the outcome.

Litigation is an adversarial process that focuses the lawyers on "blame" in order to "win." Litigation lawyers spend most of their time attempting to prove that the other parties were bad actors and that their clients were justified in whatever they might have done. The litigation "blame game" has destroyed many important relationships of both families and businesses.

Most disputes in litigation will settle before trial, but often settlement occurs after many expensive months or years of conflict. If a case does not settle, goes to trial, and the client "wins," there is often an appeal, and everyone gets to start over. So what does it mean to win in litigation? Is winning getting money even if it destroys any chance of an important ongoing relationship? Is winning punishing the other side even if the final order does not correct the reason there was a loss or injury? Must one party always win at the expense of the other parties?

The Collaborative Process

What if winning could be equated to satisfying the interests of all of the parties? When dispute resolution focuses on the clients' "interests" instead of the law or "winning," there is a much greater opportunity for parties to experience lasting satisfaction with the outcome. This is possible since the collaborative process does not rely on the law or third party neutrals to determine resolution. The parties in the collaborative process, not their lawyers, judges, or juries, are in control of all decisions that relate to the resolution of their disputes. Until the interests of the parties are addressed, no one really wins in any dispute resolution procedure, and there frequently will be no lasting resolution.

Collaborative Approach

The collaborative process is based on teamwork, full disclosure, honesty, respect, civility, healing, integrity, parity of costs, exploration of alternatives to determine a fair resolution, and parties maintaining control over the results. The entire process is designed to achieve one goal—to peacefully settle the dispute. If the parties cannot settle in the collaborative process, the their attorneys must withdraw. Collaborative lawyers cannot appear in an adversarial proceeding related to the subject matter of the dispute. The mandatory withdrawal provision is important for the following three reasons: First, the

collaborative lawyers are able to focus 100% of their time and skills on finding appropriate options for resolution. Next, the parties know that if they do not settle, they will have to get new lawyers to continue to litigation, so this eliminates people who are not serious about resolving their disputes. And finally, in order to have open and honest discussions, the parties must be comfortable with the other parties and their lawyers. If the parties know that the other lawyers can never cross examine them in court, they will feel freer to participate in the process.

The Process

The collaborative process is voluntary and cannot be court ordered. Once the process has been agreed upon, the parties to the dispute and their collaboratively trained lawyers sign a participation agreement (contract) that sets out the guidelines that are followed during the process. Since collaborative lawyers must withdraw if the dispute does not settle, they are able to focus all of their skills on the interests of the parties and resolution of the dispute rather than dividing time and energy between trying to settle and preparing for trial. This concentrated effort allows disputes to settle months, sometimes years, in advance of settlements that occur on the courthouse steps.

The collaborative approach redefines good lawyering as analysis, clarification, and negotiation. Good lawyering becomes the ability to utilize skills seldom seen in litigation. Collaborative lawyers do not rely on taking advantage of the other sides' mistakes and oversights, nor can they seek to avoid revealing the entire truth of the matters in dispute. Power plays or similar tactics are all unacceptable in the collaborative approach.

The actual resolution of the dispute takes place in a series of two to three hour long, face-to-face meetings of the parties and their lawyers. Each meeting follows an agenda that the participants receive in advance of the meetings, and no decisions are made regarding the actual dispute outside the presence of the parties.

Steps in the Process

There are five steps to the collaborative process. The first step determines the interests and goals of all parties. Parties have an opportunity to state what they want and, perhaps more importantly, why they want it. Each party also has the opportunity to hear the goals and interests of the other parties from the mouths of those parties instead of having messages channeled through lawyers. Hearing first hand saves time and eliminates misunderstandings, confusion, and any "spin" that frequently accompanies hearsay.

Since the parties are required to state the underlying basis of their concerns, they must consider their interests and goals more carefully rather than simply making a demand that has no basis in anything remotely related to reality. Determining interests and goals also lets the parties have a much better idea of the documents and other information that must be collected to intelligently approach resolution of the dispute.

The second step of the collaborative process is the task of actually gathering the necessary information. Parties and their lawyers agree to request only those documents and information that are relevant to the dispute. "Relevant" is defined as the information necessary for each side to come to agreement. Participants also agree to voluntarily comply with requests for delivery of information.

Some disputes will require an expert opinion. In those instances, the parties may decide to employ a single expert. If a single expert can be agreed upon, the parties will receive a truly objective opinion, reduce the cost of their expert opinion, and eliminate the expense of trying to qualify, disqualify, and depose experts.

The focus of the face-to-face meetings is now ready to advance to the third step which is the development of as many options as is reasonably possible. Brainstorming options will lead to out-of-the-box thinking that will result in opportunities for formulating creative solutions.

As the parties explore possibilities, they should be encouraged to concentrate discussions on the future. When negligence is an issue, responsibility for dam-

ages must be discussed; however, the attorneys should direct the discussions to the acts of the responsible party and avoid judgmental personal attacks. Casting blame or finger pointing is, at its very best, nonproductive.

Once the parties are satisfied that they have developed a comprehensive list of options, the parties evaluate the options and discard any that are unrealistic or inappropriate. During this fourth step, it is hoped that each party will become comfortable with opposing counsel; however, it is very important clients understand that although this is a collaborative approach, the parties must not rely on anyone but their own lawyers for legal advice.

The final step of the collaborative process is the negotiation of a resolution which takes each party's interests into consideration. By following the steps in the process, the parties and their counsel have systematically worked through the elements of the dispute and explored solutions that would never have been considered in the litigation process.

Retooling the Mind

Lawyers interested in the collaborative process must be trained and, to be effective, must experience what is referred to as a "paradigm shift." Making the paradigm shift requires an 180° shift in thinking from litigation to collaboration.

One example of a shift in the lawyers' behavior is the lack of reliance on the law to dictate the outcome of the dispute. Clients are privately advised of their legal rights, but discussions about the law are replaced with discussions regarding the interests and goals of the parties in the face-to-face meetings. Constant references to the law will only serve to stifle or limit creative thinking. Parties may ignore the law and resolve their problems in any manner that they agree upon so long as their solutions are not illegal or against public policy.

Some parties and counsel will find it difficult if not impossible to participate in the collaborative process. Lawyers must step back and allow their clients to play an active part in process. Clients must be willing to accept responsibility for their part in creating the problem as well as their part in resolving it. In successful collaborative cases, the dispute becomes the target for attack and all parties and their lawyers form a team and work together to overcome the problem instead of battling each other. If parties and lawyers cannot manage to do that, they should not be in the collaborative process.

Many people see the collaborative process as a many faceted opportunity to not only settle but to also avoid disputes. By using the process to negotiate contracts, parties are able to anticipate and prevent many pitfalls that could later result in expensive conflicts. Areas of the law which can benefit by early use of the process include, but are not limited to, construction contracts, partnership agreements, pre and post nuptial agreements, buy-sell agreements, estate planning documents, and employment contracts.

Parties having disputes in practically any area of the law who are willing to go forward honestly and in good faith can take advantage of the collaborative opportunity to settle their disputes privately yet remain in charge of scheduling and costs. While litigation destroys ongoing relationships, the collaborative process can be a bridge to a redefined relationship and act as a model to resolve future disputes.

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COLLABORATIVE LAW THEORY AND PRACTICE

By Stephen K. Huber*

I. Introduction

This Article addresses two aspects of Collaborative Law (CL): its theoretical underpinnings and the practice of CL as it has grown and adjusted during the twenty (20) years of its existence. If we consider the initial ten years to be a developmental period, CL has been in widespread use for only a decade. Without doubt, CL is the most significant ADR development of the 21st century.

Collaborative Law arose in the context of Family Law, mainly marriage dissolution, and this continues to be the primary subject area for the use of CL. [See the discussion in Part IV , below.] Accordingly, this article uses divorce as the prototype transaction.

In thinking about the perspectives and opinions expressed in this Article, the reader should understand that your author comes to this topic as an outsider. I am not a collaborative lawyer, and have only the most modest knowledge of family law matters. (While CL is not limited to the family context, its origins are in the marriage dissolution arena and virtually all of the CL research involves family practice.) On the other hand, I have long taught and written about ADR and Contracts topics. Since a central, even defining feature, of CL is the participation agreement, a contracts perspective might be viewed as being of particular relevance.

A Note on Terminology: Collaborative Law (CL) v. Collaborative Practice (CP). The publication on which the practice part of this Article relies most heavily is John Lande, *An Empirical Analysis of Collaborative Practice*, 49 Fam. Court Rev. 257 (2011). Lande prefers CP over CL because the process includes practitioners who are not attorneys, and issues that are not legal. Furthermore, CP is the "generally preferred usage in the field." On the other hand, CL is the original usage. [I was tempted to write "traditional usage," but a field that is only twenty years old cannot properly be said to have traditions – even in our world of ever faster changes.] A recent article by Professor Lande was titled, *Principles for Policymakers about Collaborative Law and Other ADR Procedures*, 22 Ohio St. J. on Disp. Resol. 619 (2007).

This Article adopts the term Collaborative Law rather than Collaborative Practice, in important part because it examines and relies on the Uniform Collaborative *Law* Act (UCLA). This uniform act promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) is a major development, and its terminology is likely to achieve widespread use. Your author does not claim to know whether there is a preferred usage in the field, let alone whether that usage is CL or CP. The answer may differ depending on the context, and from place to place. The discussion of CL practice in Part IV will show considerable national, state, and local variations.

The growth of CL since its inception in 1990 has been simply remarkable. There are hundreds of CL practice groups, law school courses, publications, and even a Uniform Act. Many thousand professionals have completed CL training courses. The International Academy of Collaborative Professionals (IACP) has over 4,000 members in 24 countries. While the discussion here will focus on the American experience, with some reference to Canada, it is important to note that CL has attracted a following in numerous nations. CL is a dynamic and developing form of dispute resolution, and it varies from place to place – usually in small ways, but sometimes in large ones.

II. Participation Agreement – Disqualification Provision

Let us begin with the *status quo ante*: before Collaborative Law came along, family dissolution took place with regularity; negotiation was always a part of the process; and mediation was often a part of the process. As in every other major area of law (criminal as well as civil), most family cases settled – significantly assisted by judicial guidelines about custody and financial matters adopted by Family Courts. However, some cases did not result in a settlement, and these tended to be ones where the spouses had the financial ability to finance a battle – and to hire attorneys to carry on that battle.

The advent of Collaborative Law has not changed these realities, except that the quality of some settlements are improved. Probably there is less resort to mediation, because the consensual basis of CL diminishes the need for the assistance of third party neutrals. Perhaps the quantity of settlements has increased, but this is uncertain because most disputes get settled short of trial in any event. [Our lack of definitive knowledge partly reflects the difficulty of measuring the consequence of a single variable in an environment where other important variables cannot readily be held constant. Research in the natural sciences, by contrast, has the advantage that physical variables can be controlled far more precisely than social variables.]

Collaborative Law is a creature of contract. In the vocabulary of CL, this contract is called The Collaborative Law Participation Agreement. The "essential feature" of the contract that creates a collaborative law arrangement is the Disqualification Provision. UCLA, § 1. The Disqualification Provision (DP) in the Participation Agreement (PA) states that either party can terminate the process, and a shift to litigation is permitted, but doing so requires new counsel. The CL attorneys promise each other and the parties that they will not to serve as litigation counsel in the event that the CL process fails to produce a settlement. [The contract law result is the same whether the clients are treated as parties to the PA, or as intended third party beneficiaries.]

Section 4 of the UCLA sets forth the (quite minimal) requirements for a qualifying PA:

1. Names and signatures of parties and their counsel;

2. Statement of the matter in dispute;

3. By Clients: Statement of intent to resolve matter through CL;

4. By Counsel: Statement confirming CL representation, including DP. These provisions readily lend themselves readily to a fill-in-the-blanks standard form contract, and such form agreements are in common use. Informed consent to CL by the clients is required, per the standards set out in UCLA, § 14; the needed disclosures are readily incorporated into the form contract. [Quite apart from the UCLA, or other state statute, CL Agreements would be enforceable under conventional contract law.]

The Disqualification Provision is the one essential feature of the Collaborative Law Participation Agreement, and the Collaborative Law process. Everything else is bells and whistles. [This statement is set forth in bold print to ensure that no one overlooks this perhaps controversial assertion, with which some readers are sure to disagree.]

III. Collaborative Law Theory: Herein of the Prisoner's Dilemma

One of the fascinating things about Collaborative Law is that it provides an amazingly simple (in retrospect) solution to the difficult problem of commitment in negotiations. It is well established that cooperation produces better results for disputing parties than a competitive approach. Accordingly, the rational response for disputants is to commit to negotiation. Alas, there is another well known aspect of negotiation behavior to be considered: if one party is cooperative while the other is competitive, the competitive party will do better and the cooperative party

will do worse than through mutual cooperation. Thus there is an incentive for either party in a negotiation to behave in a competitive rather than a cooperative manner. This conundrum is one example of what is known as the "Prisoner's Dilemma," an important application of Game Theory. The analysis is facilitated by the simplifying assumptions that each party engages in either cooperative or competitive behavior, and that each party can accurately classify the behavior of the other.

In Game Theory, a "game" is an activity that can be completely defined by its rules. Such a game can be modeled, an activity for which computers are extremely valuable. Lest one think that such modeling is of theoretical interest only, recall that this approach led to the creation of Deep Blue, a computer program that has defeated the best chess players in the world. (IBM, its creator, is commonly known as Big Blue.) However, producing a program that can decode simple conversations turns out to be a more complex problem, because there is not a complete set of rules for the "game" of conversation. The same is true, *a fortiori*, for the "game" of negotiation.

The rules of a game may not be adjusted or altered; indeed the game is defined by its rules. If two chess players decide to modify the game by permitting pawns to move backwards, they are no longer playing chess – because chess is defined by its rules. If given to normative assertions, one could venture the view that this innovation results in a "better" game than chess – but it is not chess.

Game theory, like many other significant human activities, has its own specialized vocabulary that is of value to those who work in that area – while mystifying and frustrating outsiders. The language of the law provides a nice example. The discussion that follows is based on standard English, and does *not* make use of the meta-language of Game Theory, and eschews the mathematical rigor that underlies the theory of games.

The origin of the Prisoner's Dilemma, as the name suggests, is in a criminal law scenario, but the same dynamic arises in civil disputes. [There are many versions of the basic Prisoner's Dilemma story, but the incentive structure remains the same.] Two individuals, A and B, are arrested. An illegal weapon was found in the car in which both were riding, an offense that carries a sentence of one year in jail. The Sheriff "knows" that A and B also robbed a bank, which carries a considerably longer sentence, but proof is lacking.

The Sheriff tells A and B the following: I am going to separate you shortly, and endeavor to get one or both of you to confess to the robbery. You have two options: remain silent or confess. The interests of A and B are simple: the less jail time the better. There are four possible outcomes – these outcomes are rules of the game, and therefore not subject to alteration by the players:

1. Both confess to bank robbery: A and B both go to jail for 7 years.

2. Both remain silent: A and B both go to jail for one year.

3. A confesses, B remains silent. A goes free; B goes to jail for 10 years.

4. B confesses, A remains silent. B goes free; A goes to jail for 10 years.

Now, let us consider how A will behave in response to this set of inducements. Since the consequences for A depend on both his action and that of B, he must consider what B will do in response to this situation. A's analysis proceeds by consideration of the two options available to B – confess or remain silent. (The analysis for B is identical to that for A, and so is omitted).

1. Assume that B confesses. If A remains silent, then B goes free and A goes to jail for 10 years. If A confesses, then each will go to jail for 7 years. Result: A confesses.

2. Assume that B remains silent. If A also remains silent, then both A and B go to jail for one year. If A confesses, then A goes free and B goes to jail. Result: A confesses.

Whatever B does – and there are only two options – A is better off by confessing. B undertakes the same (rational) analysis, with the same results. This brings us to the final outcome: A confesses and B confesses – and each goes to jail for 7 years.

This is a sub-optimum result (from the perspective of the players) because if both A and B had stayed silent they would go to jail for only one year each. Note that both A and B are worse off than if they had remained silent. In fact, the aggregate result of 14 years in prison for A and B is the *worst* of the four possible outcomes, as measured by total years in jail! So much for the simplistic conclusion that people behaving selfishly (in their own best interests) will produce optimum results – "as if by an invisible hand," as Adam Smith famously put the matter.

Collaborative Law offers a solution to the Prisoner's Dilemma, a conclusion that seems obvious to your author, but one that has received surprisingly little attention. A Google search using the terms "Collaborative Law" and "Prisoner's Dilemma" produced 507 hits – an astonishingly small number. (By contrast, a search for "Collaborative Law" and "Mediation" generated over 3 million items, while "Prisoner's Dilemma" and "Mediation" produced 44,500 items.)

A search of the journals covered by Westlaw yielded only 29 instances where an author used the terms "collatorative law" and "prisoner's dilemma" within the same article. As with most such searches, the vast majority prove to be "false positives." Only a single law review article expressly stated that the disqualification agreement was a solution to the Prisoner's Dilemma problem (emphasis supplied):.

> In family law cases, ... **the disqualification agreement solves the prisoner's dilemma** because each party is free to choose an attorney based on their settlement skills, knowing that the other party is forced to seek counsel with a similar focus and set of skills. ... [S]olving the prisoner's dilemma demonstrate the purpose of a disqualification agreement.

Gary L. Voegele, Linda K. Wray, & Ronald D. Ousky, *Collaborative Law: A Useful Tool For the Family Law Practitioner to Promote Better Outcomes*, 33 Wm. Mitchell L. Rev. 971, 981-982 (2007) (emphasis supplied).

The sole reference to the Prisoner's Dilemma in the Uniform Collaborative Law Act is found in the Prefatory Note (emphasis supplied):

> The **disqualification requirement** enables each party to penalize the other party for unacceptable negotiation behavior if the party who wants to end the collaborative law process is willing to assume the costs of engaging new counsel. Because of these mutually agreed upon costs of failure to agree, collaborative law is a modern method of addressing the age old dilemma for parties to a negotiation of assuring that one's negotiating counterpart is and will continue to be a true collaborator .... **It solves the age old problem for negotiators of deciding whether to cooperate or compete in a situation where each side does not know the other's intentions and "when the pursuit of self-interest by each leads to a poor outcome for all" – the famous "Prisoner's Dilemma" of game theory.**

There is no sensible answer to the question of why the contract solution embodied in the disqualification provision of the CPLA was not considered earlier by scholars or developed by practitioners. Of interest in this respect is a remarkable law review article by two distinguished legal scholars: Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers In Litigation*, 94 Colum. L. Rev. 509 (1994) (hereafter, Mnookin). Family law is among Professor Mnookin's areas of specialization, and the article addressed prisoner's dilemma issues in the family context. Despite all the effort these authors put into this set of problems (as well as agency concerns), they did not mention collaborative law as among the potential solutions to the difficulties they raised. The article was published in March 1994, so the research for the article probably took place during the prior two years.

Mnookin suggested that cooperation could be increased by revising codes of professional conduct (to address waiver of the zealous advocacy standard), and that professional associations could serve as promoters of cooperation. The primary example of the later used by Mnookin was the American Academy of Matrimonial Lawyers (AAML).. The AAML is an elite group of experienced attorneys, who are very successful – and set their fees accordingly. There currently are about 125 Academy members in the entire State of Texas. (For the admissions standards, and additional information, just Google AAML.) Mnookin's perception was that the AAML "seems to exist for the principal purpose of providing an efficient reputational network among family lawyers." (543) In short, the best solution Mnookin could find "to the potential for disputing parties to avoid the prisoner's dilemma inherent in much litigation" was a market in cooperation, and that private organizations such as the AAML had the potential to serve that purpose. The contractual solution offered by the CL disqualification agreement was not imagined, let alone recommended.

IV. PRACTICE

The discussion in this section addresses empirical research about CL, and relies heavily on a recent article devoted to this topic: John Lande, *An Empirical Analysis of Collaborative Practice*, 49 Fam. Court Rev. 257 (2011), also published as a Research Paper by the University of Missouri. This article summarizes the empirical studies to date about CL practice in the family context, some of which were undertaken by Professor Lande. The Missouri version of the article, can be downloaded without charge from the Social Science Research Network (SSRN}Electronic Research Paper Collection at: <http://ssrn.com/abstract=1806633>. The page citations are to the Missouri rather than the Family Courts Review version of the article.

A. Methodological Difficulties

Lande suggests a variety of methodological issues that should serve as a caution against over-interpretation of the existing studies. These include:

a. Sample selection bias – inability to randomize sample; no control group.

b. Most CL cases are handled by a few practitioners – people who are most likely to belong to a CL practice group, and be identified for participation in a study.

c. With self-reporting by CL professionals, a likely bias toward matters that settle.

d. Few studies, most with small samples.

The good news is that there do not appear to be major problems with research design, which would make the results undependable. Rather, there simply are not enough studies from enough places, and this difficulty is self-correcting with the passage of time.

To a certain extent, the problems with the empirical CL studies to date reflect CL issues, but they largely are problems common to empirical research about attorney-client interactions and the legal process. In important ways, scientific research about people is relatively easy. Tests need not begin with human beings; instead research starts with animal studies. When the time comes to do human tests, the subjects are assigned randomly to different treatment regimes – say, a new drug, the standard treatment, and no intervention. For present purposes, imagine substituting CL, mediation, and litigation as the options, and try to design a statistically valid test protocol.

Even if this form of human subject research were practical and ethical, the outcomes could not be readily evaluated. Medical researchers can rely on objective measures – e.g., the size of a tumor – that are unavailable to studies of different approaches to dispute resolution. Even when the opinion of the subject is used, the results are quite different. The medical researcher can ask the test subject how she or he feels, and the level of pain. The pain before treatment provides an (admittedly imperfect) standard of comparison. What can the CL participant tell us about the process in the absence of a standard of comparison. Would mediation or an immediate trial have been preferable to CL? How can the client know? And, whatever opinion is rendered by a client, how do you sort out the result achieved from the process question?

Medical studies also take care to provide uniform dosages at regular intervals, something that is difficult in the dispute resolution context. Indeed, the UCLA makes a point of establishing only minimum standards, thereby allowing for flexibility and adjusting the process to the needs at hand. Given the newness of CL, and the lag time associated with field studies, it is clear that these are early days for research about CL – and the results discussed here are quite preliminary.

B. CL Client Characteristics

CL is not an inexpensive approach to family dispute resolution. In the vast majority of divorce proceedings, at least one and often both of the parties are unrepresented – making CL impossible. Roughly 80 percent of divorces have a self-represented party because most families cannot afford to hire one lawyer, let alone two. These realities are reflected in the socio-economic composition of CL clients: they are predominantly affluent, educated, Caucasian, and with at least one minor child. Studies outside of the U.S., Canada, and Great Britain might well show a different racial make-up.

An American study found that 84 percent of couples participating in CL had pre-divorce household income in excess of $100,000, and almost half of these had income in excess of $200,000. A study in England found that 29 percent of CL clients has assets in excess of $1.6 million; 26 percent had assets of $800,000 to $1.6 million; 27 percent had assets of $300,000 to $800,000; and the remaining 18 percent had assets of less than $300,000. (Ideally, one would like to know about both income and assets.) Many of the CL lawyers in England also represented indigent clients under the Legal Aid scheme, but they used mediation but not CL. The reason is simple: Legal Aid will pay for mediation but not CL.
The presence of a minor child or children of the divorcing parents is a common feature of CL – *circa* 70+ percent of cases. This figure does not include situations where all children are adults, or where one of the parents has a child with a different partner.

One study found that CL clients have been married for a long time – an average of 22 years, and their average age was 49. Another study found that 81 percent were 35 to 54 years old, while 11 percent were in the 55 to 64 age range. Longer marriages generally correlate with greater wealth, whether measured by income or assets. Since a large majority of the marriages involve a minor child, there cannot be many very long-term marriages, which implies that CL is used in only a few shorter-marriage dissolutions.

Education normally correlates strongly with wealth and income, but the level of education for CL participants is significant. A British study found that 32 percent of CL clients had a bachelor's degree, while another 42 percent had an advanced degree. An American study found 84 percent to have a bachelor's degree, with 32 percent of the total sample having earned a graduate degree. (There do not appear to have been "some college" or "some graduate work" categories in these studies.)

C. Client Selection of CL

Attorneys play a major role in promoting CL to their clients. After all, CL practitioners have to believe in the process, and they are often members of CL practice group. Some 44 percent of CL participants first heard about the process from their lawyer, or only considered CL as a serious option upon the advice of counsel; 16 percent learned about CL from their spouse; and 16 percent had CL recommending by a therapist. Given the newness of CL, it would be astonishing if the general public knew much about this process, or how it differed from plain settlement negotiations or mediation. Public knowledge about CL will surely increase as the process is used more commonly, and the role of counsel in selection of CL will decrease somewhat.

Two closely related factors were noted by clients as favoring CL: impact on children (44 percent) and concern for co-parenting relationship (32 percent). Interestingly, 20 percent of client listed cost savings as the most significant factor. The surveys did not delve into the "compared to what?" question. The implicit, and sometimes express, comparison is contentious litigation – as opposed to a well conducted mediation or other settlement process.

D. CL Attorneys

Participating lawyer often view the CL process with favor that sometimes approaches messianic zeal. Many CL practitioners are dispirited litigators — burned out trial lawyers. This factor is similar to that found among supporters of mediation – indeed, those who favor CL often are the same ones who pioneered the use of family mediation.

Something is known about the composition of CL practitioners, although the data must be regarded as preliminary due to small samples and the rapid growth of CL. (The characteristics of newer and future CL lawyers may mirror those of established practitioners – we just do not know.) Women are a clear majority of collaborative practitioners – towards two-thirds of the total. One study found that the average age of CL lawyers was 60, with an average of 20 years of law practice. These two numbers seem inconsistent – perhaps many of the CL practitioners started late in the law, or dropped out to raise a family. This explanation would be consistent with the career path of women in other occupations. Another possibility is that the 60 and 20 numbers are inaccurate. One study found that the average years of pre-CL experience was 13 years.

CL attorneys predominantly practice in small firms: 80 percent practice in firms composed of ten or fewer lawyers, with about half of them being solo practitioners. This structure largely reflects the organizational structure of attorneys with a predominantly family practice, and probably tells us little about CL. As CL expands outside the divorce context, the solo and small firm practice component may decrease. An alternative scenario is that CL practitioners, like mediators, may find that larger firms are not a conducive setting for such work — largely due to conflict of interest concerns.

Even among attorneys associated with CL practice groups, most of the actual matters are being handled by a few lawyers. The level of concentration is very likely to decrease as CL matures.

E. Additional Professionals

The only professionals required for Collaborative Law are counsel for the parties. In practice, the CL process commonly makes use of additional professionals – indeed, some of them may have been working with the couple before lawyers came on the scene. Roughly 50 percent of CL cases use only lawyers, while 50 percent include additional professionals. Sometimes a team of professionals is assembled prior to the initiation of the CL process, while in other instances additional professionals are brought in on an "as needed" basis. Mental health professionals (MHPs) are the most commonly used professionals, followed by financial advisors – who usually serve as neutrals. There is considerable variation from one area to another, as evidenced by the findings of IACP research:

> The model practiced predominantly in Texas involves both clients retaining one neutral MHP (who is not referred to as a coach); in Northern California, the predominant model involves each of the client having an MHP as a coach; in Georgia, the majority of clients hire a coach and both parties also retain a child specialist. And in New York and Canada, clients most often do not retain any MHPs.

Lande quotes these conclusions without comment. Your author is skeptical: the samples are small, self-reporting may be a factor, and large places like Texas and Canada surely produce greater variation than suggested by the IACP study.

As the number of professionals rises, so does the associated cost, and upon occasions tensions about professional boundaries arise. An additional consideration is that as the number of professionals increase client participation in decision-making tends to be reduced.

F. Client Satisfaction (Self-Reported):

The level of client satisfaction with their CL experience tends is favorable in most instances, but some clients are unhappy with the process – even when CL produces a settlement. That said, it is difficult to evaluate the significance of this generality. Divorce (or even a reconciliation) is an emotionally (and financially) draining process, perhaps analogous to treatment for cancer. Normal people do not find ei-

ther to be an enjoyable experience. On the one hand, one might expect that clients are glad to have that matter behind them, and accordingly would speak favorably of the process that achieved that result. On the other hand, they might be easily dissatisfied with a process associated with a divorce. One would expect research to find that some people have each of these experiences – the central issue is, how many of each? Even if we could answer this question accurately, we still will not know whether a client would have been equally or more satisfied with a different process. Both financial and emotional costs surely would constitute relevant variables. Would the clients have been more satisfied with a successful mediation – at a lower cost? We simply do not know.

Favorable views of CL (or any process) tend to be general, while unfavorable views – although in the minority – usually are more specific. As Leo Tolstoy famously observed, in the opening line of *Anna Karenina* (1877): "Happy families are all alike; every unhappy family is unhappy in its own way." Ideally, interviews of satisfied customers would yield information about what they liked most about the CL process, and what bothered them. Finally, it is essential to take account of the most important variable – results. People usually are happy with favorable results and unhappy about unfavorable results. In addition, most clients do not have a frame of reference with which to compare Cl. CL usually produces a settlement, but that is also true of mediation and other forms of ADR.

Clearly, there is room for a lot more research, and with the continued growth of CL such research is sure to be forthcoming. In the meanwhile, there follows a list of concerns expressed by some clients in some of the research studies. This listing is not always internally consist, and none of the concerns were expressed frequently.

1. Many clients spoke favorably of the control obtained in CL, but some thought they surrendered control to the other side. As the number of participants increased, the sense of participation by clients decreased.

2. Some client thought that counsel's commitment to the process meant less support for the client, as well as less advocacy on behalf of the client. Some clients wondered who was on their side?
3. Cost was a concern, particularly where additional professionals were retained.

4. Some clients thought they were pressed to give up too much, and could have gotten a better result in court – in most instances, wishful thinking.

5. The need to have both counsel and clients in the room, made for scheduling difficulties, and some matters could have been resolved without a 4-way meeting.

6. Some clients, often women, felt vulnerable and unprotected. Power imbalances are a concern, but they are a reality that would also exist under other dispute resolution regimes.

7. Some clients wanted the ability to meet with their counsel during the course of a 4-way meeting, but others were suspicious when the other party did so.

8. Some clients thought that lawyers underestimated the amount of emotion in the process, and discouraged expressions of hurt or anger. This is surely true in some instances – lawyers as a class engage in emotive displays only infrequently – but the extent of the problem is uncertain. And, while venting can promote settlement, it can entail costs as well as benefits.

9. The negotiating environment lulled some clients into a false sense of security.

Another way to address concerns about CL is to focus on the minority of CL proceedings that failed to produce a settlement, or took considerably longer than thought necessary. According to attorneys that main factors are: "lack of mutual respect, unrealistic expectations, refusal to modify strong position, or desire to manipulate the process." (12) These factors will come as no surprise to anyone with negotiation experience, particularly in the family context.

Researchers also have a list of reasons for the failure of CL proceedings. First, the difficulty of the matter was a central factor – with disputes being ranked as very difficult, difficult, and not difficult. Not surprisingly, the "very difficult" CL cased failed to settle most frequently, but still 77 percent of these mat-

ters settled. Adverse factors included: invasion of privacy; party obtained outside advice; verbal abuse; inadequate cooperation between parties; unrealistic expectations, lack of trust of the other party or counsel; and mental health issues. (14)

V. The Role of Lawyers: Collaborative Law and Mediation

One clear consequence of the rise of Collaborative Law is a concomitant reduction in resort to mediation. (CL does not preclude resort to mediation, but that is an infrequent occurrence.) One of the central features of CL is that the lawyers are in charge, whereas in mediation the mediator is in charge. (In order to ensure that we are comparing like things, statements about mediation are limited to family situations where both parties are represented by counsel.)

Cynics and mediators, particularly those who are not licensed attorneys, might see the central feature of Collaborative Law as putting lawyers representing clients at the center of the (pre-trial) dispute resolution process. And, of course, most family law disputes are settled, and few go to trial. Describing the work of Julie Macfarlane, Lande observed:

> She described a "sibling rivalry" between CL and mediation, as some lawyers anticipated CL eventually "taking over" mediation. Some motivation for CL derived from the "threat to lawyers' hegemony posed by mediation." Some lawyers ... "see little use for mediation, believing collaborative law to be superior process in every respect." ... They believe that CP offers the benefit of direct legal support and assistance, unlike mediation where lawyers do not participate in key "moments of grace." (13)

The reader needs to bear in mind that even CL practitioners recognize that Collaborative Law is more expensive than mediation. A study by Mark Sefton (2009) asked counsel about the cost of CL compared to mediation. One-half said that CL would cost more than mediation, and none said that CL would cost less than mediation. (17)

In the conclusion of his article, John Lande (now speaking for himself), has the following to say:

> While the CL movement attracts lawyers who see CL as a "calling" or a better way to practice law, other lawyers undoubtedly perceive CL as distasteful. ... Triumphal proclamations that CL represents a "paradigm shift" imply its moral superiority and litigation's inferiority, which can seem unnecessarily arrogant and insulting to many lawyers.
>
> The CL movement also has some repair work to do with the mediation and broader ADR community. Although some Collaborative lawyers fairly discuss the mediation option with clients and speak about it respectfully, others have not acted appropriately in this regard. Mediation can be especially appropriate for parties who want or need to save money on professional fees in their case. (24-25)

If this article succeeds in stirring up some debate about collaborative law and practice among the ADR community in Texas, these efforts will not have been in vain.

* Steve Huber is Foundation Professor Emeritus at the University of Houston Law Center, and the Co-Editor of Alternative Resolutions. The third edition of his arbitration casebook (co-authored with Professor Maureen Weston of Pepperdine Law School) was just published by LexisNexis. He is the co-editor (with Ben Sheppard, former senior partner at Vinson & Elkins) of the American Arbitration Association's Annual Review of Arbitration Law (2011).

ETHICAL PUZZLER

By Suzanne M. Duvall

as submitted by
Michael J. Schless, Austin

This column addresses hypothetical 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, or fax it to214 -368-7528.

****

We all know that service of process is not to be allowed at the mediation. However, the ADR Section's Ethical Guidelines for Mediators, The Supreme Court of Texas Misc. Docket No. 05-9107 Ethical Guidelines for mediators, and the TMCA's Standards of Practice and Code of Ethics are all silent on that issue. So the first question is, by what authority can the mediator prevent service of process at the mediation?

Suppose instead of service of process, one party or lawyer calls the police to arrest another party at the mediation. What can or should the mediator do?

A. A. If the arrest is for an outstanding warrant for a moving traffic offense that occurred well before the mediation was even scheduled?
B. If the arrest is for an outstanding warrant for a misdemeanor offense that occurred well before the mediation was even scheduled?
C. If the arrest is for an outstanding warrant for a felony offense that occurred well before the mediation was even scheduled?
D. If the arrest is for an outstanding warrant for a family violence that occurred well before the mediation was even scheduled?
E. If the arrest is for conduct that occurred during the mediation, but outside the presence of the mediator?
F. If the arrest is for conduct that occurred during the mediation, and in the presence of the mediator?

****

Mike Loftlin, (Amarillo): I'm not sure I have any comments of value to offer in response to the question submitted by Michael Schless. I'ver never had either situation arise in my mediation practice and wasn't aware that a mediator had the power to prevent service of process.

If I were conducting mediation at my office, and a process server presented himself or herself to the receptionist asking for permission to serve process, I would not allow the process server to come into my office without first obtaining permission from the individual whom the process server intended to serve. If I were conducting mediation at the office of one of the parties, I likely would not have the opportunity to prevent process from being served.

If a law enforcement officer arrived at my office while I was conducting mediation, wanting to serve a warrant on or arrest a party to the mediation, I don't know what authority I would have to prevent the law enforcement officer from doing so. If the mediation was progressing well, with a reasonable prospect of producing a resolution, I would ask the law enforcement officer to consider waiting until the mediation concluded to serve the warrant or potential for violence, I would adjourn the mediation. If conduct warranting an arrest occurred during a mediation I was conducting, I would welcome the arrival of the police.

As far as I'm concerned, a mediation session isn't a safe zone for committing criminal offenses. If a person commits a violent act or steals property during a mediation session, then he or she ought to be arrested just as if the offense had been committed in any other setting.

Alvin Zimmerman, (Houston): Some local court rules or standards for mediation may state that there will not be any process service at the mediation. The interesting part of the question is, what should we do as mediators if this concept is violated during your service as a mediator?

Before the service is perfected, you may invite the party who is requesting service to not use this confidential process of mediation as a venue to advance the litigation and especially not to use your office to do that but to use a different time and place for such action. If the party disrespects your request, you certainly can consider terminating the mediation. One would have to ask "How effective can the mediation be after one tries to serve the other party?"

In considering issues a, b, c and d, we again can consider the same answer to the foregoing paragraph to apply to these also. However, warrants or arrests are not at the behest of a party but through the criminal arena through the prosecutor of the offense. The fact remains, however, that the person serving the warrant or the arresting officer is probably at your door because the harmed party notified the arresting officer that the other party would be at the mediation. Once again why couldn't the arresting officer wait until after the mediation and until the person to be arrested leaves your premises. By the mere fact such police action is taking place, the mediation will terminate.

In considering issues e and f, if the conduct of a mediation participant is so outrageous as to require a party to call the police for an arrest or the very least a complaint, the mediation will also terminate. Parries whose conduct is so outrageous as to cause harm, be it assault or battery, and whether in your presence or not, would cause the mediation to terminate. If the assault or battery occurs in the presence of the mediator, the mediator should terminate the mediation and request the separation of parties and offer to the injured party that you will request the offending party to leave the premises. Although the mediation is confidential, you certainly could invite the attorney for the injured party to call the police. In this circumstance I do not believe the concept of confidentiality extends to protecting an assailant where the misconduct occurred in your presence.

John Shipp, (Dallas): The Texas ADR Section's Ethical Guidelines for Mediators and the Texas Supreme Court Guidelines for Mediators do provide at a minimum that mediators should inform all parties that subpoenas and other service of process are not allowed at mediation. While there is no corresponding language as to a prohibition against having someone arrested at mediation, I think the spirit of the ethical guidelines remains the same.

We have an ethical duty to protect the integrity of the mediation process. If the parties cannot come to mediation without feat of being served with process, being arrested, or for that matter being subjected to physical violence, the mediation process breaks down. I hate to speak in absolutes, but as to offenses that have occurred prior to mediation, mediation should not be used as a vehicle to trap a party no matter the merit of the criminal complaint.

Unfortunately, once someone has served process or had someone arrested at mediation, the damage cannot be undone at least for that mediation. I think the short answer is to inform the offending party/ attorney that you will not allow the process to be abused, return the fee to the parties, and terminate the mediation. I would also note that the mediation is probably terminated anyway after a criminal arrest, if one of the necessary parties to a settlement is being frog marched out of your office by the police department!

If a party engages in criminal conduct at mediation, such as physical violence, I think the underlying principle remains the same. A party cannot be allowed to abuse the process. That person should be arrested, and I'm not sure if it matters if it occurs at mediation or at a later time. It is a trickier question when it is unclear to the mediator if a crime has actually been committed, such as the case where a party alleges a crime outside the presence of the mediator. In that case it is a judgment call, but in the absence of physical violence, I would say mediation is not the proper place for an arrest.

Ultimately, we are the stewards of the process, and if that process breaks down by allowing the parties to operate outside the rules, mediation will not be effective for anyone.

Priscilla Kim Park, (Southlake): The authority to prevent service of process at the mediation stems from several sources. Their provisions must be viewed in light of their intentions.

1. Originally, thanks to the pioneering vision, immeasurable volunteer hours and selfless efforts of Texas mediators in the original ADR Committee of our State Bar of Texas, the ADR Section and the Task Force on Quality, the final version of the Ethical Guidelines for Mediators "Guidelines" was completed on April 7, 1994. According to the preamble, the Guidelines were "Intended to promote public confidence in the mediation process and to be a general guide for mediator conduct."
2. The Supreme Court of Texas adopted these Guidelines on Junne 13, 2005, thereby endorsing and forever memorializing the Guidelines in Misc. Docket No. 05-9107; as amended on April 11, 2011 in Misc. Docket No. 11-9062; effective June 1, 2011. According to the Court's recent Order of Approval of Amendments to the Guidelines:

> The Ethical Guidelines for Mediators are aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer pressure and public opinion, and fi ally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

Excepts from the Guidelines provide as follows:

> 6. The Mediation Process: A mediator should inform and discuss with the participants the rules and procedures pertaining to the mediation process.
>
> Comment (b)(2) the mediation is informal (There are no court reporters present, no record is made for the proceedings, no subpoena or other service of process is allowed, and no rulings are made on the issues or the merits of the case.)

III. The Texas Mediator Credentialing Association (TMCA) ,makes these Aspirational Ethical Guideline Mandatory for their members rather than Permissive as shown below:

> Preamble
>
> ...The Guidelines have been widely accepted in Texas as the ethical standards of practice for mediators. The TMCA Board of Directors has adopted the Guidelines, with modifications, to make them mandatory rather than suggestive or permissive, as standards of practice and a code of ethics for TMCA credentialed mediators...The TMCA Standards of Practice and Code of Ethics are identical to the Guidelines with a few exceptions: generally, the permissive word "should" in the Guideline's is replaced with the mandatory word "shall" in every place that the word "should" appears in the Guidelines.

IV. Most Courts have Rules of Mediation. For example, the Dallas County Rules for Mediation provide the following:

> 11. No Service of Process At or Near The Site Of The Mediation Session. No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any mediation session upon any person entering, attending or leaving the session.
>
> 13. Interpretation and Application of Rules. The mediator shall interpret and apply these rules.

V. Before I begin a mediation, I give a copy of the Guidelines (along with a few other documents) to Counsel and their clients for review and discussion. Then all mediation participants sign and agree to a Waiver and Consent form which has a copy of their Rules of Mediation on the back.

So my authority to prevent service of process comes from my own belief in promoting public confidence in the mediation process; adherence to aspirational and mandatory standards and codes of ethics for me

as a TMCA mediator, and from the understanding and agreement by all mediation participants to abide by the rules of our mediation session.

Now, instead of service of process, one party or lawyer calls the police to arrest another party at the mediation for an outstanding warrant for a moving traffic offense or for a misdemeanor that occurred well before the mediation was scheduled, I would have to address the situation. Then given the facts, dynamics of the parties, etc., interpret nd apply the rues as appropriate.

Finally, if the arrest is for a felony, family violence or conduct that occurred during the mediation in or out of my presence, I would look for guidance from other sources such as the ABA Model Standards for Mediators 2005 which excerpts provide as follows and act accordingly:

STANDARD VI. QUALITY OF THE PROCESS

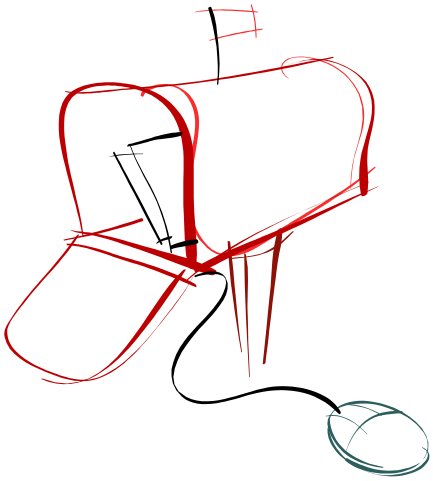
A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, and safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

****

Comment: Most of the ethical puzzlers that may present themselves in our practice lives occur "on-the-spot," without warning, and catching us off guard. Because of their spontaneous nature we have to react immediately, sometimes acting on pure intuition. Hopefully that intuition is firmly grounded on an active, working knowledge of a set of Ethical Guidelines, whether they emanate from the Supreme Court, the ADR Section, or TMCA.

However, it appears to me that the situation(s) posed by Mike Schless is unique in that it allows the practitioner the opportunity to formulate a *policy in advance* regarding service of process (based either on local rules and/or on the comment to Guideline 6), to publish that policy, and to insist in its adherence. (As pointed out by our responders, arrest warrants may be in as a separate category). The intention of Guideline 6 (and indeed all of the Ethical Guidelines) is to protect and safeguard the integrity of the process because, as John Shipp reminds us, "Ultimately, we are stewards of the process, and if that process breaks down by allowing the parties to operate outside of the rules, mediation will not be effective for anyone."

* ***Suzanne M. Duvall*** *is an attorney-mediator in Dallas. With over 800 hours of basic and advanced training in mediation, arbitration, and negotiation, she has mediated over 1,500 cases to resolution. She is a faculty member, lecturer, and trainer for numerous dispute resolution and educational organizations. She has received an Association of Attorney-Mediators Pro Bono Service Award, Louis Weber Outstanding Mediator of the Year Award, and the Susanne C. Adams and Frank G. Evans Awards for outstanding leadership in the field of ADR. Currently, she is President and a Credentialed Distinguished Mediator of the Texas Mediator Credentialing Association. She is a former Chair of the ADR Section of the State Bar of Texas.*



ADR ON THE WEB

By Mary Thompson*

Idealawg

http://westallen.typepad.com/idealawg/

Idealawg is a blog by Stephanie West Allen, a California attorney, mediator, and author. Allen is also known for her popular blog on neuroscience and conflict resolution, *Brains on Purpose.*

Idealawg posts a wide variety of topics, to say the least. Among them are Marketing, Eight Pillars of Prosperity, Goal Setting, Writing, Yogi-Lawyer, Zombies (yes, she likes zombies), Leadership, and Teambuilding. There are also links to Law News, books, and recommended blogs.

A number of categories are of special interest to dispute resolution practitioners:

Mediation includes information on

- The Nevada Law Journal's issue on mindfulness, emotions, and ethics in law and dispute resolution
- The impact of mediators imposing their process on the parties
- The role of conflict coaching in helping parties deal with feelings of outrage

Elder Mediation/Generation Mediation provides links to the following content

- Advice giving and generational differences
- Cross-generational family conflict
- A University of Minnesota website, "Who Gets Grandma's Yellow Pie Plate? An online guide to passing on personal belongings"

Conflict Resolution includes

- An article challenging the effectiveness of the mirroring technique as a communication skill
- Information on the use of storytelling to help people transform perceptions and reframe experiences
- A project that focuses on the role of positive storytelling to help resolve disputes between trustees and beneficiaries

Other relevant categories for attorneys and dispute resolution professionals include Restorative Justice, Law Firm Management, Life After Law, Nature of the Lawyer, and Business Development.

This is an entertaining site, with links to practical, scholarly, and esoteric information (see Neuroboomeritis Prevention). It demonstrates in engaging ways the odd connections between the larger culture and our world of dispute resolution.

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

CALENDAR OF EVENTS 2011

Advanced Mediation Training * Denton * August 4-7, 2011 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: http://www.twu.edu/ce/Mediation.asp

Basic Mediation Course * Houston *August 8 - 12, 2011 * *STCL Evans Center for Conflict Resolution*, * For more information call 713-646-2997 or www.stcl.edu/feccr

Specialized Course in Commercial Arbitration * Houston *August 17 - 20, 2011 ** *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

7th Annual Civil Collaborative Law Training and Symposium * Dallas, Texas * August 24-26, 2011* Special Guest Speaker: Stu Webb, Founder of Collaborative Law * Texas CLE approval pending * Training:15 hours, 2 hours ethics; Symposium 7 hours,1 hour ethics * Contact information: 972-417-7198, 214-265-9668, info@collaborativelaw.us, www.collaborativelaw.us

Conflict Resolution Training * Denton * August 25-28, 2011 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: http://www.twu.edu/ce/Mediation.asp

40-Hour Basic Mediation Training * Houston * September 9-11 continuing 16-18, 2011 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation Training * Houston * September 15-17 & 22-24, 2011 * *Worklife Institute* * For more information Diana C. Dale at (713) 266 - 2456 * or www.worklifeinstitute.com

40-Hour Basic Mediation Training * South Padre Island * September 12-16, 2011 * *Office of Dispute Resolution of Lubbock County* * For more information Harrison W. Hill at (806)775.1720 * or by E-Mail: HHill@co.lubbock.tx.us * Website: http://www.www.co.lubbock.tx.us/drc/training.htm (Registration restrictions apply – call for details)

Advanced Family Mediation Training Thursday, Friday and Saturday, September 22nd, 23rd & 24th, 2011, * Kerrville, Texas. For additional information, call (888) 292-1502 or see our website at www.hillcountrydrc.org.

Advanced Mediation Training on Family Mediation * Houston *October 14 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

24-Hour Family Mediation Training * Ruidoso, NM * October 18 – 20, 2011 * *Office of Dispute Resolution of Lubbock County* * For more information Harrison W. Hill at (806)775.1720 * or by E-Mail: HHill@co.lubbock.tx.us * Website: http://www.www.co.lubbock.tx.us/drc/training.htm (Registration restrictions apply – call for details)

Family and Divorce Mediation Training * Houston * November 2 – 5, 2011 * *Worklife Institute* * For more information Diana C. Dale at (713) 266 - 2456 * or www.worklifeinstitute.com

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
State Bar of Texas
ADR Section
P.O. Box 12487
Capitol Station
Austin, Texas 78711

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2011 to June 2012. 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**_____

Bar Card Number_____

Address_____

City_____ **State**_____ **Zip**_____

Business Telephone_____ **Fax**_____ **Cell**_____

E-Mail Address:_____

2009-2010 Section Committee Choice_____

ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.

2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.

3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.

4. Names, dates, quotations, and citations should be double-checked for accuracy.

5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.

6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.

7. Check your mailing information, and change as appropriate.

8. The author should provide a brief professional biography and a photo (in jpeg format).

9. The article may have been published previously, provided that the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

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

2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.

2. Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT 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 address 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."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2010, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

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P.O. Box 12487
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Austin, Texas 78711

http://www.texasadr.org