Alternative Resolutions

State Bar of Texas

Lionel M. Schooler, Chair, ADR Section

Alternative Dispute Resolution Section

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Chair's Corner

In my second column, I want to report to you about what has been going on with the Section this Summer.

Traveling Road Shows: San Antonio. My first priority is for the Council to provide service to the Section. To further that goal, I have put into motion an initiative to reach out to more people around the State who are, or should be, members of the Section, as well as to reach more people who need to be informed of the services and benefits that the Section can provide. I call this initiative the "Traveling Road Show." The premise of the Traveling Road Show is to reach out to Section members, prospective members, and consumers of alternative dispute

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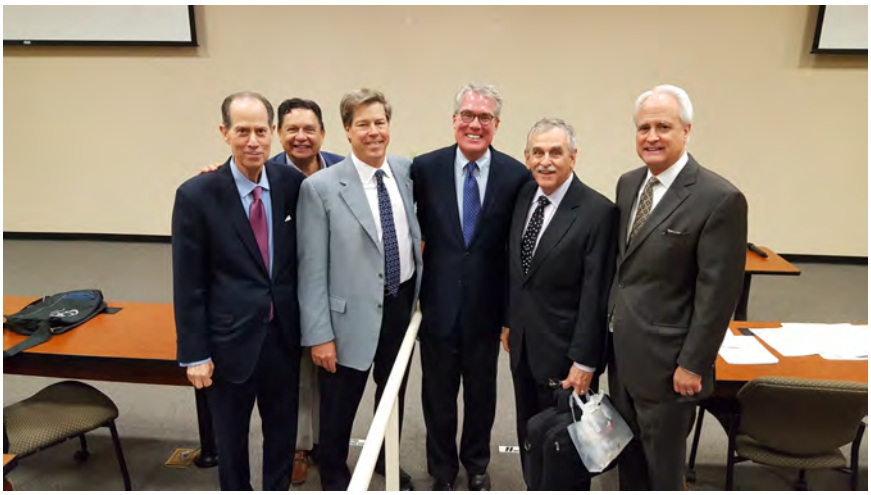


San Antonio Road Show

Left to right: Wayne Fagan (Past Section Chair); Hon. Dan Naranjo (Attendee); Trey Bergman (Section Treasurer); Don Philbin (Past Section Chair); Lionel M. Schooler (Section Chair); and John Boyce (Past Section Chair).

resolution services, to trigger conversations on a local level about

- mediation and arbitration services,ethical issues and challenges for service providers, and
- obtaining feedback from users of such services.

The design of the Traveling Road Show is to present a program of approximately 2 hours, starting at the lunch hour, and featuring up to 3 programs featuring Section Council members and local practitioners.

The first such Traveling Road Show was staged in San Antonio on September 19 at St. Mary's Law School, hosted by Professor Wayne Scott. It was presented by the Section, working in conjunction with the Chair of the San Antonio Bar Association Alternative Dispute Resolution Section, Jerry King, and afforded participants 2 hours of CLE credit, including over 1.0 hours of ethics credit.

The Road Show featured the following programs:

(a) "Ethics for Arbitrators and Mediators," including presentations by myself (focusing on arbitrators), and Section Treasurer Trey Bergman of Houston (focusing on mediators);

(b) "Decision making in Mediation: Ethical and Substantive Considerations," presented by Don Philbin of San Antonio; and

(c) "Preparing for the Preliminary Hearing in Arbitration," a panel discussion by Wayne Fagan and John Boyce, both from San Antonio. The Roadshow included time for audience participation. In case these names look familiar to you, that is

because Mr. Philbin, Mr. Boyce, and Mr. Fagan are all past Chairs of our Section.

Traveling Road Shows: El Paso. The second Road Show will be held in El Paso on Monday, November 7, 2016, at the El Paso County Courthouse, under the auspices of the El Paso Bar Association. This Road Show evolved from a discussion with Council Member Hon. Guadalupe Rivera (Ret.), formerly of the El Paso Court of Appeals. The Section also was aided significantly in its programming efforts by the President of the El Paso Bar Association, Mr. Chris Antcliff; and by its Executive Director, Nancy Gallego.

The program will begin with a box lunch at 11:30 a.m., followed by a 2-hour presentation of 3 programs, 2 of which will feature Hon. Justice Susan Larsen (Ret.) of the El Paso Court of Appeals, who now serves as a Mediator in El Paso; and Ms. Patricia Palafox, a local El Paso Mediator and Arbitrator. The third program includes the Ethics in Mediation and Arbitration program by myself and Trey Bergman first presented at the San Antonio Road Show.

As with the first Road Show, the Section will seek both CLE credit and ethics credit for those attending.

Those wishing to attend should register by email to ngallego.epba@sbcglobal.net, or to Section Secretary Linda McLain (mclainmediationservices@gmail.com) to enable the program planners to ensure enough food for all attending.

Service to the Section. We are planning at least 2 more Road Shows in 2017, and the Council is considering other locations around the State at which to host Road Shows. We want to hear from you about this, particularly if you are interested in having a Road Show come to your city.

I want to know what you think. Please let me know your ideas/suggestions, lschooler@jw.com; you can also communicate your thoughts to our Chief Editor, Kay Elliott (k4med8@swbell.net) or our Managing Editor, Jennifer Alvey (jalvey@jenniferalvey.com).

Newsletter Leadership. Kay and Jennifer are spearheading our editorial restructuring of the Newsletter, and the Section is very blessed to have 2 such capable persons taking on these roles. If you have an idea for a substantive contribution to the Newsletter, please let one of them know.

Pound Conference. The Section has been invited to participate in a very exciting world-wide project, the Global Pound Conference. (www.globalpoundconference.org). Austin has been selected as 1 of only 8 sites in the U.S. to host this conference, which is focusing upon

improving access to justice, as well as the quality of justice in civil and commercial disputes. The purpose of the Conference is to shape the future of dispute resolution. Our very own Kim Kovach, the very first Chair of this Section, has been serving on the Planning Committee and is the coordinator for the Austin event. Because of Kim's and Erich's efforts, the Pound Conference will be held on Thursday, January 26, 2017, the day before our Annual CLE meeting on January 27 at the State Bar Center.

Contents of This Issue. This issue of the Newsletter is full of useful information for mediators and arbitrators, including the following:

Lead Article: "Why Mediators Shouldn't Believe Everything They Think, Part 2," by Charles Penot. Charles discusses the book *Thinking, Fast and Slow* by Thomas Kahnemann, a Nobel-winning psychologist, and the implications for mediators. Part 2 looks at steps and strategies mediators can use to prevent the laziness of certain kinds of thinking that can derail a negotiation or mediation.

Mediation Article: The next article is "Influence Behavior to Get What You Want" by Wayne Meachum. He reviews the book *Influencer: The Power To Change Anything*, and discusses how mediators and arbitrators can master the 6 sources of influence identified by the authors. By understanding how to identify these 6 influence sources, and what behaviors to target for change, mediators and arbitrators can get past impasses and help parties move forward in their negotiations.

Restorative Justice Takes Hold in Mexico's Criminal Justice System. This article, by Prof. Walter Wright and Roberto Montoya Gonzalez, discusses the history of introducing significant changes to Mexico's criminal justice system, including the use of ADR. The system had been ruled by the implicit belief that all accused were guilty until proven innocent. Mexico has changed its procedures, and also introduced restorative justice. Restorative justice is now the preferred way to handle cases involving adolescents. The article details the legal framework and procedures now used in the Mexican criminal justice system

Ethical Puzzler. As usual, we also have Suzanne Duvall's regular contribution to ADR ethics with her "Ethical Puzzler" column. I will let you migrate to her article to see the subject she takes on this issue.

I look forward to continuing my service to you this year, and look forward to your suggestions and feedback.

Ethical Puzzler

by Suzanne Duvall

"Past Experience: The only man who never makes a mistake is the man who has never done anything."

—Teddy Roosevelt

This column regularly offers selected respondents an opportunity to solve an ethical dilemma presented by a fact situation, and based on actual cases handled by professional mediators.

Every so often, however, I ask several respondents to provide the readers their personal "oops!" moments, i.e., ethical dilemmas which, in hindsight, they wish they had handled differently. The objective is to help us all benefit and profit from the mistakes made, lessons learned, and/or "second guesses" of some of the most experienced mediators in our profession. With the possible exception of one respondent* (who shall remain anonymous), we have all been there and are better for it.

Cecelia Morgan, Dallas

The Ethical Guidelines provide in paragraph 2, Mediator Conduct, comment B, "The interests of the parties should always be placed above the personal interests of the mediator," and paragraph 13, Termination of the Mediation Session, provides "A mediator should postpone, recess or terminate the mediation process if . . . the party is unwilling or unable to participate meaningfully in the mediation process."

When is it appropriate for the mediator to stop the mediation because of their own personal interests? My quasi-oops puts these two provisions in conflict yet is a dilemma faced by many of us over the years. During the course of a highly contested, full-day mediation, I became progressively ill. The case was a pre-suit case of first impression on a relatively new statute with two seasoned 25+ year litigators. The case had high publicity potential. At noon, an attorney in another mediation in our offices

* That anonymous respondent replied, "I have never had anything [like that] happen to me."

commented that I didn't look myself. At 3:00, I faced the dilemma of recessing the mediation because one party was threatening to leave; however, I still had hope; yet I realized that I had become dangerously ill (though not contagious). I stayed with the parties until 7:00 p.m. and thereafter, was admitted to the hospital for a three week stay. The parties were much closer to resolution at 7:00 p.m. than they were at 3:00 p.m. The good news is that the case settled during my hospitalization with additional communications. At the time, I didn't know what else I could have done but stick with the process, but my family, office and friends have questioned my judgment. Next time, I may find a very graceful way to recess, but at the time, it did not seem to be the answer to the dilemma.

William Cornelius, Tyler

I mediated an employment case recently that took an unusual turn. There was obvious tension between the Plaintiff and his attorney, for several reasons, not the least of which was that the wrong Defendant had been sued. As I was sitting in my office, waiting on the Plaintiff to respond to an offer, his wife came running down the hall and told me to "come quick". I complied, and found the Plaintiff and his attorney toe to toe, exchanging profanities, and clearly on the verge of trading blows. While I managed to break it up, the Plaintiff and his wife were no longer willing to remain in the same room with their attorney. However, they wanted to continue with mediation, in hopes of achieving a settlement.

We did so, although it was awkward. I kept the attorney in the loop, but had his permission to basically deal with the Plaintiff and his wife as we continued negotiations with the Defendant. The tricky part came after a tentative resolution was reached, and they had legal questions about certain terms in the MSA. I was hesitant to provide answers, so I invited Defense Counsel in to explain, in my presence. I'm not sure if my handling of this was appropriate, but it was best idea I had!

Finally, the Plaintiff and wife wanted my opinion on whether they had a case against their attorney. I declined that one (wisely).

Kathy Fragnoli, Dallas and San Diego

After a successful mediation, the plaintiff's attorney asked me to comment about her abilities on her LinkedIn profile. I dutifully replied with a well-deserved glowing reference ... a few days after the mediation session.

Imagine my surprise when, a few days later, opposing counsel in the mediation wrote to me to say that his client—the defendant—had read my comments and felt that I was biased. (Apparently the defendant also accused his attorney of being "out-lawyered" that day and used me as proof positive.)

Lesson learned: This good deed deserved to not go unpunished. I no longer use any type of social media.

As mediators and arbitrators, all we have to sell is neutrality. We have to be

forever mindful of any appearance to the contrary.

Patrick Keel, Austin

The Texas Supreme Court's Ethical Guidelines for Mediators lists a lot of "don'ts"—for example: Don't coerce a party in any way; Don't use information obtained during mediation for personal gain; Don't breach confidences; Don't give professional advice. Among these "thou shalt nots" are a few affirmative duties, including this one: "A mediator should encourage the parties to reduce all settlement agreements to writing." I always try to fulfill this duty, keeping in mind one of the favorite sayings of my long-time mentor: "Don't let perfect be the enemy of good."

Once upon a mediation, I found myself in a situation in which the affirmative duty to encourage a written settlement agreement ran smack into another ethical issue: dealing with a party who is *pro se*. The court's ethical guidelines make several references to the special challenges presented by *pro se* parties at mediation. The comment to guideline no. 7 states: "A mediator should not convene the mediation if the mediator has reason to believe that a *pro se* party fails to understand that the mediator is not providing legal representation for the *pro se* party." Comment b to guideline no. 11 states: "A mediator should explain generally to *pro se* parties that there may be risks in proceeding without independent counsel or other professional advisors." The court correctly anticipated that *pro se* litigants are likely to turn to the mediator for guidance and professional advice, especially when the other party to the mediation has a lawyer.

Late in the evening of a full-day mediation we were finally near a deal. One party was *pro se*, the other represented by able counsel. When it came time to write up the terms of an agreement, the able counsel was even more able than I wished—he went full lawyer. He insisted on being draftsman and, instead of writing up the material terms of a deal that would be sufficient to bind the parties but flexible enough to allow for further details to be hashed out as necessary, the lawyer insisted on writing up a multi-page settlement agreement that purported to address every contingency. I think the darn thing even had a choice-of-law provision (as though two parties sitting in Austin, Texas, mediating and settling a local dispute, might later have some notion that, say, the law of Rhode Island should govern their agreement).

After several rounds of the lawyer's making me present revised drafts, Mr. Pro Se finally had enough. "I can't do this. I'm going to have to get a lawyer to look at this."

I was furious with the lawyer for over-lawyering, sympathetic to the *pro se* party for becoming anxious, and frustrated that our long day was ending without a signed deal.

What should I have done differently? In retrospect, I'm not sure there's much that a mediator in this situation can or should do. Although we should encourage parties who have settled to

put their agreement in writing, we have to be extra careful in how we deal with *pro se* parties. Furthermore, when you have a lawyer who insists on writing up the terms of an agreement in painful detail, who is a mediator to say, "No, no—you don't need to do all that"?

Nevertheless, I do believe there was a lesson for me here. If I had this mediation to do over again, I would spend time before the scheduled mediation in a conversation with Mr. Pro Se to drive home guideline 11, comment b: "You do realize, don't you, that there may be risks in proceeding without independent counsel or other professional advisors? The other side of this case has a really talented lawyer. You don't want to be at a disadvantage."

Perhaps, in retrospect, I would also point out to the lawyer that that if he presses too hard, Mr. Pro Se is going to run like a scared bunny. "Keep your eye on the prize. You're a smart lawyer. You know the elements of an enforceable agreement. Let's get the major deal points signed so that neither Mr. Pro Se nor your client has room tomorrow to try to re-trade the deal. Don't get hung up on too many details at the expense of losing the opportunity for a deal."

Another thought that comes to mind—and I actually try to do this in all of my mediations since—is for the mediator to start drafting a term sheet during the course of the day. That way, when evening approaches, the parties aren't starting from scratch. This is also a subtle way to take the drafter's job away from over-lawyering lawyers.

Heaven forbid that the mediator should have to yield to the supreme court's guideline no. 13 and terminate the mediation because "one or more of the parties is unwilling or unable to participate meaningfully in the mediation process." Nobody likes that. Especially when you've already missed supper.

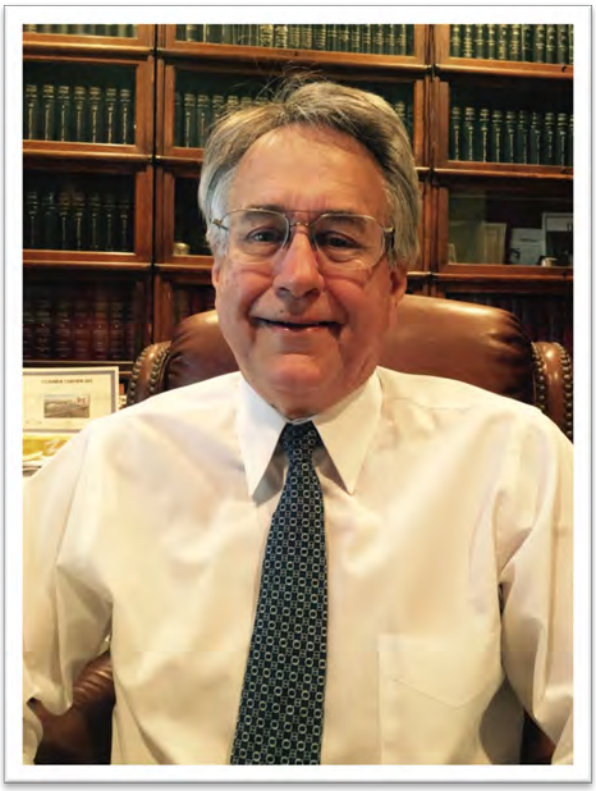
This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, suzannemduvall@gmail.com*, or 4080 Stanford Avenue, Dallas, Texas 75225, or fax to 214-368-7528.*

Suzanne M. Duvall is an attorney-mediator in Dallas with over 800 hours of training in mediation, arbitration, and negotiation. She has mediated over 2,500 cases and serves as a faculty member, lecturer and trainer for numerous dispute resolution and educational organizations in Texas and nationwide. A former Chair of the ADR Section of the State Bar of Texas, Suzanne has received numerous awards for her mediation skills and service. She has also been selected "Super Lawyer" 2003–2015 by Thomson Reuters and the publishers of Texas Monthly, and been named to Texas Best Lawyers 2009–2016 and Best Lawyers in America 2014–2016. She is a TMCA Distinguished Mediator, the highest designation given by the TMCA.

Colloquy with . . .

Ross Stoddard

by Lynne Nash



Ross Stoddard is known for being the mediator whom lawyers want to hire. He handles matters large and small, yet at the end of the day, he's excited to get up and do it all again. He takes the "counselor at law part" to heart, and considers mediation to be the best way for him to help people having disputes. Ross is a full-time mediator, and has been for over 26 years. He handles around 200 mediation sessions a year, and sees each and every case file as a new novelette waiting to be read.

In 1986, Ross risked that it was possible to establish a successful law practice outside of downtown Dallas, and moved to Las Colinas in Irving. Some would say that's luck, but Ross attributes it to "guidance from above," being yet another one of those decisions that has had a positive outcome in his life, though not for reasons appreciated or foreseeable at the time.

As happens so often, a chance meeting—in a downtown Dallas parking lot—changed Ross's legal career. It was 1989, and Ross was on his way to the courthouse in Dallas when he ran into his friend, well-respected Dallas trial lawyer Larry

Ackels, and his father, also a prominent Dallas lawyer. Larry mentioned that in a few days he and his dad would be attending an open 1-day CLE program, followed by the first limited-enrollment, invitation-only 2-day Basic Mediation Training Program. It was sponsored by the Dallas Bar Association, to learn about "something called mediation." Larry said to Ross, "It sounds like something that you would enjoy doing, and would do it well."

Ross attended the open CLE program, along with 300+ lawyers from the Dallas Metroplex, and was told again there was no available space in the next day's training. By the end of the day, Ross was convinced that what he had heard about sounded like a "coat that would fit" him perfectly. Two of the primary organizers—Steve Brutsché and Jay Madrid—told him they'd call him if anything opened up, and encouraged him to apply to attend the next training session, to be scheduled sometime in the future.

Ross did not to take "no" for an answer. Instead, he was the first to show up to the fully-enrolled training session the next morning. He hoped that they would be amenable to using him "to serve food, or run a video camera, or do something," which at least would give him the opportunity to learn more about the mediation process, even if he might not earn any credit for the time spent in the training. Fortuitously, 1 attendee was running a bit late to the training, so Steve and Jay—acknowledging Ross' obvious interest and commitment to learning about mediation—told him to "take a seat" in the training and join the other 39 attorneys who participated in that initial mediation training program of the DBA.

Several of those participants, like Ross, became stand-outs in the Texas mediation world: Mike Amis, Courtenay Bass, and Ross Hostetter, with whom Stoddard has taught mediation training programs for many years, along with Suzanne Duvall, John Estes and Sid Stahl, to name a just a few. Brutsché's training focus was on how professional mediators should be in service to the courts, lawyers, and the parties in litigation. This mind-set is still what Ross's focus remains on today, and in his mediation training and other teaching experiences.

Shortly after their training, Ross, along with Mike, Courtenay, and Ross Hostetter, were selected by Brutsché to serve as faculty for his mediation training organization, Attorney-Mediator Institute (AMI). A few years later, Brutsché became terminally ill. He sold AMI, and the four, along with Peter Chantilis, formed the American Academy of Attorney-Mediators, Inc., through which they conducted several dozen mediation training programs during the next decade.

For a dozen years beginning in 2002, Ross served as adjunct faculty in SMU's Executive MBA program, for the Effective Negotiations and Global Business Environments courses. More recently he, along with mediator colleague Jeff Abrams of Houston, has served on mediation programs in other countries which were offered by the World Forum of Mediation Centres, sponsored by the Union International des Avocats (UIA), a Paris-based international association of lawyers. Sharing his passion for service through mediation is one of Ross's driving motivations to participate in those programs.

Why Do Lawyers Hire You?

"I believe that my desire to be in service to people resonates with them. They know that I'm there to serve them." Also, lawyers have told him they recognize that he "doesn't give up on the process." Ross recognizes that it takes time to "turn the aircraft carrier around," and knows it is the process which creates the opportunity to get parties to a resolution. It's "not my practice to give up on people when they don't settle on the day of the initial mediation session; sometimes they just need a bit more time before they are ready to agree on a solution."

How Do You Explain Mediation to Clients?

Parties may come to the process with a preconceived notion of what the settlement should look like, but to get there—or as close as possible to "there"—the mediator likely will have to assist them as they move through a series of proposals, akin to going through the Panama Canal locks. Often, 1 or more of the parties needs time to adjust to the new levels of the negotiations while making moves down (or up), just as one finds in a system of canal locks. This is also comparable to the "glide path on an airplane: you want it to be smooth, so that everyone experiences a comfortable landing."

How Do You Manage the Mediation Process?

Ross says it's effective when parties start the mediation at whatever level of proposals they want to start; he rarely challenges the wisdom of their self-selected first offers. "Do they need to make it to feel good? To anchor the negotiations? To meet another need?" There are lots of reasons why parties decide what will be their initial proposals. Ross "doesn't worry about the first proposals—it's the last proposals that really matter."

Primarily, Ross wants to "keep people from inadvertently or unintentionally causing the process to stop." In Ross's experience, sometimes an attorney or party comes into mediation looking for a "hit it and get it" process. That's not likely to lead to a settlement. Conversely, "some litigators excel at

understanding how to use the mediation process, as well as the mediator, as a settlement tool." This shows they understand their role as counselor, as distinguished from the mediator's role in the case.

What Challenges Do You Face in Your Practice?

Ross explained some typical challenges that he has experienced include working with clients whose personalities are difficult, or when a lawyer is off the mark on the law and that is driving the decision-making for that party. "Sometimes it's more challenging, but as a mediator, I know that I have to work just as hard for someone who's not as pleasant to deal with as one who is." In rare instances, when a lawyer is involved who is missing the point in mediation, Ross works to guide the lawyer by demonstrating a "service first" mindset, and attempts to move the lawyer away from a position of self-interest to one focused on the interest of the client.

Do You Have Requirements for Clients?

Ross's mediation requirements involve gaining 3 commitments from his participants during the initial joint session. He asks each participant to commit to

(1) attending in good faith,

(2) with adequate authority, and

(3) with sufficient time available to give the mediation process a fair chance.

Good Faith. In Ross' view, it is essential that everyone participating in the mediation process do so in good faith, which he defines as "keeping an open mind to exploring the possibilities of settlement during the mediation process." Ross asks each participant to acknowledge verbally during the joint session (which he strongly believes should be held in nearly every mediation) that they will act in good faith during the mediation. This begins to build a sense of community of effort among the participants. Ross believes that a mediation which begins without a joint session is likely to require at least a couple more hours to get the traction necessary for the parties to have a viable chance of reaching a settlement.

Authority. Authority is vital to the success of each and every mediation. For that reason, during the joint session Ross also asks all participants to identify their role on behalf of their parties during the mediation; to acknowledge that they can make a decision that binds their party; and to confirm that they have the authority to do so.

Time Commitment. The time commitment is the final essential element to getting a mediation off of the ground correctly. Each person at the mediation is asked to verbally

commit to having the time set aside for the mediation, to give the process a fair chance to work. As Ross puts it, "nothing puts a damper on a mediation faster than someone belatedly announcing that they have to leave to catch a flight before an agreement can be finalized." It's important for everyone involved in the mediation to know at the beginning of the session if someone has a hard-stop time, so that there are no surprises later in the day.

Establishing good faith, authority, and time commitments from participants at the beginning of a mediation establishes a rapport between the mediator and the participants. It also exemplifies the mediator's equivalent treatment of all parties. Then, when the mediator is asking the tough questions in private caucuses later in the day, each side can have "confidence that everyone is being treated the same way."

One caucus tip from Ross for mediators: "As soon as you get a reasonably decent proposal, get out of the room! Before they change their mind and decide to make it a less desirable proposal."

Do You Use Technology in Your Practice?

"Not per se, within mediations." However, through modern technology, Ross can "work on cases from anywhere in the world." Whether that's "coordinating scheduling, making follow-up calls, sending mediator's proposals, or drafting final settlement agreements," Ross can finish his mediator tasks while enjoying his favorite pastime, traveling. He and his wife, June, enjoy traveling domestically, to visit with their kiddos and grandkids, and internationally, to learn "first-hand how the world works."

What's Your Advice for Those Considering a Full-time Mediation Practice?

"Don't quit your day job right away!" Give yourself a "5-year window to build a mediation practice; that way you can wean yourself off your law practice and shift your focus gradually into becoming a full-time mediator."

With a 5-year plan in mind, here are his best tips:

1. Being a mediator requires you to accept that the process is about "being in service to others." The work is most often a solo effort; in the end, a mediator must be satisfied and comfortable with private victories, due to the confidentiality obligation.

2. Prepare to adjust to a life which involves "giving up much control over when other activities in your life will happen." For example, the mediation that goes late into the evening may interfere with the mediator's evening

plans, or may necessitate changing travel plans. The true heroes of the mediation process are the spouses or significant others of mediators, who spontaneously forego many evenings, events, and even celebrations with their mediator partners. Their sacrifices are significant, and should be fully appreciated.

3 Be sure to "check your ego at the door." The focus of the mediation process is not on the mediator; rather, it is on the participants. It's about "everyone else and everyone else's needs." It's not about being the most knowledgeable-about-the-law person in the room, or being the one who knows all of the answers. This may be a mindset adjustment that will be particularly challenging for some people to take on.

4 "You'll need to equip yourself with great questions, not necessarily great answers." Most answers are for the participants to provide, not for you, the mediator. There are times when you may feel you know what should guide the parties or what optimally they should do, but that's not your place. It's up to the participants to find their answers based on the mediator's stable of well-thought-through questions. You'll need to become an expert at "living in the question."

5 "Recognize that, as the mediator, your role is to be the guardian of the integrity of the mediation process." It's the mediator's responsibility to provide a safe, and ethical, process in which the participants can conduct their negotiation. If someone is inclined to co-opt the process and use it less than ethically, the mediator needs to be ready to intervene to preclude that from happening.

6 Perhaps most importantly, Ross believes very strongly that you will be much more effective as a mediator if you tap into the guidance available to you from whatever "supreme being, or intuitive source, guides you in life. If you can do that, then ultimately you can be of greater service to participants in your mediations," while exhibiting the calm which is needed in the mediator during the sometimes stormy mediation process. Ross described several situations during mediations where the right words came to him at the right time, or his suggested course of action lead to a breakthrough—because, as he put it, "God put his hand on my shoulder and directed my way."

What Defines the Real Ross Stoddard?

Ross is a true-blue lover of people, and finds being a mediator fits him like a glove. When asked what field other than law he would have entered, he said "maybe something

entrepreneurial—if I was 21 now, probably something in technology." What he absolutely would not do is be a roofer. "I am amazed at people who do that work in the Texas summer heat!"

His favorite word is "Yes," yet he struggles with naming "No" as his least favorite word. Instead, he defines his least favorite "no" in the context of that time in mediation where someone announces "no more, we're finished," when he can still see the process being likely to get the parties to a resolution.

When asked what he'd like to hear God say when he arrives at the pearly gates, Ross immediately said "Welcome!" … and quickly added that he hopes he doesn't hear "Wrong door!"

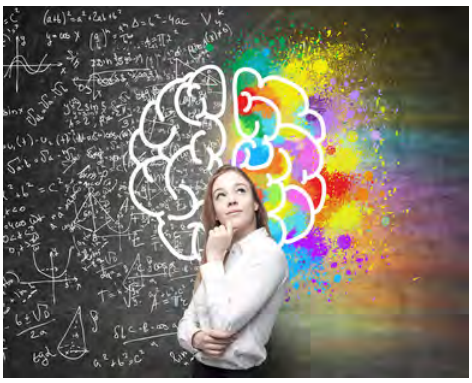
He is a man who offers his clients professional service, as well as the mediation community the benefit of his years of knowledge working through the mediation process. As long as his energy remains high enough, and if it is in "the Grand Plan," he has no thoughts of retiring. As Ross's father is alive and well at 96 years old, and his grandmothers made it past 98, it is highly likely that the ADR community of Texas and the rest of the world will continue to benefit from Ross's company for many additional years.

Lynne Nash is a 3L at Texas A&M University School of Law, graduating in December 2016. She holds an undergraduate degree from Texas A&M University in Speech Communication, and a Master's degree in Conflict Resolution and Restoration from Abilene Christian University.

As a law student, Lynne has interned for the Attorney General of Texas in Consumer Protection, the U.S. Office of Special Counsel, and for Texas judges Judge Don Pierson, Judge Martin Hoffman, and Judge Bonnie Lee Goldstein, as well as U.S. Magistrate Judge Paul Stickney. She has also competed in multiple advocacy competitions including mock trial, negotiation, mediation, arbitration, and client counseling. Lynne's 2015 client counseling team competed at Nationals, finishing in the top 6. In September 2015, Lynne was awarded the Jim Gibson scholarship by the Texas Mediators Credentialing Association and was recognized as a "rising star" who contributes to advancing the goals of mediation in Texas. In May 2016, Lynne and her teammate won the National ABA representation in mediation competition. Lynne is also the CEO of NashKnowhow, LLC, a consulting firm.

Currently Lynne is externing for Judge Bonnie Lee Goldstein and writing on the subject of silence in litigation, negotiation, and settlement situations.

Why Mediators Shouldn't Believe Everything They Think, Part 2



by Charles Penot

This is the second installment of a 2-part article that mines Daniel Kahneman's best-selling book, *Thinking, Fast and Slow*, for insights that might improve our negotiation and mediation skills. In Part 1, which appeared in the Summer 2016 edition of this newsletter, I described 2 different systems of thought that psychologists say operate in humans, and how one of those systems, the fast, intuitive System 1, often gives rise to systemic errors, or cognitive biases, in our thinking.

Here, I continue to catalogue some of those biases, and conclude by offering some modest suggestions that mediators and negotiators might use to avoid cognitive biases.

Your Mood Influences Your Thinking

Our unconscious cognitive processes influence our conscious thinking and decisions in subtle ways. For example, the mental states that Kahneman calls "cognitive ease" and "cognitive strain" may unknowingly influence whether individuals are more likely to default to the intuitive approach of System 1, or to use the more effortful, vigilant approach of System 2.

> [G]ood mood, intuition, creativity, gullibility, and increased reliance on System 1 form a cluster. At the other pole, sadness, vigilance, suspicion, an analytic approach, and increased effort also go together. A happy mood loosens the control of System 2 over performance: when in a good mood, people become more intuitive and more creative but also

> less vigilant and more prone to logical errors.[2]

These insights have a number of implications. The mere fact that something is familiar, is something you have seen or heard before, makes it more likely that you will believe it or place some positive spin on the fact.

Kahneman also observes that if one wishes to deliver a persuasive message, it's best to do anything that would result in a reduction of cognitive strain. If communicating in writing, for example:

- use high quality paper for good contrast,
- use color (preferably bright blue or red, rather than green, yellow, or pale blue)
- use strong, clean fonts, and
- use simple language.

Further, Kahnemen recommends an odd, but familiar notion, if possible and appropriate: Put it in verse. ("If the glove doesn't fit, you must acquit.")[3]

Confirmation Bias

System 1 can also lead us astray because it is quick to jump to conclusions. Even in ambiguous situations, System 1 is rarely stumped. System 1 uses clues in the present context or from memory to resolve potential ambiguities. However, it is the following characteristic of System 1 that presents the real potential for disaster:

> System 1 does not keep track of alternatives that it rejects, or even of the fact that there were alternatives. Conscious doubt is not in the repertoire of System 1; it requires maintaining incompatible interpretations in mind at the same time, which demands mental effort. Uncertainty and doubt are the domains of System 2.[4]

This characteristic of System 1 is a primary reason for one of the cognitive biases that can plague all players in mediation: *confirmation bias*, which is a tendency to only search out information that confirms preconceived ideas and ignores contrary evidence or information.

In perhaps a crass allusion to confirmation bias, I once heard a

[2] *Id.* at 60, 69.

[3] *Id.* at 63 –65. People rated rhyming aphorisms as more insightful than the same message written in non-rhyming prose. *Id.* at 63.

[4] KAHNEMAN, *supra* note 2, at 80.

lawyer tell a judge that his opponent—who happened to be me—had been "drinking too much of his own Kool-Aid." The point was clear, even though of course I disagreed.

Unless we deliberately set System 2 to the task of actively seeking out and considering evidence that refutes a proposed proposition, we are liable to fall prey to confirmation bias.

The Halo Effect

Kahneman also discusses a similar, related bias that can also plague participants in mediation or other negotiations: the *halo effect*. The halo effect is the tendency we have to like (or dislike) everything about a person, entity, or thing, based on one or more traits that we have seen and liked (or disliked). The handsome speaker with a deep and resonant voice is a classic example.

In mediation, a party's representative may be receiving undue deference because he or she enjoys the benefits of the halo effect. Conversely, the representative may defer too much to the participant who enjoys the benefit of the halo effect. Of course, the mediator might also fall under the spell of the halo effect of any participant.

"What You See Is All There Is"

Both confirmation bias and the halo effect illustrate the penchant of System 1 for jumping to conclusions. *Our minds treat available information and unavailable information in dramatically different ways*.[5]

For System 1, unavailable information means not only information that one does not know at all, but also information that simply has not been retrieved from memory.

By unavailable information, Kahneman means not only information that one does not know at all, but also information that simply has not been retrieved from memory. Avoiding this tendency requires an attentive System 2 that has overcome its lazy proclivities. Kahneman labels this troublesome characteristic, "What You See is All There Is," to which he applies the acronym, WYSIATI.

In addition to offering experimental evidence of WYSIATI,[6] Kahneman

[5] *Id.* at 85.

[6] *Id.* at 86–87.

offers the following example as illustrative of the tendency to jump the gun:

> "Will Mindik be a good leader? She is intelligent and strong . . ." An answer quickly came to your mind, and it was yes. You picked the best answer based on the very limited information available, but you jumped the gun. What if the next two adjectives were *corrupt* and *cruel*?[7]

Kahneman believes that the WYSIATI tendency explains 3 additional biases, all of which can afflict mediation participants:

1. *Overconfidence bias*: One's subjective confidence in one's own predictions and judgments is consistently higher than is warranted by objective measurement.[8]

2. *Framing Effects*: The notion that different ways of presenting the same information can elicit different responses. For example, the statement that there is a 90% survival rate in some period following surgery is going to be much more reassuring than the statement that there is a 10% mortality rate during the same period.

3. *Base-rate neglect*: The tendency of individuals to believe that known, often scarce, and sometimes superficial, information about a situation allows them to predict outcomes with greater accuracy despite their knowledge of the statistical base rate. For example, only 35% of small businesses survive for 5 years in the United States. When entrepreneurs were asked, "what is the chance of success for a business like yours?" the average estimate was 60%. When the question was posed in terms of their own businesses, 81% said they had at least a 70% chance of success, and 33% answered that their chance of failure was 0%.[9]

Overconfidence Bias and Mediation

Considerable empirical evidence suggests that lawyers and litigants suffer from overconfidence bias when it comes to predicting their chances of success in litigation.[10] The results should be unsettling to anyone who makes a living offering advice to others about their chances in

[7] *Id.* at 85.
[8] *Id.* at 87.
[9] *Id.* at 256–57.
[10] Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOLOGY, PUB. POLICY, & LAW 133 (2010); Randall L. Kiser, Martin A. Asher, & Blakely B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. Empirical Leg. Studies 551 (2008).

litigation, and even more unsettling for those relying on that advice.

Goodman-Delahunty and her colleagues had lawyers in 481 cases set for trial specify a minimum goal for the case, and provide a

By and large, lawyers are overconfident in their predictions, and, perhaps surprisingly, years of legal experience does not make much of a difference.

confidence estimate of achieving that goal. By and large, lawyers were overconfident in their predictions, and, perhaps surprisingly, years of legal experience did not make much of a difference. Even when lawyers were asked to provide reasons why they might not achieve their goals—arguably providing a stimulus that should have activated their "lazy" System 2s—their predictive accuracy did not improve significantly.

A study by Kiser and his colleagues involved 2,054 arbitrations and litigated cases in which the parties conducted settlement negotiations, but failed to reach agreement. The results of the arbitrations or trials were then compared to the parties' settlement positions, revealing high rates of decision-making errors by the disputants. Interestingly, even parties represented by attorney-mediators—attorneys trained in mediation—did not perform appreciably better.

The message should be clear: overconfidence bias can and does happen to us all. *No one is immune*.

Anchoring and Sunk Cost Biases

Another potential decision making pitfall is anchoring. Anchoring is the tendency of individuals' estimates of unknown quantities to be influenced by an initial value that was considered and primed. Kahneman describes it as "one of the most reliable and robust findings of experimental psychology."[11] The implication for negotiation and mediation seems to undermine the conventional wisdom that one should always get the other party to make the first offer.

Every mediator is familiar with, and usually can easily spot, sunk cost bias. *Sunk cost bias* describes the tendency of individuals to ramp up their commitment to a course of action, when they have already committed substantial money, time, resources, or effort. Contrast this with a decision made by focusing only on

[11] KAHNEMAN, *supra* note 2, at 119; *see also* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 25–36 (2008).

the future, marginal costs and benefits of proceeding. The expression "throwing good money after bad" aptly captures the nature of this cognitive trap.

Think here of the litigant whose commitment to staying the course in litigation is a function of attorneys' fees already incurred. Unfortunately, money already spent, though triggering feelings of regret and wanting to avoid loss, has nothing to do with the best course of action in the present moment. Nevertheless, there is a powerful human drive to avoid taking a known loss, particularly when one is perhaps overconfident about what the future holds. As the poet said, "Hope springs eternal in the human breast." Reality, however, can be more sobering.

What Can We Do to Transcend Our Cognitive Biases?

The obvious question lawyers and mediators pose after hearing about this research is, "How can we fix it?"

The question is more easily posed than answered. (Leave it to practical people to ask how we can immediately correct for the millions of years of evolutionary history that created the cognitive machinery we now have.)

Kahneman, a Nobel Prize winner who has spent a lifetime studying these issues, is not optimistic. He observes that the research is not encouraging when it comes to our abilities to overcome these biases. These biases often derive from the automatic functioning of System 1, which cannot be turned off. System 2 often is unaware of the erroneous operations and assumptions of System 1, and thus these biases cannot easily be avoided. As Kahneman states,

> The best we can do is a compromise: learn to recognize situations in which mistakes are likely, and try harder to avoid significant mistakes when the stakes are high. The premise of this book is that it is easier to recognize other people's mistakes than our own.[12]

That last observation points to some possible solutions.

First, it suggests the value of using neutrals, or at least of consulting with others who are not as close to the situation. When consulting with others, perhaps ask for opinions in writing first, without having some one speak first who may stifle candid dialogue and debate. Avoid group think.

[12] KAHNEMAN, *supra* note 2, at 28.

If consulting with a neutral isn't possible, at least be sure to pay attention, remembering that your System 2 can be lazy and oblivious to the assumptions of System 1.

- Avoid ego depletion by ensuring adequate rest and meals.
- Ask disconfirming questions.
- Entertain and test multiple perspectives and possible solutions.
- Engage in contrarian analysis.
- Try to disprove and undermine your own solutions and decisions. Combat anchors, perhaps by using outside analysts or experts who have not been exposed to the possible anchors, and
- Consider ranges, rather than single point values, or work with multiple anchors.

To mediators, this suggests that your role is *being the parties' System 2*. Watch for the cues, be aware of the circumstances in which the biases are prevalent, know the language, and draw the parties' attention to their blind spots.

But never forget that you, too, are subject to the same biases and illusions. If the parties can benefit from an outsider's perspective, that must also be true for the mediator. Although many mediators are not fans of co-mediation, this insight perhaps suggests there may be value to having another co-mediator's System 2 in the room.

The bottom line is that we humans have exquisitely intricate and marvelous brains that serve us well most of the time. But sometimes we have to remember not to believe everything that we think.

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Influence Behavior To Get the Results You Want

by Wayne Meachum

To get the change you want, don't focus on the results; focus on the behavior of the parties.

That is the message presented in the book, *INLUENCER: The Power to Change Anything.*[13]

With exhaustive research to support their conclusions, the authors identify numerous behavior practitioners, whom they refer to as "influence geniuses." They have developed a handful of powerful influence principles and strategies that can be learned and replicated to bring about behavioral changes that result in a desired outcome. My hope is that this summary of those principles and strategies will motivate further study and development of the skills that can make all of us more effective influencers. With guidance from these experts, we can all become capable of effecting positive change in each of our respective undertakings and corners of the world.

To influence change, you must determine what you are trying to change. Influencers focus on behavior. The first step is to carefully identify the behavior you want to influence. The authors point out that enormous influence can come from focusing on a few *vital, high-leverage behaviors*. So, first you must search for those behaviors and identify the strategies that focus on specific behaviors. Again, don't confuse outcome with behavior.

Second, as noted, give special attention to a handful of high-leverage behaviors which the authors identify as vital behaviors, and which

[13] Kerry Patterson, Joseph Grenny, David Maxfield, Ron McMillan & Al Switzler, McGraw-Hill, 2008.

are discussed below. Discover those, change those, and outcome/results change. In many instances, a couple of changed behaviors can open the floodgates of change.

Before someone will change their behavior, they have to *want* to change their behavior. That means they will have to think differently. People chose their behavior based on what they think will happen to them as a result of their chosen behavior. If you want to change their behavior, you have to change the person's perception of the cause-and-effect dynamic that currently drives their chosen behavior. A person's *interpretation* of events will prevail over the *facts* of the situation. In other words, a person's perception is his reality.

Six Sources of Influence

The most effective way to change a person's perceptions is to come up with innovative ways to create personal experiences. Note that experiences can be vicarious, rather than direct.

Virtually all forces that have an impact on human behavior work on only two mental maps. A person asks, "Can I do what is required?" and, "Will it be worth it?" In other words, "Am I able?" and "Am I motivated?" So, *motivation* and *ability* comprise the domains of the model. Influence geniuses know which forces to bring into play in order to determine their chances of success. Mastering the 6 sources of influence can make change inevitable.

Personal Motivation

Influencing a person to become personally motivated to behave differently than his current behavior is essential. For example, make the undesirable, desirable. Absent *personal motivation*, your influence plan will fail.

Personal Ability

The alternative behavior you want the person to choose has to be within her ability to perform. But, there are numerous real-life examples of people surpassing their limits. Demonstrating, either personally or by vicarious experience, that a person is capable of a behavior might be necessary. She might even need training to achieve her *personal ability*. Arnold Palmer said, "It's a funny thing, the more I practice the luckier I get."

Social Motivation

As the authors point out, no resource is more powerful and accessible than the persuasion of the people who make up our social network. What is good for the neighborhood, the company, the school, the family, or other group can provide motivation for changing the person's behavior to get the desired outcome. Smart influencers appreciate the amazing power humans hold over one another

and, instead of denying it, lamenting it, or attacking it, embrace and enlist it.

Social Ability

Find strength in numbers. People in any identifiable social group have to assist each other if they hope to succeed in achieving any common goal. Enlisting the help of others is a key factor of *social ability*. "Never run after your own hat—others will be delighted to do it. Why spoil their fun?" —Mark Twain

Structural Motivation

Economic/financial considerations, risk/reward equations, established relationships, and other such prevailing structural realities cannot be ignored. Directly addressing such *structural motivations* is essential to your success as an influencer seeking to change a person's behavior. Structural motivation examines how to optimize the power of *things* such as rewards, perks, and the occasional kick in the butt as motivational factors in influencing behavior, especially *changes* in behavior. Design rewards and demand accountability. Noel Coward is credited with saying, "I can take any amount of criticism, so long as it is unqualified praise."

Structural Ability

Change the environment. Clement Stone said,

> *"You are a product of your environment. So choose the environment that will best develop you toward your objective. Analyze your life in terms of its environment. Are the things around you helping you toward success—or are they holding you back?"*

This source of increasing one's ability ("Can I do it?") examines non-human forces—the world of buildings, space, sound, sight, etc.; these are not human influences, but within our "human" abilities to influence and change. Alternatives to the established "structures" within which the person's behavior is being determined might be the least readily apparent of the forces that influence vital behavior but, in virtually all cases, alternatives are available. As the authors suggest, learn to notice, make the invisible visible, be "heuristic" (learn by yourself). The influencer must address the issue of *structural ability,* or his plan will likely fail.

Changing 3,500 Year-old Behaviors, Changing the World

Out of the most impressive examples of change examined by the authors is the influence strategy used by Dr. Donald Hopkins and his staff at The Carter Center, in their work to eradicate the Guinea worm disease. They changed the dangerous water-drinking habits of millions of remote villagers in West Asia and Sub-Saharan Africa. This dramatically successful effort teaches us how to

identify a handful of vital behaviors that help change the habits—and, therefore, the lives—of millions of people.

For 3,500 years, villagers in those regions of the world drank stagnant, unfiltered water and would thereby consume the larvae of Guinea worms; those larvae would then burrow into their abdominal tissue and slowly grow into enormous worms. As the authors explain in great detail, "[T]he Guinea worm is one of the largest human parasites (it can grow to three feet long), and it has caused incalculable pain and suffering in millions of people." After the larvae burrow into the abdominal tissue of its human "host" and grows into an enormous worm, the cyclical destruction of the villagers is catastrophic.

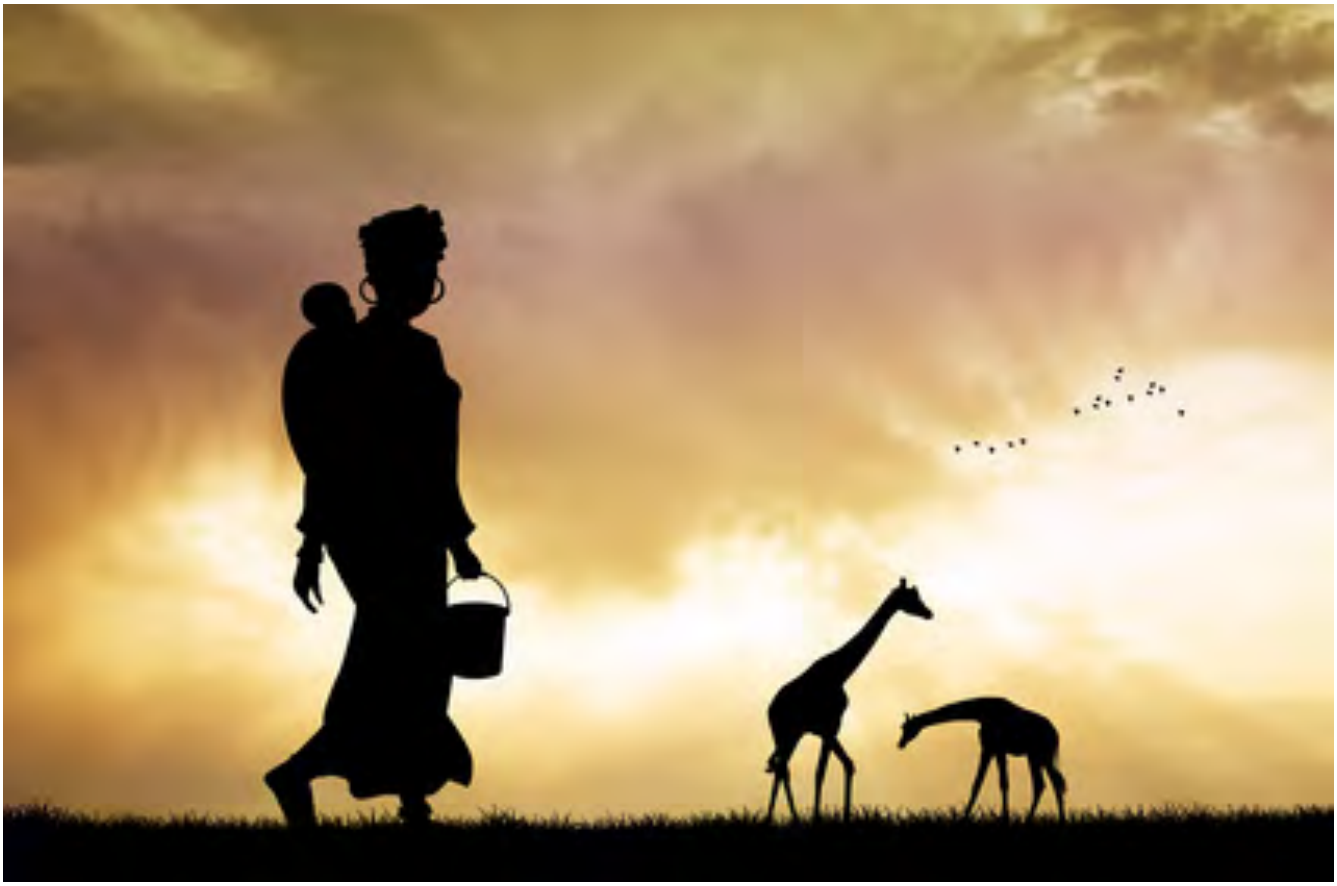
> *"Eventually the worms begin to excrete an acidlike substance that helps carve a path out of the host human's body. Once the worm approaches the skin's surface, the acid causes painful blisters. To ease the horrific pain, victims rush to the local water source and plunge their worm-infected limbs into the pond for cooling relief. This gives the worm what it wanted—access to water in which to lay hundreds of thousands of eggs, thus continuing the tragic cycle."*

The infected villagers cannot work their crops for weeks at a time. Suffering parents rely on their children to drop out of school to help with daily chores. Since crops cannot be attended, that season's harvest is lost. Starvation ensues, and the cycle of illiteracy and poverty continues to the next generation. Secondary infections caused by the worm can be fatal. As a result, the Guinea worm has been a major barrier to economic growth and social progress in dozens of countries.

Dr. Hopkins was interested in this particular health crisis, because he knew that if 120 million people in 23,000 villages would change just a few vital behaviors, for just one year, the cycle of infection and procreation of the worm would be broken, and there would never be another case of Guinea worm infection. What he and his team was attempting to do had never been accomplished in human history. If successful, they would have eradicated a global disease without finding a cure. They would have beaten the disease with nothing more than the ability to influence human thought and action.

The lessons of Dr. Hopkins success are (1) finding success where others have failed and (2) locating a handful of key actions that, if routinely performed, will guarantee success.

To embark upon their goal of ridding that region of the world of Guinea worm infection, Dr. Hopkins and his



team flew to Sub-Saharan Africa to locate a village that should have had Guinea worm disease, but didn't. Of particular interest were villages that neighbored locations that were rife with Guinea worm disease. After locating such a village, they discovered that the villagers drank from the same water supply as those of a nearby village that was highly infected with the disease. As the authors point out:

> *"It didn't take long to discover the vital behaviors. Members of the team knew that the behaviors related to the fetching and handling of water would be particularly crucial, so they zeroed in on those. In the worm-free village, the women fetched water exactly as their neighbors did, but they did something different when they returned home. They took a second water pot, covered it with their skirts, and poured the water through their skirt into the pot, effectively straining out the problem-causing larvae. Voila! That was a vital behavior. The successful villagers had invented their own eminently practical solution."*

By studying the "positive deviance" of the successful villagers' vital behaviors, the team learned that the water supply could be effectively filtered without the necessity of expensive, imported solutions from the West.

Having identified these vital behaviors, the Guinea worm eradication team embarked upon the task of changing the minds of the villagers infected with the disease. They went to Nigeria, where former U.S. President Jimmy Carter recruited former Nigerian President General Gowon to assist. Carter was making use of social motivation by asking Gowon for help; General Gowon was beloved in Nigeria for having brought stability and democracy to the country. Any day that he visited a village was an important day in the history of that village.

After a welcoming celebration, General Gowon would explain to the villagers that he had brought good news for all who suffer from the "fiery serpent," and that he had come to teach them how to rid themselves of the serpent forever. He asked the villagers to bring him water from the pond. A clay jug of pond water would be brought to him and he would pour it into a clear jug so all could see the condition of the water. Most had never seen their water in a clear jug before, and were shocked to see the murky condition of their water supply. General Gowon would then use a magnifying glass to emphasize the disgusting contents of the water (including fleas and other things darting and swimming) for all to see. He would then cover another clear jug with a cloth filter, and pour the water from the first jug into the one covered with the filter. He would invite everyone to take a close look. They saw that murkiness and the cloudy yellow color was gone. He would then ask the villagers which glass of water they would rather drink. To no one's surprise, they all pointed to the clear jar. General Gowon would hand the jar to the village chief, who would immediately drink it and report that it was good.

The beloved general would then tell the villagers of a nearby village where the water is strained, and where the fiery serpent does not exist. He explained that the villagers there were successful in growing their crops, feeding their families, and keeping their children in school, and that no one there had the serpent. He would tell them that if they would follow his instructions for two years, then they would be rid of the serpent forever. By this time, General Gowon has begun to change their minds, the first step in getting them to change their behavior.

When the authors published their book in 2008, the team from The Carter Center reported that they had eliminated the Guinea worm plague from 11 of the 20 countries afflicted at the campaign's beginning.

Worldwide, infections had dropped by over 99 percent because of the influence strategy that focused on the vital behaviors. By 2015, when former President Carter was diagnosed with cancer, he said that he did not want to die of cancer before the last Guinea worm had been eradicated from the earth. Now, thankfully, President Carter is cancer-free, and there are no known cases of Guinea worm infection anywhere in the world.

By now, it should be obvious why influence geniuses take pains to address all 6 sources of influence when up against a tough, persistent problem. As noted above, the successful influencers will analyze the problem, identify the vital behaviors to be addressed, and fashion their own 6-source influence strategy to change the behaviors that need to be changed. By doing so, they achieve the desired result.

Changing Behaviors in Mediation and Negotiation

"But," you're likely asking yourself, "how can these skills be useful in a half-day—or even a 2- or 3-day—mediation, or in a business negotiation that might stretch over 3 or 4 days?"

Kay Elliott, the brilliant professor of mediation and negotiation at Texas A&M School of Law, whose student mediation and negotiation teams have earned international stature from their perennial success in interscholastic competition, has offered thoughtful commentary on the subject. Professor Elliott says:

> *"My sense is that one lesson it teaches is that in addition to changing the way someone thinks in order to change their behavior, sometimes we can change the way they behave in order to change the way they think! Humans operate most of the time in an intuitive, fast thinking mode (System 1) that is mostly running on an unconscious level and is responsive to hormones being secreted as stimuli coming into the brain from the environment. Many behaviors (in fact most) are visible, in a fMRI* [functional MRI] *of the brain at the limbic system level. When those behaviors (habits) become conscious through education and repetition, they are visible in another part of the brain—the frontal cortex. The old destructive patterns don't disappear, they are over-ridden by the new, conscious, healthier habits."*

The authors provide a good example of Professor Elliott's observations with the experience of the Delaney Street Foundation. Delaney Street provides a structured environment for drug-addicts, ex-cons and homeless people within which they must behave and conduct themselves differently from the patterns of dysfunctional conduct that had characterized their lives before

entering Delaney Street. The success of the Delaney Street Foundation clearly shows how new habits can become transformative in the lives of the hundreds of individuals who have participated in the program.

Professor Elliott also extends the application of the phenomenon to our legal system by pointing out that our legal system was founded on the behaviors and rituals of adversarial combat; trial is a sophisticated form of warfare, where there are winners and losers. The weapons used are words, documents, tangible evidence, etc. Cases that are mediated (or negotiated) in the shadow of the law are influenced by this war metaphor, and it undergirds the way lawyers are trained, programmed, and therefore, behave. But, as she points out,

> *"We have set aside our war weapons and behaviors in order to participate in an integrative search for mutual benefit. ADR introduced new behaviors—replacing adversarial behaviors with collaborative and conciliatory ones. Now, law students are being trained in problem-solving (a frontal cortex activity) rather than merely fighting."*

I highly recommended a serious study of this thoroughly researched, extensively documented, and well-written book. A conscious, focused effort to develop the skills identified and described by the authors can be valuable to any mediator or negotiator by sharpening your insights, elevating your abilities, and increasing your success in getting the results you want.

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Restorative Justice Takes Hold in Mexico's Criminal Justice System

by Walter A. Wright & Roberto Montoya González

In recent years, Mexico has begun the process of integrating the principles of restorative justice into its criminal justice system. This article explains the work that set the stage for this initiative, the legal framework that supports the growth of restorative justice in Mexico, and the implementation of restorative justice into Mexico's criminal justice system, including recent statistics from restorative justice initiatives in several Mexican states.

Setting the Stage for Restorative Justice in Mexico

The current incorporation of restorative justice into Mexico's criminal justice system began in in 2001, when USAID/Mexico funded a project to promote mediation there.[i] The project was a joint initiative among several key actors in the United States and Mexico. The most important actors from the United States were the American Bar Association (ABA), its Dispute Resolution Section, and its Latin American Law Initiative Council. Freedom House, which describes itself as "an independent watchdog organization dedicated to the expansion of freedom and democracy around the world,"[ii] also played a significant role.

The important Mexican actors included Mexico City (which is no longer called the Federal District[iii]), most of the 31 Mexican states, the Supreme Court of Mexico, the Mexican Bar Association, the Centro de Mediación Notarial, A.C., and the Instituto Mexicano de la Mediación, A.C.[iv] The project, which lasted 5 years, provided technical and administrative assistance so that Mexico City and the participating states could establish their first dispute resolution centers. When the project ended in 2006, "Mexico had

28 court-annexed centers operating in 17 states and more than 500 mediators had trained under the Mediation in Mexico project."[v] Today, 26 of Mexico's 32 Federative Entities (i.e., the 31 states and Mexico City) have ADR statutes, and 29 Federative Entities have ADR centers administered by the courts; thousands of trained mediators staff the courts' ADR centers and engage in private mediation practice in Mexico.

The Legal Framework Supporting Restorative Justice in Mexico

Constitutional reforms. Since June 2008, Article 17 of Mexico's constitution has authorized ADR procedures with the following simple language: "The laws will provide for alternative mechanisms for the solution of controversies."[vi] The same article provides that in criminal matters, the laws will

- regulate the application of ADR procedures;
- ensure compensation for damages; and
- establish the cases in which judicial supervision will be required.[vii]

Nationwide move from "mixed inquisitorial" to "adversarial" criminal justice system. Mexico also began a major reform of its criminal justice system in 2008, and that reform became fully effective in June 2016. During the reform period, Mexico exchanged its mixed inquisitorial procedural system for a new adversarial system.

The old system relied heavily on the submission of written documents to judges and provided criminal defendants with few procedural safeguards; the common perception was that criminal defendants were presumed guilty.[viii] Under the new system, oral hearings and arguments before judges are more common, and criminal defendants possess greater due-process protections; the goal of the new system is to provide greater transparency and efficiency in the administration of criminal justice.[ix]

Nationwide limitations on cases amenable to reparatory agreements in restorative justice procedures. A new National Code of Criminal Procedure,[x] which governs criminal procedure in all courts, federal and state, became effective in 2014. Article 187 of that code stipulates the circumstances under which reparatory agreements between victims and offenders, including reparatory agreements that arise from restorative justice procedures, may occur. Reparatory agreements are limited to the following types of cases:

1) crimes that are prosecuted by *querella*, "a criminal complaint or charge or accusation brought by

[an] injured party for purposes of obtaining a conviction as well as a indemnification for injuries suffered"[xi] or equivalent requirement of an offended party;

2) crimes resulting from negligence; and

3) property crimes committed without violence against persons.[xii]

Reparatory agreements are not allowed in cases where the accused has already entered into a reparatory agreement for a crime of a similar nature or where the accusation involves family violence.[xiii]

Time for entering into a reparatory agreement. Under Article 188 of the National Code of Criminal Procedure, a reparatory agreement may be made at any time from the presentation of a complaint until the issuance of an order that trial will begin. At any time during a criminal prosecution up to the time of trial, the judge in charge of the case may suspend the process up to 30 days to give the parties time to finalize an agreement, if the parties request it. If the agreement is broken, either party may request the resumption of the criminal process.[xiv]

National standards for restorative justice procedures

Definition of restorative meeting. A National Law of Alternative Mechanisms for the Solution of Controversies in Criminal Matters went into effect in 2014.[xv] This law, which applies to all criminal cases, federal and state, recognizes 3 types of alternative mechanisms:

- mediation,
- conciliation, and
- restorative meetings.[xvi]

The law defines a restorative meeting as

> "a mechanism through which the victim or offended person, the accused, and where appropriate, the affected community, in free exercise of their autonomy, seek, construct and propose possible solutions to the controversy, in order to achieve an Agreement that meets individual and collective needs and responsibilities, such as the reintegration of the victim or offended person and the accused into the community and the reconstruction of the social fabric."[xvii]

Restorative meeting process. In a restorative meeting, a facilitator convenes the victim, the accused, and any other affected parties, including appropriate members of the local community who are affected by the controversy. The participants agree upon questions to be addressed in the restorative meeting, and they all have an opportunity to speak to the questions and propose

solutions to the controversy. If the parties reach an agreement, the facilitator reduces it to writing and submits it to the parties for their approval and signature.[xviii]

Possible remedies contained in a reparatory agreement. The law suggests (but does not require) certain types of remedies that a reparatory agreement may contain:

1) recognition of responsibility and an apology to the victim or offended person in a public or private setting, during which the accused accepts that his conduct caused damage;

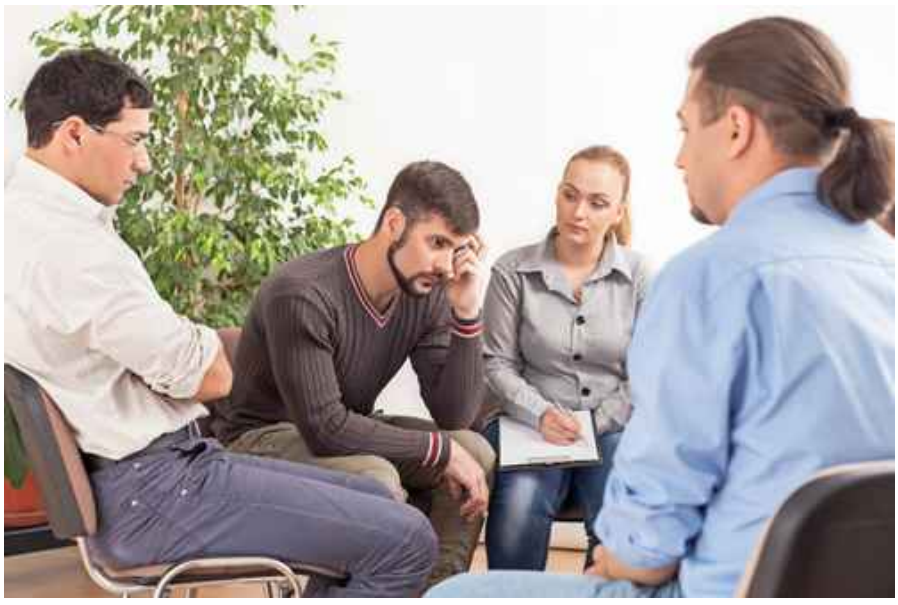
2) a commitment not to repeat the conduct that gave rise to the controversy, including a commitment to take steps designed to prevent the repetition of the conduct (e.g., addiction treatment); or

3) a restitution plan (e.g., replacement of property, provision of services to the community).[xix]

Restorative Justice Procedures in Criminal Cases Involving Adolescents

New national law governing criminal justice for adolescents. In June 2016, a new National Law for a Comprehensive System of Criminal Justice for Adolescents[xx] went into effect. The law recognizes restorative justice as a process that "respects the dignity of each person, builds understanding, and promotes social harmony through the restoration of the victim or offended person, the adolescent and the community."[xxi] The objectives of the process are to "repair harm [and] understand the origin of the conflict, its causes and consequences."[xxii]

Areas for application of restorative justice processes to adolescents. The new criminal law governing adolescents provides that when an adolescent is accused of a crime, the use of ADR procedures, including restorative justice procedures, is preferred over formal judicial proceedings against the



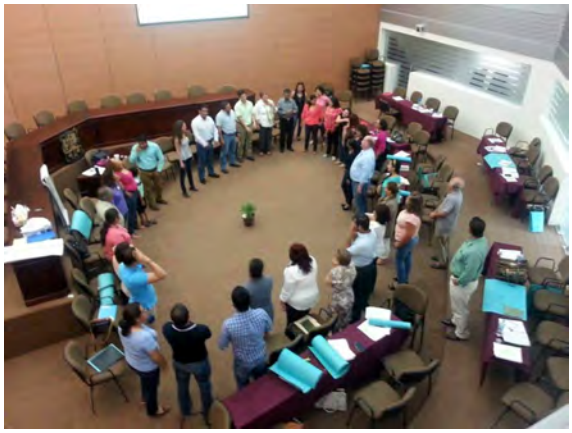
adolescent.[xxiii] If a formal proceeding is brought against an adolescent, but the adolescent enters into a reparatory agreement and complies with that agreement before a conviction of a crime, the formal proceeding is dismissed.[xxiv] If formal judicial proceedings occur and an adolescent is found guilty of a crime, a restorative justice process may still take place after the adolescent is sentenced. If a restorative justice process takes place after an adolescent is sentenced and the adolescent reaches an agreement with the victim, offended person, and/or members of the surrounding community affected by the offense, the damage caused by the offense is deemed repaired once the adolescent fulfills the terms of the agreement. Participation in a restorative justice process does not favorably or unfavorably affect how the adolescent's sentence is carried out.[xxv]

Implementing Restorative Justice in Mexico

Governing principles for ADR processes. Under the National Law for Alternative Mechanisms for the Solution of Controversies in Criminal Matters, all ADR processes, including restorative justice processes, must adhere to the following guiding principles:

- All participants must participate voluntarily;
- All participants must receive information about a process's scope and consequences;
- The information arising during a process must remain confidential and may not be used against anyone in a criminal proceeding, unless information arises about a crime being committed, or whose commission is imminent, that endangers the physical integrity or life of a person. In those cases the facilitator of the process must communicate the information to the public prosecutor;
- The process must foster an environment that encourages the generation of ideas and the resolution of any dispute by consensus; for this purpose, unnecessary formalities must be avoided, and simple language must be used;
- The process must be conducted with objectivity, avoiding the issuance of judgments, opinions, prejudices, favoritism, biases, or preferences that might give any participant an advantage;
- The process must foster equilibrium among the parties; and
- The facilitator and parties should conduct themselves honestly during the process.[xxvi]

Facilitator certification and training. The facilitators of restorative justice processes must be government employees. More specifically, the laws require Mexico City and each state to maintain an office that provides ADR services, including restorative justice services,



Training session for Restorative Justice facilitators in Ciudad Victoria, Tamaulipas.

for criminal matters.[xxvii] The offices can be located within the executive branch of the government (e.g., within a prosecutor's office) or the judicial branch (e.g., within the offices of a supreme court).[xxviii] To be certified by their government employers, facilitators of restorative justice processes must receive 180 hours of training in ADR theory and practice.[xxix] In addition, they must meet the other minimum educational, certification, registration, and character requirements of the National Law of Alternative Mechanisms for the Solution of Controversies in Criminal Matters.[xxx] A certification lasts 3 years. At the end of each 3-year period, facilitators must be recertified. As part of the recertification process, facilitators must demonstrate they have received 100 hours of additional training within the preceding 3-year period.[xxxi] Restorative justice facilitators who specialize in adolescent matters require additional training that relates to enforcement of judicial sanctions against adolescents.[xxxii] A National Council for the Certification of Judicial Facilitators Specialized in Alternative Mechanisms for the Solution of Controversies in Criminal Matters exists to harmonize the training of facilitators housed in the judicial branches of Mexico City and the state governments. This Council, composed of the Directors of the Centers for Alternative Mechanisms for the Solution of Controversies located within the judicial branches of Mexico City and the States of Sonora, Guanajuato, Tamaulipas, and Oaxaca, has established an initial set of detailed training guidelines.[xxxiii]

Recent Statistics from Restorative Justice Initiatives

Shortly before submitting this article for publication, Roberto Montoya González, one of the co-authors, contacted the directors of the various judicial Centers for Alternative Mechanisms of Resolution of Conflicts throughout Mexico, and asked them for their 2016 statistics for their ADR programs in criminal

matters. Only some of the state centers have implemented their criminal justice initiatives; 16 directors (including Montoya González) responded with current statistics, though some of the statistics were incomplete. Nevertheless, the statistics Montoya González received do provide an insight to the status of the implementation of these relatively new initiatives in Mexico. Below in the Appendix on page 39 is a chart that summarizes the results from January 1, 2016 through August 31, 2016.

The chart shows that during this 8-month period, 15 of the 16 reporting entities conducted facilitations in a total of 4,284 criminal cases, and 2,276 of those cases (53.12%) resulted in reparatory agreements. Mexico State did not report the number of facilitations conducted there, but it did report 75 reparatory agreements.

Conclusion

Mexico has just completed a comprehensive reform of its criminal justice system. The system consciously includes restorative justice as one of its essential components. Full implementation of the restorative justice component is not complete, but initial results[14] show considerable promise for the normalization of restorative justice concepts in Mexico's criminal justice system.

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i ABA/USAID Project for Mediation in Mexico, Mediation in Mexico 1-2 (2007), available at http://www.mediationworld.net/mexico/articles/full/35.html [hereinafter ABA/USAID PROJECT].

ii Freedom House, About Us, https://freedomhouse.org/about-us.

iii Acuerdo G/JGA/15/2016 por el que se cambia el nombre de Distrito Federarl por Ciudad de México [Agreement G/JGA/15/2016 by which the name of the Federal District is changed to Mexico City], Diario Oficial de la Federación [hereinafter DO], February 29, 2016, available at http://dof.gob.mx/nota_detalle.php?codigo=5428207&fecha=29/02/2016.

iv ABA/USAID Project, supra note 1, at 2.

v Hanna Hayes, Mediation Models: An International Look at ADR," Perspectives, Summer 2010, at 8.

vi Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, DO, June 18, 2008, available at http://info4.juridicas.unam.mx/ijure/fed/9/18.htm?s.

vii *Id.*

viii Octavio Rodríguez Ferreira & David A. Shirk, Criminal Procedure Reform in Mexico, 2008-2016: the final countdown for implementation 5 (2015).

ix *Id*.

x Código Nacional de Procedimientos Penales [National Code of Criminal Procedures], DO, March 5, 2014, available at http://www.diputados.gob.mx/LeyesBiblio/ref/cnpp.htm.

xi Guillermo Cabanellas de las Cuevas & Eleanor C. Hoague, Butterworth's Spanish-English Dictionary 534 (1991).

xii Código Nacional de Procedimientos Penales [National Code of Criminal Procedures], *supra* note 10, art. 187.

xiii *Id*.

xiv *Id*. art. 188.

xv Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal [National Law of Alternative Mechanisms for Solution of Controversies in Criminal Matters], DO, December 29, 2014, available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LNMASCMP_291214.pdf.

xvi *Id*. art. 3, section IX.

xvii *Id*. art. 27.

xviii *Id*. art. 28.

xix *Id*. art. 29.

xx Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [National Law for a Comprehensive System of Criminal Justice for Adolescents], DO, June 16, 2016, available at http://www.diputados.gob.mx/LeyesBiblio/pdf/LNSIJPA.pdf.

xxi *Id*. art. 21.

xxii *Id*.

xxiii *Id*. art. 18.

xxiv *Id*. art. 99.

xxv *Id*. art. 194.

xxvi Ley Nacional de Mecanismos Alternativos de Solución de Controversias [National Law of Alternative Mechanisms for Solution of Controversies in Criminal Matters], supra note 15, art. 4.

xxvii Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal [National Law of Alternative Mechanisms for Solution of Controversies in Criminal Matters], *supra* note 15, arts. 10-11, 40; Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [National Law for a Comprehensive System of Criminal Justice for Adolescents], *supra* note 20, art. 68.

xxviii Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal [National Law of Alternative Mechanisms for Solution of Controversies in Criminal Matters], *supra* note 15, arts. 10-11, 40; Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes [National Law for a Comprehensive System of Criminal Justice for Adolescents], *supra* note 20, art. 68.

xxix Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal [National Law of Alternative Mechanisms for Solution of Controversies in Criminal Matters], *supra* note 15, art. 50.

xxx *Id*. art 48. The minimum educational requirement is a bachelor's degree in a field related to a facilitator's work. Id.

xxxi *Id.* art. 50.

xxxii Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes , *supra* note 20, art. 193.

xxxiii Lineamientos para la Certificación de Facilitadores Judiciales Especializados en Mecanismos Alternativos de Solución de Controversias en Material Penal de los Tribunales Superiores y Supremos de Justicia de las Entidades Federativas de la República Mexicana [Guidelines for the Certification of Judicial Facilitators Specialized in Alternative Mechanisms for the Solution of Controversies in Criminal Matters of the Superior and Supreme Courts of Justice of the Federative Entities of the Mexican Republic], http://tsjdgo.gob.mx/CGI-BIN/wp-content/uploads/lineamientos-2-firmados.pdf.federal district

APPENDIX

Results of Criminal Justice Initiatives, January 1 — August 31, 2016

Entity	Number of Facilitators Certified in Criminal Matters	Number of Requests Received for Facilitation of Criminal Matters	Number of Matters in Which Facilitation Was Accepted	Number of Reparatory Agreements Reached
Chiapas		73	69	33
Chihuahua	6	347	340	92
Coahuila	11	8	4	4
Mexico City	6	152	140	38
Durango	15	14	14	6
Mexico State	30	299		75
Guanajuato	74	2072	2072	925
Hidalgo	5	40	40	19
Michoacán	24	694	555	396
Nuevo León	16	1130	599	513
Oaxaca	15	217	217	84
Quintana Roo	24	48	48	31
Sonora	19		99	81
Tamaulipas	18	38	37	24
Veracruz	13	46	45	28
Yucatán	13	5	5	2

ADR Section 2016-17 Calendar of Events

NOVEMBER

Traveling Road Show: El Paso, El Paso County Courthouse, Nov. 7, 2016, 11:30–1:30. Contact Nancy Gallego, ngallego.epba@sbcglobal.net or Linda McLain mclainmediationservices@gmail.com.

Family Mediation Training Course: Ft. Worth, Nov. 4 & 5, 18 & 19, 2016. Contact Dispute Resolution Services of North Texas, (817) 877-4554, or training@drsnorthtexas.org.

40 Hour Basic Mediation Training, Round Rock, Nov. 1-5, 2016. Contact Mediators of Texas: Institute of Mediation Training, 512-966-9222, info@motexas.com, www.mediatorsoftexas.com.

Elder and Adult Family Mediation Training, Houston, Nov. 10–11, 2016. Contact Manousso Mediation and Arbitration, LLC, 713-840-0828, mediation@manusso.us, http://manousso.us.

30 Hour Advanced Mediation Training, Round Rock, Nov. 14–16, 2016. Contact Mediators of Texas: Institute of Mediation Training, 512-966-9222, info@motexas.com, www.mediatorsoftexas.com.

JANUARY

Alternative Dispute Resolution Section Annual CLE meeting, Jan. 27, State Bar Center, Austin, (512) 427-1463, http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&lID=15099

FEBRUARY

Basic Mediation Training: Dallas, Feb. 7–10, 2017. Contact Conflict Happens, (214) 526-4525, www.conflicthappens.com or nkferrell@sbcglobal.net.
40 Hour Basic Mediation Training: Austin, Feb. 8–10, 14–15, 2017. Contact Austin Dispute Resolution Center, (512) 471-0033, www.austindrc.org.

MARCH

Family Mediation Training: Dallas, March 28–30, 2017. Contact Conflict Happens, (214) 526-4525, www.conflicthappens.com or nkferrell@sbcglobal.net.

Submit your training session details—name of training, date, location, contact information (telephone and/or email) & URL to Managing Editor Jennifer Alvey at jalvey@jenniferalvey.com.

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