ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By John Charles Fleming, Chair, ADR Section

John Charles Fleming

An Invitation to Conversation and Celebration

I invite all members of the ADR Section to participate in a year-long conversation and celebration. In the 2006-2007 State Bar year, the ADR Section will celebrate the anniversary of two watershed events in the history of Alternative Dispute Resolution (ADR). In 2006, we celebrate the thirtieth anniversary of the Pound Conference held in 1976. At that conference, over 200 lawyers, judges, and legal scholars gathered to discuss the causes of and cures for the public dissatisfaction with our justice system and inefficiencies in our courts. It was there that Chief Justice Warren Burger challenged the bar and the bench to explore and expand the use of ADR processes. During the conference, Harvard Professor Frank Sanders delivered his watershed lecture on "Varieties of Dispute Processing" and called for a periodic reassessment of the impact of mediation and other ADR processes in improving our legal system. I think it is fair to say that the Pound Conference and Professor Sanders's lecture mark the beginning of the modern ADR movement in the United States. The year 2007 marks the twentieth anniversary of the Texas Alternative Dispute Resolution Procedures Act. In that act, which is considered near-sacred writ by many of us, the Texas legislature declared, "It is the policy of this state to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures." Tex. Civ. Prac & Rem. Code §154.002. This year, the ADR Section will celebrate these two anniversaries and engage in a critical conversation about our progress in meeting the challenge laid out by Chief Justice Burger.

Our conversation began at the State Bar annual meeting in Austin with a panel on "How ADR Has Changed the Practice of Law." UT Professor Alan Rau, U.S. District Judge Xavier Rodriquez, Austin litigator Gregg Owens, and our former Chair Mike Schless gave their assessments from the standpoints of legal scholars, the judiciary, the trial bar, and the ADR community. I think the panel made one thing clear: we have our critics, and the worst mistake we can make is being so self-congratulatory that we do not take time to expand our conversation to include our critics.

The conversation will continue at the ADR Section's annual CLE event in October in Dallas. The planning committee has put together a first-rate list of speakers and panels. I hope to see all of you there.

Our conversation this year should include a serious discussion of first principles for ADR. I see these principles as encompassing party choice and empowerment, process integrity, and confidentiality. We need to examine a number of questions related to these first principles:

Are we "over-institutionalizing" ADR to the point that we risk losing the "alternative" part of Alternative Dispute Resolution?

Each year, state legislatures around the country pass additional ADR bills. We

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Inside this issue:

THE POUND CONFERENCE THIRTY YEARS LATER: FOUR TEXAS EXPERTS PROVIDE PERSPECTIVES ON THE EFFECTS OF ALTERNATIVE DISPUTE RESOLUTION

By Walter A. Wright*

This year marks the thirtieth anniversary of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, commonly known as the Pound Conference, which convened in Minneapolis, Minnesota on April 7-9, 1976. At that conference, widely regarded as the beginning of the modern Alternative Dispute Resolution (ADR) movement, Professor Frank Sander delivered his important paper, *Varieties of Dispute Processing*,[1] which proposed the idea of the multi-door courthouse and inspired many ADR initiatives. At the annual meeting of the ADR Section in Austin on June 16, 2006, four Texas experts provided their perspectives on ADR's effects on the administration of justice in Texas and the rest of the United States.

Professor Alan S. Rau, from the University of Texas School of Law, began the session with three propositions. First, he suggested, ADR is not one movement but several movements. It is a "counterculture" movement motivated by the anti-authoritarian, anti-rational activism of the 1960s, a "privatization" movement inspired by the deregulation of the 1980s, a "warm" movement to provide processes that are more responsive to people's needs, and a "cool" movement to provide greater efficiency in the administration of justice. Second, he declared that mediation is an alternative to failed negotiation rather than an alternative to litigation because most cases never go to trial. To support his second proposition, he cited statistics indicating that 98% of federal cases are resolved without trial. Court-ordered mediation provides a "settlement event" that attorneys can blame on the court if they wish. Once the parties and their attorneys find themselves in the same room with a mediator, settlement takes place. Because most cases settle anyway, the quality of mediation does not matter much. Statistics also indicate that integrative solutions are uncommon, and the number of cases in which settlement involves anything other than the payment of money is small. As a third proposition, Rau declared that one of the primary results of the ADR movement has been the growth of arbitration. While some people criticize arbitration because of its similarities to litigation, he declared that arbitration allows parties to design the structure of their dispute-resolution process and select their decision-maker, which is empowering. Rau also suggested that arbitration's growth has been dictated by economic imperatives.

Judge Xavier Rodriguez, of the United States District Court for the Western District of Texas, provided a judicial perspective on ADR's effects on the administration of justice. He sent *Alternative Resolutions* the text of his remarks, found on page 4 of this newsletter.

Gregg Owens, of the Austin law firm of Hays & Owens LLP, who is board certified by the Texas Board of Legal Specialization, commented on how ADR has changed the practice of law from the standpoint of a civil trial lawyer with over thirty years of experience. He stated that mediation has had a beneficial effect on the civil judicial process by providing parties with an additional tool for resolving disputes. Because mediation provides a process structured to protect the parties' settlement discussions from being used to their disadvantage at trial should a settlement not be achieved, parties feel safer in exploring settlement earlier and more thoroughly. Owens finds binding arbitration more problematic, however, due to a trend of parties with little bargaining power being compelled to sign binding arbitration agreements in a wide variety of transactions, effectively precluding their right to have juries decide their cases. He noted that where one party, because of its superior bargaining position, is allowed to unilaterally compel binding arbitration, an abusive situation can result. Mediation and arbitration have contributed to a dramatic reduction in the number of civil disputes being resolved by trial to a jury. He observed that one consequence of this is that young lawyers have great difficulty gaining experience in trying cases to juries. While some observers might see this development as a positive turn of events, he believes that independent and experienced trial lawyers are critical to the preservation of a level playing field between those with power and those without it. Moreover, trial lawyers are key players in the preservation of the individual rights that underpin our democracy.

Michael J. Schless, an Austin mediator and arbitrator, acknowledged that Professor Rau had made some legitimate points during his remarks. For example, Schless thought

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MICHAEL J. SCHLESS IS THIS YEAR'S RECIPIENT OF THE JUSTICE FRANK G. EVANS AWARD

By Walter A. Wright

At the ADR Section's annual meeting in Austin on June 16, 2006, Michael J. Schless became the fourteenth recipient of the Justice Frank G. Evans Award, which is presented annually to recognize the recipient's exceptional efforts in furthering the use or research of alternative dispute resolution methods in Texas.

Mike, who practices in Austin, has focused exclusively on alternative dispute resolution—especially mediation and arbitration—since 1992. He has mediated or arbitrated over 1,500 cases. A former Chair of the ADR Section, Mike held every Council leadership position during his Council tenure. He has also served as President of the Texas Association of Mediators, and he received that organization's Susanne C. Adams Award in 2003 for his outstanding service and dedication to the mediation profession. Mike presently sits on the Board of Directors of the Texas Mediator Credentialing Association, and he was a member of the Supreme Court of Texas Advisory Committee on Court-Annexed Mediation. He is a Fellow of the Center for Public Policy Dispute Resolution at the University of Texas School of Law and an Advisory Committee member for the Frank Evans Center for Conflict Resolution at the South Texas College of Law in Houston.

Mike earned a bachelor's degree in Philosophy from the University of Texas in 1970 and a law degree from the University of Texas School of Law in 1973. He practiced law in Austin from 1973 until 1982. From 1982 to 1992, he served the people of Travis County as a County Court at Law Judge, and his fellow judges selected him to serve as their first presiding judge.

Justice Frank G. Evans, after whom the award that Mike received is named, could not witness Mike receive the award because he was teaching a course in international mediation and arbitration in Malta. Although he did not witness the presentation of the award, Judge Evans sent a written tribute to Mike, which Professor Kimberlee Kovach read to the crowd assembled in Austin. Judge Evans wrote that Mike "believes in people and loves the challenge of helping them improve their lives. You can see this love in his eyes when he listens, and you can hear it in his voice when he speaks." Judge Evans added, "With his wonderful sense of humor and good cheer, he continues to achieve high professional goals while endearing himself to everyone."

The ADR Section proudly adds Mike'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); and Maxel "Bud" Silverberg and Rena Silverberg (2005).

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Professor Rau's argument that mediation is an alternative to failed negotiation makes some sense because the practice of negotiating prior to filing suit has waned. Schless defended mediation by observing that it adds a collaborative process to disputants' and attorneys' "tool boxes." Moreover, mediation permits disputants and their representatives to control who decides their disputes, how the disputes are resolved, and what the disputes' outcomes will be. Schless does not believe that ADR processes, standing alone, can be blamed for the demise of the jury trial; other factors such as litigation costs and tort reform share the blame. As to arbitration, Schless observed that it can be abused, especially at the consumer level, and is not necessary "in a contract to buy a washing machine."

The ADR Section appreciates the thoughtful and sometimes provocative remarks of Professor Rau, Judge Rodriguez, Mr. Owens, and Mr. Schless.

* ***Walter A. Wright*** *is the Chair of the Newsletter Editorial Board of Alternative Resolutions*.

ENDNOTES

[1] Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976).

JUDGE XAVIER RODRIGUEZ* ADDRESSES THE ALTERNATIVE DISPUTE RESOLUTION SECTION

(Note from the Chair of the Newsletter Editorial Board: At the ADR Section's CLE program in Austin on June 16, 2006, Judge Xavier Rodriquez gave the following address.)

I have been asked to address the following questions:

- How has ADR changed the practice of law?
- Has the promise of ADR been fulfilled?
- Are we seeing the demise of the jury trial?

Let me start first with whether the promise of ADR has been fulfilled. As you are all aware, the following are some of the most commonly cited purposes for using ADR: to save time and money; to preserve party relationships; and to achieve better or more effective results.

No doubt that voluntary, non-binding mediation has been a success. After an initial period of discovery, the parties are able to evaluate their strengths and weaknesses intelligently, and mediators are able to engage the parties in effectuating a voluntary settlement without incurring all the financial and emotional expense of trial.

Accordingly, I will confine my remarks to the ADR mechanism known as arbitration. Have arbitrations saved litigants time and money? I don't know. The lack of openness that surrounds arbitrations is part of the problem in answering those questions. In response to the question, "How long do arbitrations generally last, from filing to close?" the American Arbitration Association (AAA) publicly responds, "The length of the arbitration depends on the dispute, the party's preparation, and the complexity of the dispute." As to costs, the AAA outlines the administrative and filing fees it charges, but as to the arbitrator fees, it states, "The rate of compensation for hearings, study and award preparation time, preliminary hearings, etc. is established by each arbitrator."

Whether arbitration saves litigants time and money requires serious study. The anecdotal stories and my personal experience suggest that arbitration has taken on the appearance and formality of trial, with full discovery and all the costs and delays that are associated with that process.

In the absence of hard evidence that arbitrations are less costly and provide greater efficiency than trials, it appears that some commentators base their favorable conclusions about arbitrations on their impression that jury consultants have added a layer of expense to jury trials and there is an implicit cost associated with a jury as decision-maker.

As to the issue of jury consultants, their use could readily be curtailed by the discontinuation of peremptory strikes. To those concerned about the declining jury trial, serious consideration needs to be given to how we are currently doing business and its effects. More about this later, however.

As to the argument that the mere presence of a jury imposes costs, I would respond that there is a level of risk inherent any time a decision is placed in the hands of a non-party, be it a judge, a jury, or an arbitrator.

Now to be fair, advocates of arbitration will argue that the risks are lessened when an arbitrator is chosen who is experienced in the field of law at issue. Nevertheless, we need to be mindful that aberrations can still arise, even when experts are deciding, and arbitration decisions are binding and generally not subject to appellate review. As we all know, "manifest disregard of the law" is the seminal non-statutory ground for vacating an arbitration award, and that means much more than mere error. For those arguing that there needs to be a quantification of jury uncertainty into the costs equation, it would appear that the non-reviewability of an arbitration award and the "split the baby in the middle" scenario must also be quantified.

Accordingly, my belief is that the preference for arbitration stems more from a fear of a jury rather than any true belief that all parties can get justice in an arbitration setting and that parties are merely migrating to the most economically efficient delivery system. The argument goes that the jury is "a sort of black box into which various versions of the facts are dumped and from which an unpredictable answer rolls out."

Given tort reform, case law defining the evidence necessary to recover for mental anguish awards, and statutory caps on punitive damages, I believe it is time to reassess the economic-costs argument described above.

Again, in fairness to those advancing arbitration, the argument appears to be that "outlier" jury verdicts, even if later reduced, produce inefficient results. They argue that aberrant verdicts raise the dynamics of settlements and establish "subliminal benchmarks for future jurors." Perhaps the solution to these concerns lies with an instruction to the jury that in no event can their punitive damage award surpass the statutory cap.

Has the promise of ADR been fulfilled? My bottom-line answer is that despite the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice that took place in April of 1976, we are no closer to resolving the popular dissatisfaction or assessing ADR.

A major obstacle to an adequate assessment of arbitration is the lack of transparency. Unlike courthouse litigation, there is no mechanism to determine what kinds of arbitration claims are filed, the identities of the claimants and respondents, whether

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the claimants are successful, the kinds of awards made, how long it takes before claims are resolved, how much is charged in administrative and arbitrator fees, and whether the claims are settled before any hearings or awards. Because these statistics are not publicly available, any claim that arbitration is faster and less expensive sounds like puffery.

In addition, the lack of transparency also makes suspect the claim that arbitration is an adequate alternative in a democracy. Workers and consumers are unable to intelligently evaluate the employers they work for and the businesses they patronize. Government officials charged with overseeing health, safety, employment, and corporate boardroom behavior are kept in the dark regarding claims filed and issues presented.

As to popular dissatisfaction with the civil justice system and the second issue I was asked to address—the demise of the jury—again, this issue requires a beneath-the-surface analysis.

There is no doubt that fewer cases are being tried today. There has been a 25% decline in federal civil jury trials between 1989 and 1999. Only two percent of federal civil cases today proceed to a jury trial. Similar trends are occurring in the state courts outside the family-law context.

The "usual suspects" for the vanishing jury trial include rising litigation costs, rising stakes/amounts at issue, increasing use of summary judgment, uncertainty of outcome, some judges' views of their role as case managers, stricter requirements for expert evidence post Daubert, and tort reform. Some district court judges have also added to the list the appellate courts' lack of respect for civil juries. Given that Judge Sparks has criticized an opinion that I wrote while serving on the Supreme Court of Texas, I am not so sure about that last point.

And, of course, the "prime suspect" for the vanishing jury trial is displacement by arbitration. While population numbers increase, the number of civil cases filed has remained relatively flat. Conversely, one of the few public figures available from the AAA indicates that the aggregate number of arbitration claims filed from 1992 to 2002 has risen from 59,152 to 230,258.

Is this necessarily "bad?" Again, I have not seen studies that have analyzed the type of cases that proceeded to trial years back versus what type of cases are tried today. Are public-interest cases no longer being adjudicated in the public forum? Have those cases been displaced by private arbitrators? Again, this question has not yet been satisfactorily answered.

Some have argued that today's complex cases are no longer appropriately decided by juries. These individuals argue that jury awards are more correlated to the demographic makeup of the jury and other broad socioeconomic factors, such as the income level from which the panel is drawn. One of these commentators dissects de Tocqueville's praise of the jury system, noting that the jury of that day was select, educated, and wealthy. Another notes that prior to the Jury Selection and Service Act of 1968, chief judges selected a "key man" who would assemble jury panels of known "good" jurors.

I do not agree with these elitist theories. That is not to say that tinkering with our procedural rules should not be examined. Perhaps peremptory strikes should be eliminated, note-taking and questioning by jurors should be experimented with, periodic summations in a lengthy case perhaps should be allowed, and simplification of jury instructions and questions is absolutely needed.

To those who do subscribe to these elitist theories, I find it interesting that they fail to address why the use of bench trials is not as satisfactory as arbitration. The answer appears to be more of an interest in keeping the dispute private and out of the public's attention.

I do not advocate a wholesale disapproval of arbitration. Arbitration agreements reached by equal parties in bargained-for agreements are reasonable, provided that the subject disputes do not implicate larger policy issues. However, what we see today is consumers, employees, and vendors being deprived of an open court because paragraph 37 of 49 paragraphs, found on the reverse side of some agreement, has an arbitration clause. Was this the promise of ADR?

Recently, the Fifth Circuit ruled that an employee's claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA) are subject to mandatory arbitration under an employer policy requiring arbitration of employment disputes. There are fewer than 100 substantive cases interpreting this important statute meant to protect soldiers, sailors, and airmen serving our country. Was it the promise of ADR that statutes of this importance were to be interpreted and decided by private, non-judicial officers with no appellate review? Also, there is no guarantee of uniformity across these unpublished awards. How do cases of import reach the United States Supreme Court when they are decided in arbitrations?

Was it the expectation of ADR that private arbitrators would decide the preemptive effects of federal regulatory schemes?

The proposed Revised Uniform Arbitration Act seeks to provide guidance as to whether, and under what circumstances, consolidation of arbitrations can occur. Was it the expectation of ADR that it supplant Multi-District Litigation or MDL courts?

In some ways, the discussion at the Pound Conference has come full circle. Litigants are now expressing dissatisfaction with arbitration. Unwilling arbitration participants attack the underlying agreements as unconscionable. Administrative fees and arbitrator fees (especially the fees of three-person arbitrator panels) are criticized because they often cause claimants to withdraw their claims. Discovery in arbitration, with e-discovery disputes now rising, have made the process as time-consuming as traditional litigation. Efforts to limit pre-hearing discovery are attacked as a substantive deprivation of a fair hearing. The amounts of attorneys' fees in arbitration cases likely mirror those incurred in traditional litigation. There is no judge to reign in the discovery fights. Arbitrators have no financial incentive to grant dispositive motions, and they disfavor their submission. Dissatisfied participants in past arbitration hearings now seek to amend their agreements to provide for appellate arbitration panels to avoid aberrant and outlier

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HOW TO ACCESS *ALTERNATIVE RESOLUTIONS* ONLINE

*By Walter A. Wright**

The current and many past issues of *Alternative Resolutions* are available online at the website of the ADR Section. Most issues are available to everyone, members and nonmembers alike, but the two most-recent issues are available only at the Members' Area of the website.

To access the older issues of the newsletter, follow these steps:

1. Go to the website of the ADR Section at http://www.texasadr.org/.
2. Click on the "Resources" icon at the top of the home page. Several options will appear, including a "Newsletters" option. Click on "Newsletters."
3. When you click on "Newsletters," several options will appear to your left, including a second "Newsletters" option. Click on that "Newsletters" option, then select the issue of *Alternative Resolutions* that you wish to read.

To access the two most-recent issues of the newsletter, follow these steps:

1. Go to the website of the ADR Section at http://www.texasadr.org/. If you know how to login, please do so at the "Members Login" area at the top left portion of the home page.
2. If you do not know how to login, click on the "login help" link in the "Members Login" area at the top left portion of the home page. You will be directed to some helpful information on how to login.
3. To login, your username is your last name in all lower-case letters and with all punctuation removed. Your password consists of the last four digits of your State Bar of Texas number, followed by this year's "secret word." The "secret word" is the acronym for your favorite section of the State Bar of Texas (hint, hint).
4. After you login, you should see links to the two most-recent issues of *Alternative Resolutions.* Select the issue you wish to read.

If you have any problems locating the recent or older issues of the newsletter, please contact Walter A. Wright at ww05@txstate.edu.

* ***Walter A. Wright*** *is the Chair of the Newsletter Editorial Board of Alternative Resolutions.*

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awards made by sole arbitrators. Those seeking to vacate adverse arbitration awards have sought post-arbitration judicial relief. Initially spurned courts have responded with statements like the following: "The subject matter jurisdiction of the trial court to review an arbitration award is limited and circumscribed by statute . . . . Judicial review is limited because the parties have chosen the forum and must therefore be content with the informalities and possible eccentricities of their choice."

The practice of law has changed. Trials for young litigators are rare; as a result, their later capacity to counsel and advise their clients is diminished. The promise of ADR—to save time and money, to preserve party relationships, and to achieve better or more effective results—cannot be objectively measured at this time. Clearly, the federal and state courts need to study and implement measures to make the civil justice system more responsive. However, any attempt to triumph arbitration as the superior adjudicative system has hardly been demonstrated. Finally, the disappearance of juries is not healthy for our republic. Citizens must have faith in our judicial system, and their participation as jurors allows a foundation of trust to be built.

* ***The Honorable Xavier Rodriguez*** *has served as a United States District Judge for the Western District of Texas since 2003. From 2001 to 2002, he was a justice of the Supreme Court of Texas. He was an attorney at Fulbright & Jaworski L.L.P. from 1987 to 2001 and from 2002 to 2003. He received a Bachelor of Arts degree from Harvard University in 1983, a Master's Degree in Public Affairs from the LBJ School of Public Affairs at the University of Texas in 1987, and a Doctor of Jurisprudence Degree from the University of Texas School of Law in 1987.*

THE EAGLE HAS LANDED—WITH A THUD: *ARKANSAS DEPARTMENT OF HUMAN SERVICES V. AHLBORN* AND MEDICAID SET-ASIDES

By Jeff Jury*

Much of the power and prestige of the United States of America is reflected in federal statutes governing third-party recoveries in personal injury cases. The unfulfilling moment of watching a personal injury mediation slow to a crawl or collapse because someone was unprepared to deal with a government lien on a third-party recovery before mediation day is second only to the heartburn of watching a lawyer attempt to navigate around the lien by careful apportionment of settlement proceeds among elements of damage. A recent decision gives some guidance, if not comfort, regarding the limits on states to assert Medicaid recovery rights in tort actions.[1]

The federal Medicaid statutes empower states to ascertain third-party liability for payments made under state Medicaid plans, and to seek reimbursement from a responsible party for those payments.[2] The statutes impose two conditions of eligibility for Medicaid benefits: (1) assigning to the state the right to payment from a responsible party, and (2) cooperating in the state's attempts to recover from a responsible party.[3] The federal Medicaid statutes prohibit, however, broad imposition of liens on an eligible recipient's property for payments made under the program.[4]

Arkansas enacted a medical-recovery statute that imposed an automatic lien on a personal injury settlement equal to the amount paid by Medicaid for medical care. The statute provided that, if the government's lien exceeded the portion of the settlement representing medical costs, the claimant was required to repay Arkansas out of settlement proceeds allocated for pain and suffering, lost wages, and loss of future earnings. On May 1, 2006, the United States Supreme Court decided *Arkansas Department of Health & Human Services v. Ahlborn*,[5] a case testing the automatic lien provision.

The predictable problem in *Ahlborn* arose after Arkansas had paid $215,645.30 in Medicaid benefits, and Ahlborn's tort claim settled for the unallocated amount of $550,000.00. Arkansas, never formally put on notice of Ahlborn's suit, did not intervene in her case. Without participating in the negotiations, Arkansas took the position that it was entitled to reimbursement of the entire lien amount under the statute. Ahlborn argued that Arkansas was limited to approximately one-sixth of the lien, which the parties stipulated was the approximate chance that Ahlborn would prevail at trial.

The practical question for negotiation and mediation of personal injury claims presented in *Ahlborn* is whether Medicaid lien rights are completely protected in dollar terms when a settlement is evaluated against factors such as the likelihood of prevailing. Put another way, is the government's interest subject to risk factors that would motivate injured individuals to compromise?

The Supreme Court held that Arkansas's third-party recovery law was unenforceable because the federal Medicaid statute did not authorize a lien on unallocated settlement proceeds in the manner urged by Arkansas. In reaching this conclusion, the Court found that an attempt to reach the unallocated portion of the settlement would run afoul of the anti-lien provisions of 42 U.S.C. § 1396p (a)(1). Thus, Arkansas's lien could not reach this unallocated settlement imperforate. The Big Eagle landed with a thud.

Arkansas also argued that Ahlborn breached her duty to cooperate in the pursuit of its lien, and that a contrary result would risk the government's interests being allocated away by collusive settlements practices. The Court did not reach a conclusion on these issues, which were not fully developed in the appellate record, but noted that the duty to cooperate generally arises only in actions by the State to make a recovery, which was not the case in *Ahlborn*.[6] The collusion argument was diluted by the stipulation regarding a one-sixth likelihood of prevailing.

In a footnote, the majority opinion noted, without expressly deciding, that obtaining an advance agreement from the State or submitting the issue to a court for resolution would limit the risk of manipulation of the settlement process. In this sense, the *Ahlborn* Court returned us, full circle, to imagining a perfect world of having the government's lien interests agreed upon or judicially decided before a compromise is negotiated.

The lesson of *Ahlborn* is that recovery of a federal medical lien against an unallocated settlement sum is not a certain thing. Left open is the question whether an injured party and a tortfeasor may whittle a lien to an amount that does not reflect realistic risk factors. Left for your consideration is the extent to which a neutral should become involved in vetting out these issues with parties as part of the negotiation.

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ARBITRATOR IMMUNITY FOR BIAS OR FAILURE TO DISCLOSE

Pullara v. American Arbitration Association and Paxson[1]

By John Allen Chalk, Sr.*

The arbitrator in a construction-dispute arbitration under the Texas General Arbitration Act ("TGAA") disclosed to the parties that he was a member of Greater Houston Builders Association ("GHBA"), but he failed to disclose that he had served for over ten years as GHBA's general counsel.[2] The arbitrator awarded the Claimant the sum of $97,442.29, but the Claimant sued the arbitrator and AAA when he learned (approximately one year later) of the arbitrator's relationship with GHBA.[3] The Claimant was outside the TGAA ninety-day period in which to move to vacate the award.[4] The trial court granted the defendants' motions for summary judgment without specifying the basis for grant of the motions,[5] which the Texarkana Court of Appeals affirmed in a memorandum opinion.[6]

The court of appeals relied on judicial-immunity principles, citing the U.S. Supreme Court, Eighth and Second Circuit cases, and *Blue Cross Blue Shield v. Juneau*.[7] The Claimant asked the court of appeals to ignore *Juneau* and issue a contradictory holding, which the court refused, "believing the conclusion reached by the *Juneau* court [regarding arbitrator immunity] is ultimately correct."[8] The court of appeals concluded, after its survey of other states' cases as well as cases from other federal circuits, "[I]t is the general principle that arbitrators and their sponsoring organizations are immune from civil liability for bias or the failure to disclose a possible source of bias. We adopt that principle."[9]

The court of appeals also encouraged the growing sentiment that parties to arbitration have some "due diligence" obligation to investigate their potential arbitrators for "bias-revealing background information."[10] This *ipse dixit* observation by the court of appeals may encourage a growing trend by arbitration practitioners to request more information about a prospective arbitrator prior to or at the time of the arbitrator's appointment. These party requests sometimes include detailed questionnaires, follow-up written questions to the initial inquiries, *voir dire* of potential arbitrators, personal interviews, and even, in some instances, the parties' attempts to get potential arbitrators to commit to positions on legal issues prior to their appointment. It will be interesting to watch how various arbitral institutions respond to this judicial encouragement of arbitration parties' use of more "due diligence" in the discovery of "bias-revealing background information regarding their arbitrators."

Nothing in this opinion contracts or limits the potential arbitrator's duty to disclose. The court of appeals stated the Texas "evident partiality" test, citing *Mariner Financial Group v. Bossley*,[11] and *Burlington Northern R.R. v. TUCO*.[12] The Texas Supreme Court has observed that "the conscientious arbitrator should err in favor of disclosure."[13] The ABA/AAA *Code of Ethics for Arbitrators in Commercial Disputes* (2004) also provides the arbitrator's broad duty to disclose "known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties."[14] Many arbitrators continue to make disclosures as determined "in the eyes of the arbitrator" rather than "in the eyes of any of the parties," as required by the ABA/AAA Code. Arbitrators disclose; parties determine impartiality and independence.[15] *Pullara v. American Arbitration Association and Paxson* in no way diminishes the arbitrator's duty to disclose, but the case encourages a new "due diligence" responsibility on arbitration parties to know their arbitrators.

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ENDNOTES

1. 2006 Tex. App. LEXIS 4081 (Tex. App. - Texarkana May 11, 2006, no pet.) (not designated for publication).

2. *Id.* at *2 n. 3. Not the first time that GHBA has been involved in an arbitrator -failure-to-disclose problem. See Houston Village Bldgs., Inc. v. Falbaum, 105 S.W.3d 28 (Tex. App. - Houston [14th] 2003, pet. denied).

3. Pullara asserted breach of contract, fraud, negligence, gross negligence, negligent misrepresentation, unjust enrichment, breach of express warranty, and DTPA violations as causes of action against the arbitrator and AAA. 2006 Tex. App. LEXIS 4081, at *3 n. 4.

4. See Tex. Civ. Prac. & Rem. Code §171.088(b) based on evident partiality under §171.088(a)(2)(A). There is a statutory discovery rule at Tex. Civ. Prac. & Rem. Code §171.088(b), but only for vacatur actions based on §171.088(a)(1) grounds of corruption, fraud, or other undue means, which Pullara did not assert.

5. The Defendants' motions for summary judgment asserted four defenses of arbitral immunity, statutory preemption, release, and what appears to be a no-evidence defense. 2006 Tex. App. LEXIS 4081, at *3 n. 4.

6. *See* Tex. R. App. Proced. 47.

7. 114 S.W.3d 126 (Tex. App. – Austin 2003, no pet.). The court of appeals relied on the statutory direction provided by Tex. Civ. Prac. & Rem. Code §171.003 that the TGAA "shall be construed to effect its purpose and make uniform the construction of other states' law applicable to an arbitration." The case cited Alaska, California, New York, and Minnesota cases in support of arbitral immunity, even in the face of arbitrator failure to disclose.

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THE SUPREME COURT OF TEXAS HOLDS, IN *IN RE VESTA INS. GROUP, INC.*, THAT TORTIOUS INTERFERENCE CLAIMS MUST BE ARBITRATED BETWEEN PARTIES TO CONTRACTS CONTAINING ARBITRATION CLAUSES

By Steven M. Fishburn*

The Supreme Court of Texas recently granted a petition for writ of mandamus to hear *In re Vesta Ins. Group, Inc.*,[1] a case involving an allegation of tortious interference with a contract. The court held that tortious interference claims between parties to a contract arise more from the contract rather than general law and thus should be arbitrated in situations in which there is an arbitration clause.[2] The court conditionally granted the petition of mandamus and remanded the case to the trial court, directing that it proceed to arbitration.[3]

James Cashion and States General Insurance Company had signed a contract that contained a clause requiring that any dispute between the parties under the contract be arbitrated, including any disputes over commissions.[4] Cashion was an agent selling health insurance policies for States General. He and States General were the only parties to the contract. Subsequently, States General reduced Casion's commissions, Vesta Insurance Group, Inc. bought 100 percent of the stock in States General, and Cashion was replaced with another agent.[5] Thereupon, Casion sued Vesta, Vesta's former chief executive officer and former financial officer, and the agent that replaced him (and two affiliates) for tortious interference with his contract.

The court's analysis first focused on considerations of what the obligation(s) might be of a nonparty to a contract, temporarily granting for argument's sake that the corporate officers of Vesta were nonparties since they had not signed the contract (although later finding they were parties because "as a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts"[6]). It was quickly established that nonparties must generally arbitrate claims if the liability arises under a contract with an arbitration clause, but are not obligated to arbitrate when "liability arises from general obligations imposed by law."[7] The court agreed that there is a general legal obligation not to tortiously interfere with a contract, but concluded that such an obligation is not imposed on parties to a contract, that a party cannot tortiously interfere with his own contract.[8] As the court said, "a person must be a stranger to a contract to tortiously interfere with it."[9] Following this analysis, the court announced its holding that "tortious interference claims between a signatory to an arbitration agreement and agents or affiliates of the other signatory arise more from the contract than general law, and thus fall on the arbitration side of the scale."[10]

The court then proceeded to a discussion of a number of practical considerations that should prevent tortious interference claims from being brought when a contract contains an arbitration clause. The first of these is that every contract claim against a corporation could be cast as a tortious interference claim against its agents, and allowing these claims to go forward would have the effect of delaying arbitration.[11] The court clearly did not want to do anything to encourage the avoidance of arbitration clauses, and it cited authority to the effect that one party to a contract cannot unilaterally avoid arbitration.[12]

Second, the court reasoned that contracts containing arbitration clauses are intended to apply to the corporation and all its agents, and it is not necessary to have every officer and agent sign the contract or be listed as a third-party beneficiary.[13]

Finally, and most persuasive according to the court, is that many Texas appellate courts "have held that a tortious interference claim against a signatory's employees or affiliates must be arbitrated, even though the latter are nonsignatories" and that "[s]everal federal courts have agreed."[14] The court emphasized the need to keep federal and state law uniform.[15]

The court concluded by quickly disposing of Cashion's assertion that the other parties waived their right to arbitration through delay, stating that "[d]elay alone generally does not establish waiver."[16]

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ENDNOTES

1 In re Vesta Ins. Group, Inc., 2006 Tex. LEXIS 220 (Tex. Mar. 17, 2006).
2 *Id.* at *5.
3 *Id.* at *11-12.
4 *Id.* at *2.
5 *Id.* at *3.
6 *Id.* at *6
7 *Id.* at *4 (citing In re Weekly Homes, L.P., 180 S.W.3d 127, 132, 134 (Tex. 2005).

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THE FLEXIBLE ARBITRAL PROCESS

By John Allen Chalk, Sr.*

The Connecticut Supreme Court has recently decided that "the flexibility of the arbitral process" is too important to **require** arbitrators, absent the parties' express agreement to the contrary, to apply claim preclusion (*res judicata*) based on prior arbitral awards.[1] This recent decision joins an earlier ruling by the same court that chose "the flexibility of the arbitral process" over **requiring** arbitrators, absent the parties' express agreement to the contrary, to apply issue preclusion (collateral estoppel) based on prior arbitral awards.[2] Both cases interpreted Connecticut state arbitration law, not the Federal Arbitration Act.[3] Both cases involved a subsequent arbitration and arbitral award involving the same parties and the interpretation of the same contractual provision as in a prior arbitration and arbitral award.[4] Both were first- impression cases in Connecticut regarding an arbitrator's **obligation** to apply issue preclusion[5] and claim preclusion,[6] respectively.

The Connecticut Supreme Court emphasized, in both opinions, arbitration as "a creature of contract"[7] and the parties' agreement (in their contract) to obtain the arbitrator's independent judgment.[8] If the parties choose to submit their disputes with a broad form arbitration clause and without restraints on their arbitrators' discretion, the court will not substitute its judgment "merely because our interpretation of the agreement or contract at issue might differ from that of the arbitrator."[9] This arbitrator independence also means that it is the arbitrator who chooses what effect, if any, should be given a prior arbitral award involving the same parties and the same issues.[10]

Stratford and *Lasalla* present two competing policy considerations: "(1) the desire to promote stability and finality of judgments, and the closely related interest of judicial economy; and (2) the desire to maintain the flexibility of the arbitral process."[11] But "the overwhelming precedent in the federal courts,"[12] the parties' freedom to bargain and contract arbitration of their disputes (even including "a provision establishing a system of arbitral precedent"),[13] the arbitrator's power to interpret the meaning of "final and binding,"[14] and "the ordinarily single tiered nature of arbitration and the very limited scope of judicial review of arbitration awards,"[15] support the arbitrator's right to assess whatever import or weight he or she chooses, if any, for arbitral precedent. This guarantees that the parties get the bargained-for arbitration of **each** dispute by a fully empowered arbitrator that "creates an informal system of checks and balances in the arbitral process and thus helps to ensure that arbitration proceedings result in just dispositions."[16] This protects the flexibility and discretion "that lies at the core of the arbitral process."[17]

The *Lasalla* court also emphasized that parties who "must deal with each other in an ongoing business relationship for a lengthy period of time" would be greatly disadvantaged by requiring arbitrators to apply claim and issue preclusion based on prior arbitral awards.[18] The ongoing business relationship would be excessively burdened and disrupted by requiring a party in arbitration to bring all possible claims. The claim and issue preclusion burden would unnecessarily escalate many disputes "likely to be worked out amicably between the parties."[19]

Texas courts have not addressed claim and issue preclusion in the context of serial or multiple arbitrations involving the same parties and same contract. Texas courts have repeatedly stressed the finality and binding nature of arbitration awards, including awards never confirmed by court order.[20] Texas courts have also recognized the preclusive effect of arbitration awards in subsequent litigation.[21] The policy considerations in *Stratford* and *Lasalla* suggest that Texas courts should leave to the arbitrator and the parties' arbitration agreement what, if any, preclusive effect to give prior arbitral awards.

Practical Planning Considerations

1 These two cases from the Connecticut Supreme Court strongly encourage the careful, thoughtful drafting of arbitration agreements. The arbitration clause should never be an after-thought in contract negotiation and drafting. Arbitration is a creature of contract![22]

2 The nature of the business or other relationship of the parties should shape the terms of the arbitration agreement the parties negotiate. Many parties do not want to consider possible future disputes in a new business relationship. As a result, they leave themselves vulnerable to expensive, time-consuming, inefficient, and inflexible dispute resolution. How parties resolve their disputes is as important as whether parties do business with each other.

3 How the arbitration is conducted and who conducts the arbitration are vitally important questions. Administered arbitrations provide the parties with two levels of dispute-resolution-process leadership: the arbitral institution that administers the arbitration and the arbitrator. Private, non-administered arbitrations often produce confusion and delay in resolution of the dispute.

4 Selection of an arbitrator requires due diligence. The arbitrator's independence and discretion require great care in selection of the parties' arbitrator. The arbitrator is a key player in the well-executed arbitration.

5 Flexibility in the arbitration (as an alternative dispute resolution method) is critical, but that flexibility must be considered in the drafting of the arbitration agreement. Much of the current criticism of arbitration results from carelessly considered and badly drafted arbitration agreements.

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The Flexible Arbitral Process
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ENDNOTES

1. Lasalla v. Doctor's Assoc., Inc., 898 A.2d 803 (Conn., 2006).

2. Town of Stratford v. Int'l Ass'n of Firefighters, AFL-CIO, Local 998, 728 A.2d 1063, 1072-73 (Conn. 1999).

3. However, *Stratford* interpreted numerous federal court holdings (including 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 11th, and D.C. circuits), to say that arbitrators are not **required** to apply claim and issue preclusion based on prior arbitral awards. 728 A.2d at 1070-71.

4. In *Lasalla*, the Claimant was a franchise development agent under contract (that called for arbitration of all disputes) with a franchisor to develop and service Subway sandwich shop franchises. Claimant was to be compensated under the contract by a percentage of royalties and transfer fees paid to the franchisor by the franchisees. Both arbitrations involved the same parties disputing the meaning and application of the compensation provisions of the development agent's contract. In *Stratford*, the town and its firefighters' union had a collective bargaining agreement that called for arbitration of all disputes. In multiple arbitrations, the same parties disputed what firefighter positions were subject to the collective bargaining agreement's promotion provisions.

5. *See Stratford*, 728 A.2d at 1069 ("It should be noted, however, that although collateral estoppel precludes subsequent litigation in our courts of issues meeting the above requirements, we have never addressed whether the doctrine properly applies in the context of arbitration.").

6. *See Lasalla*, 898 A.2d at 811 ("We turn, therefore, to the aspect of the defendant's claim that we have not squarely decided [in *Stratford*], namely, that the doctrine of claim preclusion should be imposed in voluntary arbitration as a matter of public policy.").

7. *See Stratford*, 728 A.2d at 1068; *Lasalla*, 898 A.2d at 810.

8. *See Stratford*, 728 A.2d at 1068, 1071 ("Put simply, the parties bargain for the arbitrator's independent judgment and sense of justice, unfettered by the opinions of other arbitrators."); *Lasalla*, 898 A.2d at 810.

9. *Stratford*, 728 A.2d at 1068.

10. *See Lasalla*, 898 A.2d at 810.

11. *Stratford*, 728 A.2d at 1069; *Lasalla*, 898 A.2d at 810.

12. *Lasalla*, 898 A.2d at 810.

13. *Id.; see also Stratford*, 728 A.2d at 1071n.6.

14. *Lasalla*, 898 A.2d at 810; *see also Stratford*, 728 A.2d at 1072 ("Although one arbitrator might interpret such a phrase ["final and binding"] so as to require the application of collateral estoppel or res judicata principles, a subsequent arbitrator is free to construe that language as applicable only to subsequent arbitrations between the exact same parties, on the same contract provision, on precisely the same facts.").

15. *Id.; see Stratford*, 728 A.2d at 1072.

16. *Lasalla*, 898 A.2d at 810-11; *Stratford*, 728 A.2d at 1072.

17. *Stratford*, 728 A.2d at 1073.

18. *Lasalla*, 898 A.2d at 812.

19. *Id.*

20. *See* Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 270 (Tex.App. Houston [14th] 2003, pet. denied); Milliken v. Grigson, 986 F.Supp. 426, 431 (S.D.Tex. 1997), *aff'd* 158 F.3d 583 (5th Cir.1998).

21. *See Tanox*, 105 S.W.3d at 270.

22. "But no matter how much arbitration is to be favored by the courts, or how deferential our review of arbitration awards is to be, arbitration agreements are still creatures of contract and must be analyzed as such." Peacock v. Wave Tec Pools,Inc., 107 S.W.3d 631, 636 (Tex.App. - Waco 2003, no pet.).

Chair's Corner
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have applauded these efforts in the past. Now, however, I think we need to discuss whether we are making the processes so formulistic that we are restricting creativity and parties' ability to shape their own processes for resolving their own disputes. This question encompasses another question: When do our well-intended standards for neutrals become gatekeepers that actually retard the entry of new mediators and other neutrals into the field of practice? The question also encompasses the on-going debate about whether evaluative styles of mediation should even be called mediation. There are inherent tensions in these questions between maintaining process integrity and consumer protection on the one hand and the principle of party choice on the other.

Is the "cloak of confidentiality," which is so important to the mediation process, now being invoked in ways that compromise process integrity? Should a party to mediation be able to use mediation confidentiality to shield itself from examination of a mediation settlement agreement that was induced by a fraudulent representation made in the mediation process? Are companies using mandatory pre-dispute arbitration clauses to shield themselves from public scrutiny of their consumer-market behavior?

I invite all of you to participate in this conversation. One of my goals as Chair is to expand the participation in the ADR Section through our subcommittees. If you are willing to serve on a subcommittee, email me with your contact information. Let me know whether you are interested primarily in mediation, arbitration, or collaborative law, or whether you have an interest in all three. My email address is jfleming@austin.rr.com.

The Supreme Court of Texas Holds, in *In RE Vesta Ins. Group, Inc.*, that Tortious Interference Claims Must Be Arbitrated Between Parties To Contracts Containing Arbitration Clauses
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8 *Id.* at *4 (finding support for the assertion that parties to a contract cannot tortiously interfere with it in Holloway v. Skinner, 898 S.W.2d 793,796 (Tex. 1995)).

9 *Id.* at *4-5 (quoting from Morgan Stanley & Co., Inc. v. Texas Oil Co., 958 S.W.2d 178, 179 (Tex. 1997).

10 *Id.* at *5.

11 *Id.* at *5-6.

12 *Id.* at *5-6 (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223,230 n.2 (Tex. 2003) where it was found that "most courts have found illusory any contract allowing one party to unilaterally avoid arbitration").

13 *Id.* at *6.

14 *Id.* at *6-7

15 *Id.* at *7.

16 *Id.* at * 9 (citing In re Serv. Corp. Int'l, 85 S.W.3d 171, 174 (Tex. 2002)).

ISSUES IN MAY 2006 NEW JERSEY *LEDERMAN* COMPANION CASES: (1) CAREFUL DRAFTING OF AGREEMENTS TO ARBITRATE IS ESSENTIAL; AND (2) VIOLATED CONFIDENTIALITY AGREEMENTS MAY REQUIRE SHOWINGS OF SPECIFIC INJURY WHEN BALANCED AGAINST THE PUBLIC'S RIGHT OF ACCESS

By Steven M. Fishburn*

In companion cases, both styled *Lederman v. Prudential Life Ins. Co. of Am. Inc.*,[1] the Superior Court of New Jersey, Appellate Division, first reversed a lower court's summary judgment dismissing Lederman's claims against Prudential and a law firm, LMB, for fraud, misrepresentation, and bribery, among others,[2] and then decided contractual clauses compelling confidentiality and arbitration were outweighed by the public's interest in Lederman's allegations.[3]

The basic facts in the case were the same, although there were differences in the procedural history. Lederman was a sales agent and manager for Prudential for about thirty-one years, from 1966 through 1997. After a transfer to another office in 1992, Lederman alleged that Prudential began pressuring him and other agents not to sell insurance to minorities. As a result of Prudential's discriminatory treatment against him, Lederman stated that he suffered a nervous breakdown, was unable to continue employment, and had to leave the company, going on disability in 1997.[4] But Lederman was not alone. He had the company of 358 other employees that had similar claims against Prudential for pressuring them not to sell to minorities. Lederman and these other former employees retained the legal services of a New York law firm, LMB, to represent them in their claims against Prudential. After a number of meetings, Lederman and the other employees entered into an agreement fashioned by Prudential and LMB (the First Agreement) that committed them to a confidential dispute resolution process referred to as the Road to Resolution (R to R).[5] The types of actions under the umbrella of the First Agreement included discrimination claims, tortious interference with contractual relations, fraud, intentional and negligent infliction of emotional distress, and misrepresentation.[6] If the confidential ADR process, the R to R, did not result in resolution, the parties agreed to binding arbitration. Further, Prudential agreed to pay all the claimants' legal fees to LMB, notwithstanding the claimants' contingent fee agreement with LMB.

Aspects of the First Agreement that figured prominently in the subsequent dispute were a confidentiality agreement not to disclose, directly or indirectly, the existence or terms of the First Agreement and that any court action to enforce the First Agreement would be filed under seal with the court.[7] Of equal importance to LMB and Prudential was that the First Agreement bound the claimants to dispute resolution by the American Arbitration Association. The claimants further agreed not to disclose any of the contents or of any agreement or even the results of an agreement without Prudential's written permission.[8]

Despite language in the First Agreement that it was the "entire agreement and final understanding concerning the subject matter," Prudential and LMB entered into a second agreement (the Second Agreement) with each other. The Second Agreement obligated LMB to submit all the claims—Lederman's and the other 358—to Prudential's R to R dispute resolution process. LMB would do that in exchange for fixed sums of money that would effectively cap the total amount of damages (i.e., LMB was to receive $5 million in legal fees in advance of any settlement of claims while $10 million total was to be made available to distribute among the claimants).[9] Lederman claimed that he was not told about the Second Agreement prior to his signing the First Agreement. He argued that the $5 million payment to LMB amounted to a commercial bribe to LMB that would have the effect of making them somewhat less than zealous in pursuing his claim and those of the others involved against Prudential.[10]

When the Second Agreement came to light, one of the other claimants, Philip Shapiro, filed a complaint against LMB in 2001 with the Grievance Committee of the New York Supreme Court for ethical violations. Ultimately, the grievance was dismissed by the Committee. However, it came out in testimony for the instant proceeding that Lederman wrote a number of letters to the Grievance Committee saying that he was aware of the $5 million advance payment to LMB. Lederman alleged that he had been "forced" to write the letters because an attorney at LMB had told him his dispute with Prudential would never be settled unless he wrote the letters.[11]

After two additional amendments to the First Agreement, Lederman and the other claimants signed a settlement agreement under which Lederman received the second highest settlement amount ($500,000) and the total settlement amount

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Issues in May 2006 New Jersey *Lederman* Companion Cases: (1) Careful Drafting Of Agreements To Arbitrate Is Essential; and (2) Violated Confidentiality Agreements May Require Showings Of Specific Injury When Balanced Against The Public's Right of Access
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for all disputants was $10,500,000. Lederman apparently continued to be aggrieved even after the settlement and filed a complaint against Prudential and LMB in November 2002. It was not filed under seal as required by the First Agreement, and it also disclosed the contents of the First Agreement because Lederman attached a copy of the First Agreement to his complaint. The court did, though, at the defendant's motion, place the proceedings under seal, closing them to the public.[12]

Lederman later filed a second amended complaint that contained seven independent causes of action against Prudential and LMB, including fraud, misrepresentation, and bribery. It was this amended complaint that was at issue in the first proceeding LEXIS 138").[13] In a sealed hearing, the lower court dismissed the claims against Prudential and LMB and against three of the individual LMB attorneys and referred them to arbitration. The judge ultimately dismissed the claims against LMB attorneys, did not address Lederman's discovery motion, and permanently sealed the record.[14]

The issue, as framed by the Superior Court in *Lederman*, LEXIS 138, was whether Lederman's claims fell "within the scope of the arbitration clause of the May 1999 Agreement [the First Agreement] and its amendments"; the court held that it did not.[15] The court focused on the language of the First Agreement and its purpose, which was that LMB would represent Lederman and the others in their "labor action" against Prudential.[16] According to the court, "[t]he language of the arbitration clause, in the context of the Agreement as a whole, does not encompass a dispute between plaintiff and his attorneys, or plaintiff's claim that LMB and Prudential conspired to defraud him,"[17] which Lederman alleged in his second amended complaint.[18] Moreover, the court held the language of the arbitration clause of the First Agreement provided a dispute resolution process that related only to the First Agreement itself and 'any dispute about the terms or application hereof.'[19] The court pointed out the error of the lower court in ordering arbitration. "[B]ecause of the narrow language of the arbitration clause," which might have been written more broadly to include 'arising out of, concerning or related to the [First] Agreement,' the court held that Lederman did not "agree to arbitrate 'any dispute' between plaintiff and defendant arising out of 'termination' of employment."[20] The court continued for two to three additional paragraphs drawing out the distinction between what the language of paragraph 20 of the First Agreement was versus what it might have been, if more broadly written, then concluded that the arbitration clause of the First Agreement was not ambiguous and did not encompass the causes of action brought by Lederman in his second amended complaint (among them fraud, misrepresentation, and bribery by LMB and Prudential).[21] The court also reminded all of the favored status of arbitration as a tool for dispute resolution, but that it can only be applied to those disputes that the parties have agreed to submit to arbitration.[22] The court reversed the trial court order (summary judgment) dismissing Lederman's "complaint against Prudential and LMB and its principals and sending those claims to arbitration. The claims [were] reinstated and the substantive issues are to be resolved by the factfinder, not an arbitrator."[23]

The primary issue brought forward in the second case, (hereinafter, "*Lederman*, LEXIS 139")[24] is whether it was appropriate for the trial court to have sealed the court proceedings in accord with its understanding of the requirements of the First Agreement because the agreements were private, the confidentiality provisions were clear on their face, and were bargained for by the parties. The trial court found that New Jersey's public policy favored alternative dispute resolution processes, including provisions that required confidentiality and that the agreement of the parties to keep the records confidential outweighed the presumption of openness of court proceedings to the public.[25] The superior court disagreed, coming down on the side of a tradition of openness and right of access to judicial proceedings. According to the superior court, such decisions must involve a "flexible balancing process . . . to determine whether the need for secrecy substantially outweighs the presumption of access"[26] and that a need for secrecy must be specifically demonstrated with regard to each document and by a preponderance of the evidence; the burden of persuasion rests on the person trying to overcome the presumption of access.[27] The court pointed out its understanding that defendant's primary argument rested on the fact that the parties contracted for confidentiality, but the court went on to say that more than a binding contractual obligation is required to seal court records.[28] "Mere deprivation of the right to enforce a contractual obligation is not, without an additional showing of serious harm, sufficient to override the public's right of access to the courts" and the court decided that the defendants had failed to make the required showing of "specific, serious injury that would result from lifting the seal."[29] Embarrassment or harm to the parties' reputations should the documents become public as a result of Lederman's complaint, which alleged discriminatory business practices and claims of bribery and fraud, were not sufficient justification for closing the record.[30]

The court also discussed the fact that Lederman had violated his agreement not to file a complaint unless under seal. However, after having done that, the information in his complaint was disseminated in the media, and the court reasoned there was no longer any justification for keeping it sealed; it was out already. Of far greater consequence to the court's decision than the fact that the information was out, was that Lederman's allegations had inherent public interest that might outweigh any interest in preserving bargained-for confidentiality.[31] As the court said, "A profound public interest is implicated when matters of 'health, safety and consumer fraud are involved. There must be careful scrutiny prior to sealing records and documents filed with a court in a high public-interest case."[32] The court had no reservation in finding that this case was a high public-interest case because "the underlying litigation involves . . . allegations of racial discrimination against Prudential and fraud and bribery claims against both Prudential and LMB. These

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CALIFORNIA COURT OF APPEALS PROTECTS MEDIATION CONFIDENTIALITY AND GIVES SPECIAL DEFERENCE TO A MEDIATED SETTLEMENT AGREEMENT

By Jacqueline D. Saunders*

In re Kieturakis[1] recently allowed the California First District Court of Appeals to reaffirm California's mediation confidentiality law, which prevents disclosure of any communication that takes place during the mediation process. Section 1119 of the California Evidence Code provides, in part, that all communications, negotiations, or settlement discussions among parties to a mediation or mediation consultation are not admissible or subject to discovery; nor shall disclosure of such information be compelled in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which testimony may be required.

Anna Kieturakis filed a petition for divorce after fourteen years of marriage to Dr. Maciej Jan Kieturakis. The couple participated in mediation, and a judgment for dissolution, which incorporated their marital settlement agreement (MSA), was filed on June 23, 1999. The MSA divided the marital estate unequally in favor of Maciej. Two years later, Anna filed an order to show cause to set aside the judgment and the marital settlement agreement, and to modify the support she was receiving. The trial court admitted evidence from the couple's mediation, including all documents generated during the mediation, testimony from the mediator, testimony from the appraiser of Maciej's medical companies, and evidence of royalties from Maciej's medical inventions, reasoning that upholding the mediation privilege would impede the court's "ability and obligation to do justice . . . and undermine confidence in our judicial system."[2] The First District Court of Appeals, however, did not concur.

California courts have a history of upholding its mediation privilege. The California Supreme Court has concluded that there are no exceptions to the confidentiality of mediation communication, no statutory limits on the content of a mediator's reports, and has stressed the need for confidentiality if mediation is to be effective. *In re Kieturakis* takes California's mediation privilege a step further by ruling that family law deliberations must acquiesce to the state's confidentiality protections when a judgment incorporates a mediated marital settlement agreement.

Of particular interest in this case is the special deference the appellate court afforded the MSA because it resulted from mediation. California law presumes that undue influence causes an unequal marital settlement,[3] but the appellate court refused to extend the presumption of undue influence to a settlement agreement reached during mediation. The court provided three reasons for its decision: (1) "while mediation is no guarantee against the exercise of undue influence, it should help to minimize unfairness in the process by which a marital settlement agreement is reached"[4]; (2) "the presumption of undue influence should not apply in a case like this where the influence is alleged with respect to a judgment that has long been final"[5]; and (3) "the parties acknowledged in the MSA that no undue influence was exercised."[6]

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ENDNOTES

[1] In re the Marriage of Anna and Maciej Jan Kieturakis, 41
[2] Cal. Rptr. 3d 119 (1st Dist. Ct. App. 2006).
[3] *Id*. at 132 (quoting the trial court).
[4] In re Marriage of Bonds, 5 P.3d 815 (Cal. 2000).
Kieturakis, 41 Cal. Rptr. 3d at 140.
[5] *Id*. at 142.
[6] *Id*. at 144.

Think like a wise man but communicate in the language of the people.

William Butler Yeats
Irish dramatist & poet (1865 – 1939)

Issues in May 2006 New Jersey *Lederman* Companion Cases: (1) Careful Drafting Of Agreements To Arbitrate Is Essential; and (2) Violated Confidentiality Agreements May Require Showings Of Specific Injury When Balanced Against The Public's Right of Access
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issues warranted 'careful scrutiny' and more circumspection, which the [trial] court did not apply when it determined to seal the records."[33]

Finally, the court emphasized the importance of the openness of court proceedings, declaring, "The presumption of openness to court proceeds requires more than a passing nod. Open access is the lens though which the public views our government institutions. It is essential to foster public confidence in the judiciary. Access to the courts advances the first amendment's 'core purpose of assuring freedom of communication on matters relating to the functioning of government.' Protective orders that have a chilling effect upon this purpose should be used sparingly, and only after the entity that seeks to overcome the strong presumption of access establishes that the interest in secrecy outweighs the presumption. Here, defendants have not met that burden."[34] After making those remarks, the court vacated the trial court's order to seal the records, remanded the case to the Law Division to redact personal information, and made the proceedings open to the public and the media.

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ENDNOTES

[1] Lederman v. Prudential Life Ins. Co. of Am., Inc., No. A-1485-04T5, 2006 N.J. Super. LEXIS 138 (N.J. Super. Ct. App. Div. May 9, 2006); Lederman v. Prudential Life Ins. Co. of Am., Inc., No. A-1449-04T5, 2006 N.J. Super. LEXIS 139 (N.J. Super. Ct. App. Div. May 9, 2006).
[2] Lederman, 2006 N.J. Super. LEXIS 138, at *31.
[3] Lederman, 2006 N.J. Super. LEXIS 139, at *23.
[4] Lederman, 2006 N.J. Super. LEXIS 138, at *3-4.
[5] *Id.* at *4-5.
[6] *Id.* at *5.
[7] *Id.* at *6-8.
[8] *Id.* at *7.
[9] *Id.* at *7-8.
[10] *Id.* at *9.
[11] *Id.* at *9-10.
[12] *Id.* at *12.
[13] *Id.* at *12.
[14] *Id.* at *13.
[15] *Id.* at *15.
[16] *Id.* at *20.
[17] *Id.* at *24.
[18] *Id.* at *12.
[19] Id. at *25 (quoting from paragraph 20 of the May 1999 Agreement).
[20] Id. at *26 (parsing the language of the May 1999 Agreement and showing how a more broadly written arbitration clause might have been more supportive of the defendants' position including a citation to RCM Techs., Inc. v. Constr. Servs. Assocs., 149 F. Supp. 2d 109, 112 n. 2, 113 (D.N.J. 2001)in support of that concept).
[21] *Id.* at *26-28.
[22] *Id.* at *28.
[23] *Id.* at *31.
[24] Lederman v. Prudential Life Ins. Co. of Am., Inc., No. A-1449-04T5, 2006 N.J. Super. LEXIS 139 (N.J. Super. Ct. App. Div. May 9, 2006).
[25] *Id.* at *7-8
[26] *Id.* at *12.
[27] *Id.* at *12-13.
[28] *Id.* at *13-14.
[29] *Id.* at *16.
[30] *Id.* at *18-19.
[31] *Id.* at *23.
[32] *Id.* at *23 (quoting from Hammock v. Hoffmann-LaRoche, Inc., 662 A.2d 546 (N.J. 1995)).
[33] *Id.* at *24.
[34] *Id.* at 25.

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8. 2006 Tex. App. LEXIS 4081, at *7.

9. 2006 Tex. App. LEXIS 4081, at *10.

10. 2006 Tex. App. LEXIS 4081, at *15 n. 6. But the Texas Supreme Court, in Mariner v. Bossley, 79 S.W.3d 30, 33 (Tex. 2002), refused to decide if the complaining party had a duty to discover the arbitrator's non-disclosure.

11. 79 S.W.3d 30 (Tex. 2002).

12 960 S.W.2d 629 (Tex. 1997). "[T]he fact that a reasonable person could conclude that the referral might affect [the arbitrator's] impartiality triggers the duty of disclosure. [The arbitrator's] failure to disclose the referral thus constitutes evident partiality under the Act." *Id.* at 639.

13. Burlington N. R.R. v. TUCO, 960 S.W.2d at 637.

14. See Canon II (cited by Burlington N. R.R. v. TUCO, 960 S.W.2d at 636).

15."[I]t is for the parties to determine, after full disclosure, whether a particular relationship is likely to undermine an arbitrator's impartiality." Burlington N. R.R. v. TUCO, 960 S.W.2d at 638.
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FLORIDA COURT: ENFORCE AMBIGUOUS MEDIATED AGREEMENT

By David Schleicher*

Florida's Second District Court of Appeal, in *RAHO of Pass-A-Grille, Inc. v. Pass-A-Grille Beach Motel, Inc.*,[1] has ordered enforcement of a mediated settlement agreement notwithstanding its ambiguous meaning. During a mediation, the parties entered into a written settlement agreement that resolved a shareholder dispute over a beach-front motel. When disagreements later arose over the agreement's meaning, each party sought enforcement of its terms. After an evidentiary hearing, the trial court concluded that the parties had not reached a "meeting of the minds" in their agreement and invalidated the agreement in its entirety. The appellate court reversed and remanded, finding the trial court erred when it held that a lack of a "meeting of the minds" precluded the enforcement requested by the parties.

The appellate court relied on the Florida Supreme Court's holding in *Blackhawk Heating*[2] that "[e]ven though all the details are not definitely fixed, an agreement may be binding if the parties agree on the essential terms and seriously understand and intend the agreement to be binding on them."[3] The *Blackhawk* case reflected a distaste for voiding agreements on the basis of uncertainty "unless there is no other way out." The trial court in *Pass-A-Grille* may have viewed refusal to enforce the mediation agreement as the easiest means to deal with ambiguities remaining after an evidentiary hearing. But the appellate court found it "incumbent on the trial court to resolve any ambiguities in the agreement based on the parol evidence introduced."[4]

As the appellate court noted,[5] one of the parties did not appear at the appellate level, leading the court to refrain from an extended discussion of the underlying facts. Whether for that reason or another, the decision also does not address how to reconcile the use of parol evidence in interpreting a mediation agreement with the requirement that mediation discussions remain confidential.

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ENDNOTES

[1] 923 So. 2d 564 (Fla. Dist. Ct. App. 2006).
[2] Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp., 302 So. 2d 404 (Fla. 1974).
[3] *Id.* at 408.
[4] *Pass-A-Grille,* 923 So. 2d at 565.
[5] *Id.* at 566, n.1.

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ENDNOTES

[1] The individual states administer the Medicaid system through their agencies, which is why a state statute was at issue in this case.
[2] 42 U. S. C. § 1396a (a)(25)(A)-(B).
[3] *Id.* § 1396k (a)(1) (A) – (B).
[4] *Id.* § 1396p (a)(1).
[5] 126 S. Ct. 1752 (2006).
[6] 42 U. S. C. § 1396k (a)(1)(C).

CONFUSING TERMINOLOGY: "BINDING MEDIATION" VS. "BINDING ARBITRATION," THE ISSUE IN A CALIFORNIA COURT OF APPLEALS CASE, *LINDSAY V. LEWANDOWSKI*

By Steven M. Fishburn*

In May 2006, the California Court of Appeals, 4th District, decided in *Lindsay v. Lewandowski*,[1] that a settlement agreement was unenforceable because there was no clear indication the parties had reached an agreement on a material term or that the material term was not reasonably certain.[2] The confusion in terminology turned on the use and meaning of the terms "binding mediation" versus "binding arbitration" because, according to the court, if nothing else was clear, it was clear the parties "did not regard binding mediation as the equivalent of arbitration."[3]

In December 2000, all parties [Betsy Lindsay, Michael Lindsay, and Ultrasystems Environmental, Inc. (collectively, the "Lindsays") and Piotr Lewandowski, Joan Lewandowski, and The Hydro Company (collectively, the "Lewandowskis")] had agreed to a settlement, but the settlement agreement literally took on two forms as there were two different versions of the agreement the parties signed. One version, signed by most of the parties, stipulated if a dispute arose as to the terms of the settlement, the parties would return to the mediator for final resolution "by binding arbitration."[4] The words "by binding arbitration" were a typed addition to the form language. The other version, signed by Lindsay and another person (Bennett), did not contain these additional, typed-in words.[5]

Another part of the settlement agreement originally provided that a dispute between Ultrasystems and Hydro would be resolved "through binding mediation," but the word mediation had been crossed out, and the word "arbitration" had been typed above it. This part of the agreement further provided that any arbitration award for Ultrasystems was to be set off against the amount the Lindsays owed to the Lewandowskis.

To further complicate matters, another part of the agreement called for resolution of disputes about the payment terms of a monetary settlement between the Lindsays and the Lewandoskis to be resolved by a judge—Judge R. J. Polis (retired)—through a process of "binding mediation."[6] That section of the agreement provided, "Lindsay pays to Lewandowski the sum of $190,000 with cash, payment terms, security arrangements and stipulations regarding non-dischargeability in bankruptcy 'reasonably' agreeable to both parties but to be submitted to 'binding' mediation by Judge R. J. Polis (ret.) if no satisfactory agreement on terms in [sic] entered within five days of commencement of negotiations between the parties on this issue."[7] According to Judge Polis, he had described binding mediation to the parties as follows: "[T]he parties have agreed in advance that in the event the parties fail to agree, I then decide these terms and conditions, typically by asking the parties to each submit to me their final offers, accompanied by their oral argument as to why I should select their version over all others. I then select as the final binding provision the term or terms of either one party or the other."[8]

All of these initial disputes notwithstanding, the parties did eventually arbitrate the dispute between Ultrasystems and Hydro, but only with the understanding that the Lindsays did not waive their objection that the settlement agreement was unenforceable.[9] At the completion of the arbitration, Judge Polis issued an award to Hydro.[10] In December 2001, the trial court granted a motion the Lewandowskis had made in April 2001 to compel binding arbitration as to payment terms.[11] The court found that the parties had agreed to resolve their dispute through an alternative dispute resolution process and that agreement included "binding" mediation by Judge Polis.[12] The Lindsays responded by attempting to disqualify Judge Polis as an arbitrator in the matter while the Lewandowskis moved again to compel arbitration.[13] The trial court found the attempt to disqualify invalid and ordered the parties into an arbitration overseen by Judge Polis.[14] Judge Polis issued a "binding mediation ruling" in April 2002 in favor of the Lewandowskis that would result in the Lindsays having to pay the Lewandowskis $190,000 in cash. This occasion also provided another opportunity for Judge Polis to offer his definition of binding mediation, saying, "Binding mediation has only one accepted meaning, that is, that the parties who enter intend that there shall be an agreement at the end of it, even if the mediator must make the final call."[15] Afterwards, the trial court confirmed a motion made by the Lewandowskis to confirm the arbitration award and enforce the settlement. A judgment was entered awarding the Lewandowskis $190,000 against the Lindsays and Ultrasystems.[16]

The appellate court's decision was narrow, based on the basic contract principle that there was no meeting of the minds; that if the parties fail to agree on a material term, or if a material

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CONFUSING TERMINOLOGY: "BINDING MEDIATION" VS. "BINDING ARBITRATION," THE ISSUE IN A CALIFORNIA COURT OF APPEALS CASE, *LINDSAY V. LEWANDOWSKI*
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term is uncertain, then the settlement agreement is unenforceable.[17] The court said, "About the only thing that is clear is that the parties did not regard binding mediation as the equivalent of arbitration. The stipulation for settlement originally provided for resolution of the Hydro dispute by "binding mediation," but "mediation" is crossed out and "arbitration" inserted in its place. That indicates the parties did not consider binding mediation the equivalent of arbitration. Since there was not agreement on a recognized procedure to resolve the payment term dispute, the stipulation for settlement is unenforceable."[18]

In dicta, the court discussed whether the concept of binding mediation was viable, describing its understanding that it might consist of an agreement by the parties that if a mediation fails or reaches an impasse, the parties might agree that the mediation could metamorphose into an arbitration.[19] But the court concluded that a key problem with such a process is that no rules have been established. That lack of rules or guidelines might become critical with respect to a couple of issues: whether the person who began as a mediator could continue as a neutral arbitrator and whether that same person, in arbitration, could "consider facts presented to him or her during the mediation."[20] The court had prefaced all of these remarks by saying, "This resolution precludes any meaningful determination of the viability of the concept of "binding mediation"[21] so, perforce, did not attempt a resolution. Nonetheless, the appellate court did reverse the trial court because, according to the court, "the parties never agreed on a procedure to resolve the payment dispute."[22]

The issue of the viability of binding mediation was, then, taken up by Judge P. J. Sills, in a concurring opinion that did not mince words. In Judge Sills's opinion, there is "nothing more self-contradictory than 'binding mediation.' Mediation is by definition a voluntary process which achieves a voluntary result, and is meaningful in distinction to 'arbitration' in its very voluntariness. Or, to put it with more bite—mediation is distinctive from arbitration in its inherent lack of consequences. You go to mediation, you like it, you don't, you settle, you don't, no big deal."[23] The judge expressed grave doubts about the workability of the concept of a mediation that can morph into an arbitration if the parties fail to reach a settlement, saying that such an arrangement might actually "retard a settlement."[24] Judge Sills observed that frequently during settlement conferences, lawyers say things to one another or to a mediator in an effort to reach a settlement that they would never say to a trial judge or an arbitrator. In fact, according to the judge, "no lawyer in his right mind would ever tell such things to a mediator if he thought it was possible the mediator might become the arbitrator. For that very reason, rule 1620.7 (g) requires a mediator to exercise 'caution' when combining mediation with other alternative resolution processes and to do so only with the 'informed consent of the parties.' And, if the mediation can become an arbitration, each party *must* be given opportunity to select 'another neutral' to conduct the ensuing proceedings."[25] Judge Sills concluded that the stipulated settlement before the appellate court "obviously did not comply with the requirement of rule 1620.7(g) that the parties have the right to 'select another neutral' when mediation is 'combine[d]' with 'other alternative dispute resolution (ADR) processes."[26] According to Judge Sills, making a decision on contract grounds spared the court's having to make a decision as to whether there was a violation of rule 1620.7(g).[27]

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ENDNOTES

1 Lindsay v. Lewandowski, No. G033173, 139 Cal. App. 4th 1618, 2006 Cal. App. LEXIS 821 (Cal. Ct. App. [4th Dist.] May 31, 2006).
2 *Id.* at **7 (citing Weddington Productions, Inc. v. Flick, 71 Cal. Rptr.2d 265 (Cal. Ct. App.[2nd Dist.] 1998).
3 *Id.* at **8-9.
4 *Id.* at **1-2.
5 *Id.* at **2.
6 *Id.* at **2.
7 *Id.* at **2.
8 *Id.* at **3.
9 *Id.* at **4.
10 *Id.* at **4.
11 *Id.* at **4.
12 *Id.* at **4.
13 *Id.* at **4-5.
14 *Id.* at **5
15 *Id.* at **5.
16 *Id.* at **6.
17 *Id.* at **7.
18 *Id.* at **8-9.
19 *Id.* at **9-10.
20 *Id.* at **11-12.
21 *Id.* at **9.
22 *Id.* at. **6.
23 *Id.* at **15.
24 *Id.* at **18.
25 *Id.* at **19 (alluding, perhaps, to the fact that Lindsay was not allowed to disqualify Judge Polis, who started as a mediator then became an arbitrator.)
26 *Id.* at **21.
27 *Id.* at **21.

WHERE'S THE MONEY? BUSINESS ADVICE FROM KEN BURDIN*

The questions I am asked often touch on the subject of making a living in mediation. Friends and strangers alike inquire, "When will I achieve financial success? Why can't I make a reasonable income? Should I continue in this profession? What is the eventual reward? What are the directions to success in the dispute-resolution field?" My answer to all of the questions is the same: "If you're a good mediator, and if you can market, you'll succeed."

Those of you reading this article are doing so because you have asked or thought quietly about your chances of surviving in this field. You have thought, "Is this profession worth it? Can I compete? How long does it take to become recognized? What more should I do?" Today there are real opportunities to make a living in mediation, more so than at any other time in the history of our profession. The "how" of professional success depends totally on practitioners making it happen.

Why did you select mediation as your life's pursuit? Did you pick mediation because you wanted to be rich? Probably not. Do you mediate because you expect a trophy and a big tip if you help settle a case? Unlikely. Are you in love with the joy, satisfaction, do-good feeling, and creative features of mediation? Probably.

Assuming your quest is genuine, you may still have concerns about your chances of competing with "Super Lawyers" who are well-connected and who offer their clients elite mediation facilities. It is reasonable to ask whether the marketplace is large enough to support all who desire to enter.

I ask some simple questions when people express their concerns: "Have you done your homework? Do you have all the best tools to build your practice? What's your plan?" You cannot build a house without a blueprint. If you want to make money, you must prepare for it.

Because this article is intended as advice, not as a debate, here is an answer: If you became a mediator to help people further their objectives, and you are able to accomplish just that, you will succeed. And yes, you can make a good, fair, pleasant living.

Just like a painter, book writer, or cobbler, you mediate because of the passion, purpose, or perks. Enter this profession from wherever you desire, but remember that the profession is still not well defined and is very fluid. More mediators are entering the field than the market can support. Do your homework – prepare your plan.

States, counties, cities, parishes, small businesses, corporations, and governments operate their legal, litigation, HR, and ADR departments *in completely different ways*. You, the practitioner, must figure out who is buying and what you have to sell. Is there a good fit to make a living? Identify your customers and decide how to sell them your services. This research becomes the basis of your **Business Plan**.

The simple elements of your **Business Plan** should include the following: (1) a statement of what you want your business to be; (2) an assessment of the market for your services and the probable "life expectancy" of that market; (3) a location for your business; (4) a plan for creating and sustaining a reasonable income; (5) an assessment of the start-up costs; (6) a cash-flow analysis; (7) an honest assessment of your chances of success; and (8) a time frame to begin your business.

You also need a **Marketing Plan** that contains all the actions required to sell your services. Here are some questions you should ask when formulating your marketing plan: What is your service? Who are your customers? How will you market your service to your customers? What is the competition? How will you distinguish your services from your competition's services? What is the potential and acceptability of your services? Assess what skills you have to do this job while maintaining your professionalism.

Your business and marketing plans will prepare you to enter the mediation profession while addressing the "dollars and sense." If you are good, if you can compete, and if you can sell yourself, there is a career.

There are only two ways to make money: take someone else's or create your own. The first way is easier, but it is not as satisfying as making your own. The best decision is to create your own market and serve that market. Mediation is a product perfect for today's consumer society.

Making money in mediation is not easy. Sorry, wish I had better news, but it is tough in the trenches. Success can be accomplished, though, because there is existing business and potential business. Many providers are making decent money around the state. How much you make depends on you.

OK, so where's the money? Simple: everywhere. Here is a short list: airports, attorneys, charities, churches, cities, corporations, courts, governments, health-care providers, home owners associations, insurance companies, law-enforcement agencies, lodging industry, military institutions, prisons,

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REFLECTIONS FROM THE EDGE

MOVIES AS METAPHOR AND MIRROR

By Kay Elliott*

(Note from the Chair of the Newsletter Editorial Board: This article is the second in a series entitled "Reflections from the Edge," written by Kay Elkins-Elliott. In this series, Kay reviews the latest research and literature in the interdisciplinary field of dispute resolution, and she explores possible applications of the research and literature to everyday practice.)

Why do we go to the movies? Quick answer—for entertainment and escape. There are other answers and other questions. Who do we think we are? Consciously or unconsciously, we use the movies as a mirror. Does this mean that the movies reflect who we already are or what we want to believe we are? If the latter is true, to any extent, then the movies can be helpful in changing a society that, while individualistic, status-seeking, and competitive, gives indications of transitioning to a more collective, or at least collaborative, approach to conflict.

The July issue of the magazine, *Fort Worth, Texas*, featured an article by an attorney, Steven Laird, on collaborative law. In the first paragraph, Mr. Laird used the movie, "War of the Roses," to frame his message: divorce is war and everyone loses. Readers may remember that at the beginning of that movie, Danny DeVito, the divorce attorney, counsels his new client to forget divorcing his wife and go home and reconcile. His argument is that divorce is costly and can even be lethal. The divorcing couple, the Roses, actually die in battle, and the house they are so determined to win is destroyed in their war, leaving their two children orphans. Why do movies send a message so emphatically? Is it because most of us are visual learners, the screen is big and colorful, and we sit in the dark as the sound envelops us? Is it also possible that we learn by example and the characters in fictional drama give us an opportunity to find new meaning in our own dramas? In this column, I suggest that referencing movies, telling their stories, just as writers do, can be a tool for helping embattled parties find a way to reach consensus without losing face.

I am reminded of the teaching movie, "Don't Forget the Children," produced by the Texas Young Lawyers, which has been shown to many divorcing parents prior to mediation with Family Court Services in Dallas. Real survivors of custody battles, including a child, participate in the movie. The message is stop fighting; use mediation—not the courtroom—as the resoluton process. Somehow the advice given by actual survivors of divorce, the documentary approach to enlightenment, has an impact that the advice of counselors does not. Why are we seeing so many documentaries or docudramas lately? We have to question why this form of social change has become so popular as a means of changing social behavior such as smoking, gun use, violence in schools, and substance abuse. Movies have the power to change us.

In the book *Blink: The Power of Thinking Without Thinking*, by Malcolm Gladwell, the powerful and unconscious impact of our culture to create implicit associations in our mind is discussed. If you want to see how your mind has been affected, go to www.implicit.harvard.edu and take some of the implicit association tests. You will be amazed to learn you have many biases as a result of your cultural programming since birth. In the race-implicit-association test, for example, you will probably have a pro-white bias, irrespective of your ethnicity, if you grew up in the U.S.A. You cannot consciously change that bias, as Mr. Gladwell who is himself half Jamaican discovered, but you can reprogram your mind by, for example, watching hours of films such as one of Martin Luther King, Jr., making his "I Have a Dream" speech. This phenomenon has been documented.

Our culture differs from many others in our preferences for individualism, winning through competition, use of public trials, and emphasis on materialism. In some older, more-collective and less-diverse societies, mediation is the forum of choice. In the Navajo culture, the Peacemaker Court operates openly and in parallel to the judicial system. In the Polynesian islands, Ho'oponopono, or "making right the pain," an elaborate multi-step process for families, has been adapted to labor disputes. In New Zealand, family group decision-making is used when children are neglected or abandoned and has now been incorporated into the Family Protective Services agencies in Texas and elsewhere in the U.S.A. In China, the People's Court offers a very different approach to publicly resolving disputes than our version of going to court, and in international arbitration, the highly sophisticated international arbitrators continue to encourage and facilitate a mediated outcome because that approach is so integral to the Chinese culture.

In cultures in which shame for bad behavior still can be used to motivate apologies and reconciliation, collaboration has a fertile ground in which to grow. Psychologists agree that the power of shame exists in all cultures because it is a primary emotion. What has happened in the United States with regard to shame? Dr. Joyce Brothers has addressed this topic and illustrated her points with movies - the mirrors of social change. Beginning with the Hays Code of the thirties, shame showed its face in the movies all the time. The culture of that era had clear rules for behavior. In the sixties, the hippies declared war on shame, and were very successful. According to Dr. Brothers,

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successful. According to Dr. Brothers, today's freedom to be vulgar can be traced to that decade. Now, of course, we are seeing in the Family Values movement the backlash to that war on shame. There is always a price to be paid for the loss of shame in a culture. One psychiatrist, Dr. Leon Wurmser, summarizes this cost: "Where there is an unrestrained exposure of one's emotions and of one's body, a parading of secrets, a wanton intrusion of curiosity, [it has] become hard to express tender feelings, feelings of respect, of awe, of idealization, of reverence . . . . The culture of shamelessness is also the culture of irreverence, of debunking and devaluing ideals."

We do not go to the movies to learn how to behave, but we do seek out connections to and mirrors of ourselves: the ideal and the actual self. In some award-winning movies, we are given the chance to have a few hours of proximity with amazing public figures such as Howard Hughes, Ray Charles, and James Barrie. Or we are given the chance to see the pain of the scorned as in "Broke Back Mountain," "I'll Walk the Line," and "Schindler's List." The question is, do we learn who we are or do we just satisfy a curiosity about the famous and infamous? More importantly, can we learn from art, be it written, cinematic, painted, danced, or sculpted, anything about ourselves that helps us in conflict? Some art critics believe that the artist makes public the *private dream that we are ashamed to expose*. If movies are a mirror, particularly in the culture that made them a major form of artistic and populist art, let us learn from some of the greats as much as we can about the resolution of conflict. If William Ury is accurate, our human tribe is endangered by conflict. More people go to the movies than read books generally, let alone books about the techniques of collaborative problem solving. As a source for social change, the movies offer mostly untapped, fertile fields.

I have chosen to highlight some movies that provide particularly poignant, provocative, or funny examples of conflict. The values conflict depicted in "Other People's Money" is beautifully scripted with Danny DeVito expounding the virtues of the get-rich-quick capitalist approach to security, while Gregory Peck stands up for the hard-work-and-corporation-as-father ethic. The real lesson about collaboration comes at the end in a very subtle, and probably mostly ignored solution, offered by the female lawyer, hired by her stepfather (Peck) to keep the company functioning. She has neatly sidestepped the values clash, gone beyond compromise, and truly found a value-creating solution for everyone: turn the obsolete wire and cable company into a manufacturer of car air bags (made from that same wire) with capital and technological infusion from a Japanese company that already produces the product. As a further value, DeVito hopes to marry her, and presumably her stoic stepfather will have to acknowledge that she has earned his respect.

Drama, by its nature, depicts conflict. We are complex creatures, often competing for status, cultural identity, and sometimes for scarce resources. When the competition escalates, when the stakes are high, waste and tragedy can result. One former best-actor Oscar nominee, Don Cheadle, played the owner of the "Hotel Rwanda." He used every persuasive means to save the lives of people whose only "crime" was to belong to the wrong tribe. Another movie scene that clearly depicts the destructive force of conflict, this time a competition for scarce resources (water), occurs in the first few minutes of the Stanley Kubrick film, "2001: A Space Odyssey". Two troops of oddly human-looking apes fight to see which will get the water and which will die. In the night, the smaller and weaker of the two troop leaders gets a message from an alien species and has an insight. He picks up a leg bone from a pile of carcasses and imagines killing an animal with it, then pictures what he could do to his enemy and for his thirsty troop. He and his followers, bones in hand, attack and prevail. The enemy leader is killed. Because the scene is so primitive, actually pre-human, many viewers failed to get the message. These creatures could not communicate, negotiate, or collaborate. They killed to survive. We don't have to, but we still do. As an example of pure primal response to conflict, this scene is beautiful, graphic, and powerful. As a teaching tool, the viewer is left with the question: what have we learned since then?

We know that a picture is worth a thousand words. What is a movie worth on that scale? Some movies intend to teach us something, but any benefit derived by most moviegoers in terms of changes in behavior is unconscious. Yet if we do seek connection to the characters in the movies, which many commentators seem to agree is happening, then let us, as conflict specialists, remember to consciously reference movies to help our message.

One of my mental health colleagues tells me that when we try to push parties from the cognitive directly to consensus, we will always cause resistance. Only by letting disputants express and acknowledge their feelings can we facilitate change. If she is correct, there is an opportunity to find, in some movies, the feelings, the meanings, and the awareness we have failed to see in our own life because it was too close to us. Up there, on a huge screen, in a dark, public yet somehow private, theatre we see ourselves, and sometimes we connect.

Art is the purest and the most joyful expression of cultural identity. Conflict resolution techniques are our best hope for managing and transforming destructive, primal forces that resort to power rather than problem solving. Some mediators use stories to help parties find a new way to view conflict. Some use humor and others reference popular culture. Two very different films, "1776" and "Gandhi," illustrate two abstract concepts that are hard to explain but readily apparent. In each movie, a famous leader illustrates emotionally mature behavior that changes the conflict, their country, and even world history. They employ very different techniques to accomplish their objectives, consistent with the cultural context in which each conflict is occurring. These two men are legendary examples of mature leadership. Neither was a military nor heroic figure in the classical sense of Napoleon or Alexander the Great. Gandhi was a lawyer,

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TEXAS LEADS THE WAY IN COLLABORATIVE LAW

By Norma Levine Trusch*

(Note from the Chair of the Newsletter Editorial Board: This article continues a new series whose purpose is to expose our readers to perspectives on Collaborative Law. If you would like to contribute an article about Collaborative Law, please contact Sherrie Abney at SAbney913@aol.com or Walter A. Wright at ww05@txstate.edu.)

One of the greatest challenges I have ever faced as an attorney was serving for two years as President of the International Academy of Collaborative Professionals (IACP). Like many other board members, I found myself working actively for the organization when I had only been practicing collaborative law for a short period of time. And, like many who discover collaborative law late in their legal careers, I felt that I had found a way of practicing law that I had been looking for ever since I graduated law school, so I was filled with passion and enthusiasm for the goals of the organization.

Although I had been active in various bar organizations at the local and state and national level, nothing had prepared me for the IACP. As its name connotes, the IACP is an organization of collaborative professionals - not collaborative lawyers - so I found myself for the first time dealing with the unique cultures of three professional groups: lawyers, mental health professionals, and financial professionals. I soon discovered that a high level of suspicion and even antipathy existed between two of these groups - the lawyers and the mental health professionals. Because the organization initially concentrated on family law, the mental health professionals brought to the table all of the horror stories they had heard from their patients about their divorces, and had to deal with the destructive effects on the children of their patients' experiences. They saw the lawyers as the source of the problem and distrusted our verbalized intentions to create a process that was client-centered and practiced with integrity. The good news is that, despite these differences, we were able to bridge the divide and work together to promote what we all believed was the healthiest, most humane way to handle what is often a traumatic life passage.

Thanks to the initiative of IACP, collaborative law has now moved out of the family arena into various civil law disciplines, and I predict will, in time, replace the adversarial system as the preferred method for handling legal disputes. Meanwhile, those of us who dream of that day have a long way to go.

The first challenge we faced and continue to face is letting attorneys and the public know that the process exists. Like mediation, collaborative law's first hurdle was convincing the legal profession of its legitimacy. Unlike mediation, Texas collaborative lawyers were able to get statutory support for the process early in its development. The first Texas training of collaborative lawyers occurred in January of 2000, and by September of 2001 the Texas Family Code had been amended to recognize collaborative law as a legitimate method of assisting families in restructuring after divorce. Think of the easier time mediation would have had if legislation had been in place ten years earlier, when the idea first took root. One of the ironies of the passage of the collaborative law legislation was the concern of mediators that the process was a threat to their movement. In actuality, mediators are regularly utilized to prevent impasse in collaborative law, and many of the leaders of the collaborative law movement are utilizing techniques in collaboration that they learned as mediators. Collaborative law has won over many of its critics in the legal community, and the next legislature will probably see expansion of the legislation into the Civil Practices and Remedies Code.

Reaching the public has taken longer. Although it was already an international organization when I began my service on the board, the IACP had a minimal and isolated membership scattered across the United States and Canada and little money to spend on the level that was needed to conduct an effective public education campaign about the process. Although we still have a long way to go, IACP is now on the verge of launching the second phase of a public education campaign that has brought us to the development of collaborative law practice groups in thirty-eight states, over a dozen Canadian provinces, across the British Isles and Europe, and in Australia. All of this has taken money, lots of money, but an ever-bourgeoning membership has kept the organization afloat. More is and will be needed, however.

The greatest source of pride for me during my time at the helm of IACP, was seeing the leadership Texas brought to the organization. In a reversal of the usual way things happen, a statewide organization set the pace for an international one. The Collaborative Law Institute of Texas, Inc. set a standard of service to its membership and the public that IACP was quick to recognize and emulate. Texas collaborative lawyers are recognized as the most creative, innovative and energetic practitioners in the world. Texas has developed a unique approach to interdisciplinary family law practice that is winning converts all over North America, and Texas trainers are now in demand in the United States and Canada. The Texas Collaborative Law Council, an organization of civil collaborative lawyers, has organized institutes in Dallas that have attracted civil lawyers from across the country.

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REFLECTIONS FROM THE EDGE
Movies As Metaphor And Mirror
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trained in England. Franklin, who began as an indentured servant, became an inventor, publisher, and diplomat. Each believed in a simple lifestyle and in the ability of the individual to be self-sufficient. Each stood for human dignity and yet for diplomacy.

In the musical, "1776," John Adams, a representative to the Continental Congress from Massachusetts, aggressively advocates that the colonies revolt against England and declare their independence as the United States of America. He is an unpopular, rather unpleasant person and does not enjoy much respect or adherence from his fellows. He seeks the advice and help of the persuasive statesman, Ben Franklin. Ben knows what John is after and has already formulated a strategy that John's frontal approach would never contemplate. Ben realizes that what is needed is a *proposer* of independence who is popular. The modern way to put this is a proposer with more emotional intelligence than John Adams. Ben uses an elegant, open-ended-questioning technique on John Adams and with Richard Henry Lee, a charismatic statesman from Virginia. By asking questions of Lee that evoke the "yes" answers Ben intends, the Virginian gains insight and comes to see himself as the hero of independence. He rushes off to get support for his newly found affiliation with the cause of revolution. The questioning techniques look familiar: we see the mediator, the integrative negotiator, and the collaborative lawyer in his behavior. The rest, as you know, is history!

In "Gandhi" we see a very different culture caught in the grip of destructive religious conflict. Gandhi has employed a hunger strike as a peaceful way to achieve change. If the fighting doesn't stop, and he doesn't believe that it will not start again, he will publicly starve himself to death. Because he is beloved and recognized for his exceptional spiritual and emotional maturity, his ultimate sacrifice has power to cause change. Suddenly a crazed person runs to his bed and throws bread upon it. Gandhi questions the man as to why he says he is doomed to go to hell. The stranger tells his story which tragically begins with his own son being killed by his enemies and his retaliatory behavior toward the sons of his enemies. There is silence followed by Gandhi saying very quietly: "I know a way out of hell." The instruction Gandhi gives the killer is to go and adopt a young boy, the same age as his dead son, and to love him and teach him religious values. After a pause, Gandhi adds, almost as an afterthought, that the boy must be the son of an enemy and the religious values taught must be the religion of the enemy. The killer cries, seems to have an insight, and kneels at the bed of Gandhi, who then ends the hunger strike. This scene displays the use of role reversal – stepping into the shoes of your enemy – and compassionate communication. Instead of chastising the killer, Gandhi helps him to reframe his tragedy and to become more compassionate. One is reminded of the truth in the statement, "You cannot hate a group if you have ever loved someone of that group."

In these two powerful, short, visually and aurally beautiful scenes, we see the best of human nature transforming the worst. We also see the intelligent deployment of persuasive communication used in a devastatingly effective way. There are few Franklins and Gandhis among us today. But in their writings, their teachings, and what has survived in terms of cultural changes they affected, we have an opportunity to grow a little ourselves and to have an insight into the nature of effective conflict resolution.

**** Kay Elliott** is an attorney, mediator, and adjunct professor of law. She is also co-editor of the State Bar of Texas ADR Handbook (3d ed. 2003) and a Credentialed Distinguished Mediator.*

ENDNOTES

[1] *Helpmates and Heroes*, N.Y. TIMES, Feb. 13, 2005.
[2] Joyce Brothers, *Shame May Not Be So Bad After All*, PARADE MAGAZINE, Feb. 27, 2005.
[3] *Id.*
[4] *Id.*
[5] *Helpmates and Heroes*, N.Y. TIMES, Feb. 13, 2005
[6] Paul Grimley Kuntz, *Art as Public Dream: The Practice and Theory of Anais Nin*, A CASEBOOK ON ANAIS NIN (1974).
[7] William Ury, GETTING TO PEACE: TRANSFORMING CONFLICT AT HOME, AT WORK, AND IN THE WORLD (1999).

Texas Leads the Way In Collaborative Law
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Strangely, there is another group that needs to learn more about collaborative law - and that is the ADR community. It was only in its last issue that the newsletter for the ADR Section of the American Bar Association finally printed an article on collaborative law. I am hopeful that articles on collaborative law will be seen as frequently as articles on mediation and arbitration in that publication as well as this one. We *are* a form of alternative dispute resolution, and should be recognized as such by the ADR community.

My final wish as I finished my term as President of IACP was that every mediator out there - whether a legal, mental health, or financial professional - would become a trained collaborative professional and join us in transforming the way disputes are resolved here in Texas and around the world. For information about interdisciplinary collaborative law trainings here in Texas, visit the website of the Collaborative Law Institute of Texas, Inc., www.collablawtexas.com. For information about civil collaborative law trainings, visit the Texas Collaborative Law Council, Inc. website at www.collaborativelaw.us.

****Norma Levine Trusch**, of Houston, is immediate Past President of the International Academy of Collaborative Professionals, a Trustee of the Board and director of training for the Collaborative Law Institute of Texas, Inc., and a fellow of the American Academy of Matrimonial Lawyers.*

AN EXPERIENCE OF COMMUNITY MEDIATION IN ARGENTINA[1]

By Dr. Gustavo Enrique Serra*

The Institutional Framework

To give an idea of the institutional framework of this mediation, I begin by referencing the Public Defender of the Province of Córdoba, Argentina.[2] This position (in other areas, ombudsman) has constitutional status in Córdoba. The Defender is designated by the legislature; he has functional autonomy, freedom of opinion and independence from the executive power. His function is to defend labor and community rights, to supervise the efficiency of public services, and especially to protect human rights, like the rights to life, health, education, and freedom of work, thought, conscience, and religion.

In 2003, in order to fulfill his mission and help to change the adversarial paradigm into a culture of cooperation, the Public Defender created the Community Mediation Center, which after its authorization and a period of public advertising, began receiving cases around September 2004.

The Case

The first case was presented by a non-governmental organization (NGO) dedicated to human and environmental rights. The conflict was in a town of nearly 800 residents, located in the foothills of the Sierras. Its limited tourist activity consisted of two or three festivals, the rental of vacation homes or shops for tourists in a couple of inns and a hotel. The NGO intervened at the request of a group of neighbors who expressed complaints about the excessive volume of music at shows, dances, games, and bars, especially during the summer. The events were organized by individuals, shopkeepers, cultural and sporting entities, and even by the municipal authorities. In most cases, the musical broadcasts directly or indirectly generated economic benefits, even when the organizers did not make a profit. In the past, this situation was denounced by some neighbors before the Municipality (an executive body), the Deliberative Council (a legislative body), the Justice of the Peace,[3] and the local police without getting satisfactory responses. Those affected expressed fear of possible damage to their health, by direct exposure to noise as well as sleep deprivation and the resulting irritability, as well as other consequences.[4]

The NGO said about the conflict, "The case maintains a clear public and community character, because the nature of the behavior is linked to the violation of constitutional rights to health, to a dignified quality of life, and to live in a healthy environment . . . ."

Handling the Conflict

When the case came in, the Mediation Center set up an interdisciplinary mediation team[5] made up of two women and two men, with the participation of the (female) Director of the Center. Some of us had participated in community-mediation cases, without having become experts on the subject. We held preliminary meetings in order to familiarize ourselves with the available information: documents provided by the NGO and information obtained from telephone calls with some of the people involved in the conflict.

In addition, to prepare ourselves, we took a course in "mediation of public conflicts" taught by respected colleagues with experience in the subject, and we attended a seminar about acoustics. The first gave us ideas like identifying—prior to our intervention—participants in the conflict and any relevant organizations or community leaders. The acoustics seminar provided basic knowledge for understanding noise problems.

Nevertheless, I would later form an opinion that each mediation (especially community mediation) is unique, and therefore what outside experience or theory can contribute is limited. Likewise, after eight years of studying and practicing mediation, I am convinced that technical knowledge of the issue of a conflict can help the mediation very little. It is only necessary to know how to mediate (nothing less!). I also dare to affirm that it is not desirable for a mediator to act from an expert's point of view regarding the issue at conflict (even when he has the expertise), because the temptation can arise to impose solutions that he considers technically better than the decision freely adopted by the parties.

Returning to the story of the mediation, we first sought to determine the parties to the conflict. The preliminary conclusion was: (1) the complaining neighbors; (2) the NGO; (3) the Municipality; (4) the Deliberative Council; (5) the merchants who used the music to attract clients; (6) the event organizers; and (7) the young people who attended the dances. (After the first interviews, we discovered other interested parties who will be mentioned later.) As a result, it was undoubtedly a "multiparty" mediation. At this point, we debated if we should begin the process with a joint meeting or individual interviews.

From his experience, the public Defender counseled us to be careful in the communication and relationship that we established with the authorities so that they would not feel questioned by the mediation process and would participate in it.

We used a location away from the headquarters of the Mediation Center because we considered displacement of mediators preferable to that of the attendees of the mediation.

The Mediation Process

In the successive trips that we made to the location of the conflict, we held interviews with the different participants. The preliminary contacts with the authorities were tense, of a merely formal nature, and it seemed to us that they were not willing to participate in the process, likely fearful of being questioned about their acts of government.

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We interviewed the participants most affected by the noise, who immediately brought in other neighbors for a much larger meeting. There we noticed different shades of involvement in the conflict: some tended to advocate eliminating the sources of noise while others tended to look for points of balance. In private meetings, some of the second group confided in us that they had participated in the complaints more out of solidarity with friends than out of their own suffering.

We conducted interviews with merchants who occasionally organized small shows on their premises, or used music as an attraction for clients. We also interviewed organizers of festivals and popular events (in which music had a predominant role). In these and other interviews (e.g., with parents of young people, the eighth category of interested parties we detected), we noticed that some people thought that some adverse effect of the noise was acceptable if it was the price of some fun existing in the town. The merchants advocated this preference from the perspective of maintaining or increasing their revenues, while the cultural-event organizers wanted the town to maintain some attractions for tourists, and the parents hoped their children could have fun in the town without having to travel to other locations to dance.

We also interviewed some Council members,[6] the majority of whom were well-disposed to contributing solutions to the conflict, even promising to legislate on the matter. One Council member, while aligned with those affected by the noise, admitted the necessity of maintaining musical attractions. "It's not a question of the people remaining mute," she said, and added that it was necessary to look for other solutions like decreasing volume or appropriately positioning the speakers.

We had interviews with the director of the regional hospital, teachers, professors, church collaborators, and many other people not directly involved in the conflict, but with a strong community commitment (the ninth category of interested parties we detected). We also interviewed the local police chief (the tenth interested party).

In the course of the interviews, we perceived polarization that existed between two traditional political parties—with certain equilibrium in their strength—that in some measure was intertwined with the conflict that we had to mediate. We also learned of other conflicts and received requests to intervene in them. We decided to limit our action to the original conflict, convinced that if we intervened with success, the people would be in a better position to resolve problems by themselves, or they would be able to organize a mediation team for that purpose.

Listening to the neighbors, we managed to grasp part of the idiosyncrasy of the community, discovering that its makeup was nearly equal between local descendants ("natives") and others, immigrants from the within the country and some from other countries ("newcomers"). This combination produced a notable cultural mixture, which enriched the community, although it also generated social dissimilarities. We also discovered that there were descendents of aborigines, who were not prone to reveal their ethnic origin. This reluctance contrasted with others who organized festivals with native music without being of indigenous origin.

After every return trip, we mediators talked for hours about the experiences we had had. From trip to trip, we met to analyze what we observed and to plan future actions.

After negotiating it and after several attempts, we received at the headquarters of the Mediation Center a visit from the city executive, an important interview because by making our purposes known and describing the principles and mechanics of mediation, in some way we disarmed his concerns about questioning the authorities. It also opened the possibility that he would participate in a future group meeting.

The activity described lasted two months, and when we were ready to call the participants to a group meeting, there were objections of a practical nature that made the meeting impossible before the end of the year. We analyzed the situation and agreed that it was prudent to wait until summer was over.[8] One of the reasons for this decision was the deliberative state that our presence had caused in the town. The citizens began to talk about the noise, and we thought that the maturation of the situation could generate positive elements. Also, it changed the attitude of the authorities who began to produce meaningful suggestions regarding the conflict, like placing special clauses regarding noise in contracts for concessions at a public location that it rented out during the summer.

The selection of the place for conducting the group meeting was a cause of concern. A city office was offered, but we thought that the location should be completely neutral with respect to those who would participate, and how the Municipality and members of the Deliberative Council would participate. It was preferable to look for another site. Finally, a school room became available as a valid alternative. Although educators would participate, the great majority of the interviewees saw the public school as a neutral location.

The Final Meeting

Summer ended, and we mailed invitations for a group meeting to the interviewees and to other people that we believed should participate. We arrived in the town the day before the meeting, and that day lasted until the dawn of the next. We prepared different components that we had decided to use, and we debated one more time the way we would conduct the meeting, how we would begin, and the roles we would assume, that in short were the following: One would open the meeting, by explaining the institutional framework, the reason for our intervention, the voluntary and non-profit position of the mediators, and by giving a summary of the conflict. Another would be attentive to all that was said, recording it on a notepad located within site of the participants (the "scribe" in the jargon of our mediation team). Two would conduct the meeting, explaining principles and procedure and the order of the discussion, and making necessary interventions. The remaining member of the team would remain observant, attentively watching the development of the meeting and being ready to intervene when it was necessary (the "observer").

The following day—Saturday—we met very early at the school to prepare the room. We put the seats in a circle. We hung a net on the wall, intending for everyone to put a name tag on it, and trying to give the expression of a motivating metaphor (a

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network). We also displayed placards that were allusive to mediation and to the Institution that we represented.[8]

We waited tensely, because nearly forty minutes passed after the scheduled time and no one arrived. However, we saw that in the area there was movement of people who were anxious about what would happen in the school. When the tension *was* gaining on us, the first participant entered and the rest followed, totaling about thirty people. Each one received two cards with his name on it, one to stick on the net and the other so that the mediators could identify them by name during the meeting.

The meeting began as planned. The facilitators proposed the following idea: "We have had conversations with many people, now we want to have another conversation among everyone," after which they presented the rules of the process and the key question: "What contributions are each of you ready to make in order to resolve the noise problem in the community?" There was a prolonged silence, until a high school professor asked for the floor and offered his contribution in two ways: he said that besides being in education, he had knowledge of acoustics and by using both, he could organize courses, or conferences directed at students or the community in general. He could also advise the authorities regarding the development of policies and rules.

This offer alleviated the tension and paved the road for many neighbors who asked for the floor, in many cases making self-criticisms and offering their contribution to help the situation.
A Catholic parishioner expressed her concern that the religious celebrations and festivals held outside did not take into account that the canticles and the music could bother some neighbors, for which she gave heartfelt apologies.

Many of the participants emphasized that during the summer—after the interviews conducted by the mediators—the noise had diminished noticeably. So testified one of the most affected neighbors, who had headed the complaints, thanking all of the efforts made and even asking forgiveness for the problems she had caused.

The police chief offered to participate in controlling the noise, at the same time asking the neighbors' collaboration with the police force's efforts.

The municipal authorities explained some of the measures that already had been taken during the summer and promised their efforts for improving the situation.

Not all went well. One Council member expressed his doubt regarding being able to obtain anything from this mechanism. Because his contribution was not echoed, he left the meeting.

After all of the contributions were received, we proposed to those present to draw up a contract of community commitment, taking from the notepad participants' ideas just as they had been expressed, resulting in a document whose prominent points I transcribe:
(1) From the school: To generate responsible listeners among the students by means of awareness courses; to offer workshops on noise, directed at parents and students, with technical contributions from the professor; to advise the authorities on the enactment of rules. (2) From the authorities: Inclusion of regulatory clauses in the rules, already carried out in part. (3) To look for opportunities for community dialogue about providing community balance and preserving community identity, all to be done within a framework of mutual respect. (4) To organize events to raise funds to buy a decibel meter. (5) To be concerned about keeping the young people in the town. (6) To require the collaboration of the police immediately after complaints about noise are made so that they can act as mediators. (7) To paying attention to other sources of noise besides music (such as machinery). (8) All of the members of the community to act with concern for each other. (9) To recognize and preserve vegetation and natural, indigenous fauna, to avoid cutting down trees, and to plant new ones in order to create natural acoustical barriers; to consider also another type of barrier or acoustical deflector. (10) The Deliberative Council to discuss the issue of noise in the community. (11) The Catholic congregation to offer collaboration in the education of children and to ask for technical advice for its events. (12) To generate special opportunities for dialogue directed at the youth. (13) One group of neighbors requested a mediation course to take place soon. (14) The NGO promised to contribute a bibliography of resources to the community.
When the participants left, satisfaction was evident on their faces. They had understood that by means of dialogue and consensus, they had tackled the problem by themselves, finding a solution. They took ownership of a democratic tool for doing it in the future. Certainly no less was the satisfaction of the mediation team, which in that moment, in that place, had found an adequate path for the conflict.

Observations
I have already stated my belief that an outside experience can make only a limited contribution, but below I list, from my position as a participating observer, some guidelines that clearly arose from this mediation:

- It is preferable that community mediation be local or be held in the location of the conflict.
- The process can adopt different modalities from other mediations, combining facilitation, negotiation, consensus-building, and approaches to crisis.
- The process should be planned, but with flexibility: the strategy may need to change along the way, especially after conducting a certain number of interviews.
- It is not usually convenient to incorporate discussion of problems different from those which caused the mediation.
- It is necessary to identify everyone involved in the conflict, their interests, their alliances, which probably is discovered after holding various interviews, from which new participants to interview will emerge.
- No one interested in participating in the process should be excluded. It is necessary to generate a

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- framework of mutual respect so that everyone interested participates in the process, even the local authorities.
- It becomes indispensable to know the idiosyncrasies of the community, its history, wishes, needs, and frustrations, its identity, as well as the social characteristics of each one of its groups or members.
- It is better to begin with individual interviews, before holding a group meeting.
- It is not necessary to acquire in-depth technical knowledge about the subject of the conflict.
- A mediation team is better than a single mediator.
- Defined roles within the team can exist beforehand, but they should be capable of change according to need. At a minimum, I believe it is necessary to plan the role of the facilitator of the meetings, the registrar, and the contact person for the participants.
- The place selected for the group meetings should be neutral with respect to all participants.
- In the defining moments, it is good to utilize a key question like, "What contribution is each one of you ready to make in order to advance toward a solution?"
- The closing document should reflect the agreements with the same language used by the participants.
- It never should be forgotten that mediation is a school of democracy because it returns the power of decision-making to the citizens.

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Alternative Resolutions thanks ***Tracy Engle****, a paralegal at an Austin law firm, for translating this article from Spanish to English.*

ENDNOTES

[1] Complying with the Province's rules of mediation, in order to preserve confidentiality, all identifying references to participants in the mediation will be omitted, as well as the name of the town.
[2] The province of Córdoba is located in central Argentina. It is 165.321 square kilometers, and has an estimated population of 3.28 million. Its capital of the same name, with 1.48 million residents, was founded in 1573, and in 1614 the Jesuits founded the Univsersity, the second oldest in Spanish-speaking Latin America. Today it is considered the Argentine city with the largest percentage of college students, but it is also the second largest economy among the Argentine provinces.
[3] Non-lawyer judicial officials with competence in minor causes.
[4] Specialists in the subject affirm that the effects of noise on the human body can involve temporary or permanent displacement of the auditory threshold; hearing buzzes or noises in absence of a source that produce them; and earaches and headaches. And people's behavior and performance can be affected, causing nervousness, irritabiliy, lack of tolerance in social interactions, exhaustion, and deterioration of cognitive functions like attention and memory.
[5] The province's law about mediation establishes that, in addition to training as a mediator and other formal requirements, "To act as a mediator in an out-of-court venue, one must: a. Possess any university degree and three years of professional experience . . . . "
[6] Members of the Deliberative Council, a municipal legislative body.
[7] In Argentina, the summer begins in December and lasts until March.
[8] It is important to emphasize that the simple demonstration that we belonged to the Community Mediation Center opened many doors for us.

Where's The Money? Business Advice From Ken Burdin*
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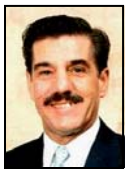
restaurants, retailers, schools, and unions. You can think of a million other possibilities.

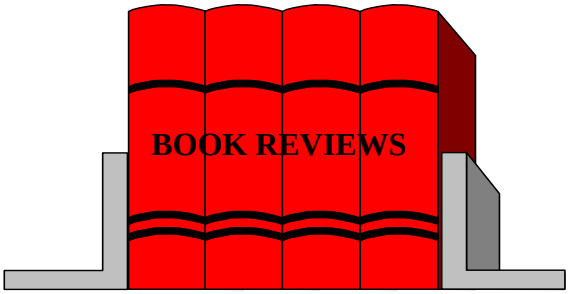
There are disputes everywhere and all the time. Find a way to settle those disputes honorably, efficiently, and with customer satisfaction, and you can create your own niche. Good luck, and happy mediating!



*** ***Ken Burdin*** *is a former director of the Texas Association of Mediators, and he co-chaired the 2005 TAM conference in Dallas. In 1993, he founded Burdin Mediations, which today is one of the nation's leading mediation providers. His firm has conducted over 20,000 settlement conferences.*

I have always thought the actions of men the best interpreters of their thoughts.

COMMUNICATION AND PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING



Stephen P. Depoe, John W. Delicath, and Marie-France Aepli Elsenbeer, eds.
State University of New York Press, 2004

Reviewed by Lisa Weatherford*

Decide. Announce. Defend. Not the most effective communication strategy; yet, it is very often the strategy of choice (or at least default) for public policy decision-makers. From a public participation perspective, the problem with this strategy is clear: little or no public input. Even when citizens are invited to participate, their input is often sought to meet compliance requirements or to "validate" a decision that has already been made. It is not surprising that public policy decisions—especially environmental decisions—are frequently challenged.

Environmental issues are notoriously contentious and emotionally charged, so a decision-making strategy that ignores the public, or circumvents public participation statutes will almost certainly result in conflict and increase the likelihood of activist and court challenges to the contested policies. Just one environmental decision can affect several diverse stakeholders, which complicates the decision-making process and decreases the probability that the outcome will be satisfactory to all participants.

The concept of public or citizen participation in shaping environmental policies is not new. In fact, there is little disagreement among interested groups that the public should take an active role in decision-making. Unfortunately, there is little agreement about what that role should be, and how the decision-making process can effectively include community members, their concerns, and their contributions. Much of the contemporary discourse that attempts to explain why the public participation process is not effective focuses on aspects of the various processes themselves, and ignores a fundamental source of conflict: ineffective communication within the processes.

One of this book's objectives is to point out the "centrality of communication" in public participation and environmental decision making. The editors explain that the study of environmental communication is an "emerging research tradition," an exploration of how communication "impacts both our conception and our interaction with the physical world." In a communication theory context, the public participation process does not begin at a city council meeting, when a public interest group pickets a development project, or when a government agency posts its intention to promulgate a new rule. It begins when the public's perception about the natural world, or about an environmental issue is influenced by the purveyors of persuasive information.

The natural world, however, can be experienced as a "material substance," and also perceived in its abstract through the processing of information. With so many "intersubjective interpretations of common experiences," stakeholder attempts to communicate with each other frequently end in frustration and failure. The book's authors examine the dynamics of stakeholder involvement in environmental decisions; they build on, and at other times profess skepticism for the "accepted wisdom about the purposes, structures, and outcomes of public participation in environmental decision making."

The editors of *Communication and Public Participation in Environmental Decision Making* have compiled a three-part volume of works authored by environmental communication scholars who teach at universities throughout the country, and whose studies collectively focus on public participation, decision making, and conflict management. While the book is generally sympathetic to the disenfranchised citizenry, it does not ignore the legitimate frustrations that decision-makers experience when interacting with the public.

Part One is titled "Theorizing and Constructing More Effective Public Participation Processes," in which each chapter discusses a theoretical approach to effective public communication and applies it to environmental decision making.

- The Trinity of Voice (TOV) theory holds that one must have access (opportunity to express opinions); standing ("civic legitimacy"); and influence (the participant's opinions have been respectfully considered), to have a legitimate voice in the decision.
- An analysis of a U.S. Forest Service case demonstrates that openness, shared responsibility, and interpersonal relationships can create a positive collaborative environment. The Social Communication Perspective makes the distinction between a typical policy-maker's view of communication as a means to "exchange or collect static pieces of information," and the social constructionist view that human understanding of reality is "created or constructed through interaction and interpretation."
- The Competing Values Approach presents "alternative priorities," which are essentially tensions between three sets of diametrically opposed group dynamics: flexibility and control; internal group issues and external contexts; and the process's function as a means or an end.

When these six components are combined in various ways, four competing perspectives emerge to explain group process effectiveness. The rational, political, consensual, and empirical perspectives "provide a useful way to examine participants' expectations for public participation as a decision process."

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Book Review
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- A chapter about the influence of technical expertise postulates that during environmental and energy decision-making processes, scientific experts are persuasive while the technically challenged public is intimidated and alienated. The solution? "Public expertise," a foundation of knowledge that allows public participants to comprehend technical information and communicate more effectively.

The second part of the book, "Evaluating Mechanisms for Public Participation in Environmental Decision Making," is comprised of case studies in which the authors dissect the communications processes and examine their efficacy in context. In one case—a dispute about public land use in Placitas, New Mexico—the author asserts that the National Environmental Policy Act (NEPA) was used as a means by which the Bureau of Land Management (BLM) manipulated the public into accepting a controversial and highly contested decision that was clearly not in the public's best interest. At its best, NEPA was considered a "compliance hoop" that decision-makers jump through before forging ahead with an already-planned action.

The U. S. Forest Service, in the "Roadless Areas" case study, boasted that a "totally open public process" was in place to encourage public participation. The Forest Service held public meetings, accepted over 1,500,000 comments from the public, and established an impressive web site; yet, as the author of this piece points out, those traditional strategies render "public participation" an "oxymoron" because they offer no genuine means of participation. Another Forest Service case involves the management of the Boundary Water Canoe Area, and is considered a failure primarily because the plan did not attempt to "connect public participation to actual changes in agency decision making."

Other case analyses in this section include a review of citizen involvement in the remediation of the Fernald uranium processing plant site, and a controversial Georgia Port Authority decision to deepen the Savannah River. The author of the latter study concludes that a consensus model of public participation is not viable, and suggests that the focus should shift from the "myths of mediation" to approaches that explore the methods that work in practice. One case study widens the scope of investigation and analysis to citizen participation in globalization and free trade issues, in particular the North American Free Trade Agreement (NAFTA) and a Free Trade Area of the Americas (FTAA).

Part Three moves away from public hearings, comment gathering, and citizen groups, and focuses on the alternatives to the traditional public communication processes. It is arguably the most intriguing and accessible part of the book. "Emergent Participation Practices Among Activist Communities" is a three-chapter examination of public participation in some of its more radical, and therefore more controversial forms. The section begins with a study of non-governmental organization (NGO) strategies and their influence on economic governance institutions such as the World Bank and the World Trade Organization, and found that the Internet has allowed NGOs to develop transnational alliances, increase their influence, and build "social capital."

Toxic tours, or what the author prefers to call "advocacy tours," are conducted by people who live in polluted areas. The purpose of toxic tours is to remind decision-makers that people are not abstractions, that lives and communities are affected by environmental decisions. The value of the tours lies in their ability to create "presence." The "tourists" see, smell, and hear about the environment and its effects on residents; however, there is a fine line between presence and emotional manipulation, which may foster resentment rather than sympathy.

The final chapter is about an unusual approach to public participation that the author calls "cultural activism," a way of "giving voice to people in their own language and images." It chronicles the story of Winona, Texas and a citizen's group called Mothers Organized to Stop Environmental Sins (M.O.S.E.S.). Winona is also a story of environmental racism, a woman who campaigned tirelessly to communicate Winona's plight to the world, and a photographer who was willing to do pro bono work to help make Winona synonymous with environmental injustice. The outcome—*Fruits of the Orchard* (FOTO)—is a collection of black and white images of affected Winona residents. After reading about Winona, this reviewer was motivated to search for the photographs online to look upon the faces of those residents. Unfortunately, cultural activism is frequently the strategy of last resort for people who have no participatory opportunities. Even so, it can be a powerful form of political pressure.

As the reader negotiates the chapters of this book, it becomes clear that the recurring concepts of trust, respect, openness, honesty, responsibility, and voice are significant components of a successful collaborative decision making process. Indeed, those concepts are the foundation of any communication process, whether that process involves two people or a network of Internet activists. The book affirms and cautions: affirms the reader's optimism that public participation processes can work, but cautions that it is the quality of the communication within those processes that will determine success.

**** Lisa Weatherford*** *holds a B.A. and M.A. in English from New Mexico State University, and plans to graduate in December with a M.A. in Legal Studies from Texas State University in San Marcos. Lisa has taught college-level composition, business writing, literature, and public speaking, and has worked as an accountant and sales auditor, petroleum sales analyst, insurance underwriter, and avocational archaeologist. She has earned the Basic 40-hour mediation certificate, the 30-hour Advanced Family Mediation certificate, and is an arbitrator and mediator at the Central Texas Better Business Bureau, where she has conducted fourteen arbitration hearings.*

FLORIDA COURT ORDERS ROCK, PAPER, SCISSORS GAME, THEN RESCINDS IT

By Walter A .Wright

Yes, the order that accompanies this article is a real order from Judge Gregory A. Presnell of the United States District Court for the Middle District of Florida. The order caught the attention of the national press and was touted as a "new form of Alternative Dispute Resolution." According to Thomas W. Krause, a reporter for *The Tampa Tribune*, Judge Presnell rescinded the order on June 26, 2006, after the attorneys in the case agreed on a location for the subject deposition (without playing the game of rock, paper, scissors) and asked the judge to call off the game. Krause's article is at http://www.tbo.com/news/metro/MGB1MRU3ZOE.html.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AVISTA MANAGEMENT, INC.,
d/b/a Avista Plex, Inc.,

Plaintiff,

-vs- Case No. 6:05-cv-1430-Orl-31JGG
(Consolidated)

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

ORDER

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

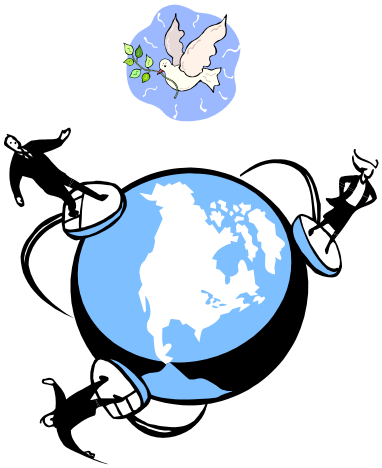
ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida 32801.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 6, 2006.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party



ADR on the Web

Dialogue and Deliberation

National Issues Forum—www.nifi.org

Texas Forums—www.texasforums.org

National Coalition on Dialogue and Deliberation—www.thataway.org

Reviewed by Mary Thompson*

In the last decade, the conflict resolution field has seen an increased focus on programs offering deliberation on controversial community and public policy issues. "Deliberation" refers to a structured forum where participants with diverse views contemplate and weigh policy options. Neutral moderators present several policy alternatives and facilitate the discussion among the participants. The goal is to educate the public on policy issues, promote understanding and civil discourse, and establish a common ground for future action on public issues.

As a pioneer in this field, the National Issues Forum (*www.nifi.org*) promotes a network of forums throughout the country. Their website contains extensive resources for convening and moderating forums, as well as downloadable policy guides for use in the deliberation process. The guides are available on a variety of issues, including health care, civil rights, immigration, foreign affairs, education and economic policy.

In Texas, we have our very own resource in Texas Forums, based at the LBJ Presidential Library and Museum in Austin. (www.texasforums.org) Texas Forum's website offers information on events and resources related to civic engagement, schedules for forums, and announcements of training programs for forum moderators.

The most interesting and comprehensive web resource in this movement is sponsored by the National Coalition on Dialogue and Deliberation (http://thataway.org). Each section of the site has an impressive amount of up-to-date, practical, and varied information.

For example, the section entitled "Resources for Understanding, Practicing and Exploring Dialogue and Deliberation" contains

- a list of over 20 D&D models from processes that include Conversation Café, Open Space Technology, Appreciative Inquiry, and AmericaSpeaks;
- A list of training opportunities for neutrals and moderators;
- An article and list of resources on collaborative technology, including online deliberation, discussion, mapping, and electronic polling; and
- A series of web-based guides on dialogue and deliberation

In response to widespread polarization of our communities, dialogue and deliberation forums are being held in libraries, churches, and community centers across the country. The topic is seen regularly on conference programs in the mediation and conflict resolution fields. For mediators and neutrals interested in policy issues, it is an exciting time to make a contribution to meaningful citizen engagement.

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

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

If men would consider not so much wherein they differ, as wherein they agree, there would be far less of uncharitableness and angry feelings.

Joseph Addison
English essayist, poet, & politician (1672 - 1719)

ETHICAL PUZZLER

*by Suzanne Mann Duvall**

This column addresses hypothetical ethical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, and Office #214-361-0802 and Fax #214-368-7258.

Mediation is an evolving profession. Each year, newly trained mediators enter the field. In an attempt to distinguish themselves in a highly competitive market, mediators have come up with some creative, even innovative, marketing ideas—but are they ethical?

What are your thoughts on the following ideas? Are they ethical? Would you incorporate them in your practice? Please explain.

1. As a solo practitioner, you have decided to be the leader in high-volume, low-cost mediations. In order to make this idea profitable, you must schedule and mediate up to five half-day mediations per day beginning at 8:30 a.m. and ending promptly at 5:30 p.m. Of necessity, this approach requires you to mediate at least two (and sometimes three) cases at any one time throughout the day. Neither your brochure nor your fee schedule mentions this fact. All mediations are prices on a half-day basis and define "half-day" as lasting "up to" four hours.

2. You are a five-year mediator with a 91% settlement rate. You are so confident that you can settle virtually any case that you have sent out letters to members of your local bar association offering a money-back guarantee if the case doesn't settle. Attorneys who are opposed to this money-back incentive offer are welcome to pay the full fee no matter the outcome.

3. You specialize in the mediation of personal injury cases. Over the years, you have developed a loyal following of insurance carriers and their adjusters. Lately, however, the competition has gotten tougher and there is always a mediator out there willing to charge less and promise to deliver more. Therefore, you have come up with a "client loyalty plan" that "rewards" repeat client insurance carriers and their adjusters with gift certificates for spa treatments and workout sessions at a local gym. No such rewards are offered to plaintiffs because you do not want to incur "liability for exacerbating their injuries." Would your answer be different if the client loyalty rewards were dinner and theatre tickets?

4. As a highly successful "premier" mediator, you have built your reputation on the amenities you provide the parties and their lawyers who mediate with you. However, lately the continental breakfasts and the gourmet lunches have become old hat, and you have decided to upgrade your food service by offering an open bar with adult beverages to all participants who are still in mediation after 6:00 p.m. and a *gratis* celebratory bottle of champagne to all parties and their counsel who settle their cases at mediation.

Meg Walker (Galveston):

Creative Marketing Idea Number 1: In my opinion, marketing may be essential to developing a lucrative practice: however, it may lead to situations where the interests of the mediator are placed before the parties. The TMCA Ethical Guidelines may not specifically prohibit "double booking," but **Paragraph 2 (Mediator Conduct), Comment (b)** states**:** *The interests of the parties shall always be placed above the personal interests of the mediator.* If the idea is to get the parties in and out in about an hour, then it seems there is an ethical problem because the mediator might be motivated to force a settlement or call an impasse prematurely. The Model Standards of Conduct for Mediators adopted by the ABA, AAA and ACR state: *a mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.* **(Standard I. Self-Determination)**

Additionally, parties often come to a half-day mediation with the expectation that the mediator has set aside a four-hour block of time, even though the half day is defined as lasting "up to four hours." In **Paragraph 7 (Convening the Mediation)** of the TMCA Ethical Guidelines**,** the mediator *shall not* convene a mediation unless *an adequate amount of time has been reserved by all parties to the mediation to allow the mediation process to be productive.* I don't think it would be a good practice to say that this rule applies only to parties and not the mediator. The Model Standards state: *A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.* **(Standard VI. Quality of Process)**

I cannot imagine the nightmare of trying to keep all the information straight with up to three cases going at the same time. I have an even harder time imagining that the mediator is really providing a quality service to the parties in the situation.

Creative Marketing Idea Number 2: My understanding is that under **Paragraph 3** of the TMCA Ethical Guidelines: *A mediator shall not charge a contingent fee or a fee based upon the*

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outcome of the mediation. A money-back guarantee seems to fall into that category. Also, how would that approach affect the appearance of neutrality and impartiality if one side is paying the full rate and the other is getting a money-back guarantee? Most mediators are motivated to get the case settled, but adding the potential loss of income might place the mediator's interest above that of the parties and undermine party self-determination.

Creative Marketing Idea Number 3: The client-loyalty plan or "rewards" might set up the mediator to appear partial to the loyal clients. There is also a potential conflict of interest that the mediator would have to disclose in the future under TMCA rules.

Creative Marketing Idea Number 4: The open bar raises several issues, including the potential liability of someone leaving the mediation and causing harm to themselves or others after consuming too many adult beverages or the celebratory bottle of champagne. Should the mediator have a breathalyzer on hand and have the mediators agree to be subjected to an analysis in the Agreement to Mediate?

Alcoholism is a serious issue, and I don't intend to make light of it, especially when many of the family and CPS mediations that I conduct often involve substance abuse. Obviously, the open bar would be a temptation at best. One also might want to consider the possibility that one or more of the participants is a recovering alcoholic or opposed to alcohol. The proximity of alcohol may make participants uncomfortable which is the opposite of the mediator's goal.

The potential ethical issue related more directly to the mediation is whether you have parties that might agree after a few cocktails then wake up in the morning saying, "I was drunk and don't remember signing anything" or, "my lawyer was too drunk to advise me of the effect of this agreement." Does this conduct raise an issue of the parties' mental capacity to agree? In TMCA Rule 13, *the mediator shall postpone, recess, or terminate the mediation process if it is apparent to the mediator that the case is inappropriate for mediation or one or more of the parties is unwilling or unable to participate meaningfully in the mediation process.*

Lastly, I think it would benefit our profession if reputations were built on the skills and integrity of the mediators rather than the amenities.

Mina Brees (Austin):

1. The first marketing idea is absolutely wrong for many reasons:

a. A good mediator must devote his or her full attention to the case being mediated, and juggling two or three mediations at one time dilutes the mediator's effectiveness. By handling two or more cases at one time, there is a high likelihood that the mediator will make mistakes by transmitting incorrect information, misunderstanding information that is given, or producing bad results.

b. If the mediator does not reveal in his brochure or literature that he is handling five or six half-day mediations in one day with two or three mediations going on at one time, there is a problem. It is a failure to disclose pertinent information that lawyers and clients would want to know before they select a mediator to mediate their case. If I had a case to be mediated, I would want my mediator completely devoted to my case during the time allotted to my case.

c. In addition, if the mediator is advertising that the half-day mediation is four hours, lawyers and clients are led to believe that the mediator is devoting four hours exclusively to their case. If the mediator is conducting two or three mediations in that same time period, the lawyers and clients are not getting what was advertised or what they believe they are paying for. Four hours of the mediator's time is not being devoted soley to their case. Instead each half-day mediation is being given one or two hours of the mediator's attention during the alleged four-hour mediation.

2. Sending a letter to the local bar association notifying everyone of your 91% settlement rate as a mediator is great; however, offering a money-back guarantee if the case doesn't settle offends me.

3. The mediator needs to be neutral and independent at all times, and giving gifts or rewards of any kind to mediation clients does not indicate that the mediator is neutral. Giving gifts or rewards to one side or another at any time indicates that the mediator is not neutral or independent. This type of action is unacceptable.

4. Offering alcohol to participants in a mediation session, even at the cocktail or happy hour, is inappropriate. The participants and the mediator in mediation need to be sober when the mediation is in session. Otherwise, the parties and the mediator would find themselves in a situation where one of the participants in a mediation may decide the next morning that the settlement made while under the influence of alcohol was not really what he intended and then "what a mess!" Offering the celebratory bottle of champagne to all the parties and their counsel who settle their cases at mediation is inappropriate also. Even if the parties have settled, participants under the influence of alcohol may become hostile, and the entire agreement could fall apart.

Travis Vanderpool (Dallas):

Here are my thoughts on the ethical issues raised in the "creative marketing ideas." Please note that all references to "Guidelines" refer to the State Bar of Texas Ethical Guidelines for Mediators and mediations, which have been incorporated in the Supreme Court Ethical Guidelines for Mediators and Mediation.

1. The first procedure is not consistent with the ethical guidelines.

The parties would be expected to assume that their half-day mediation was for half of the mediator's day, not just half of their own day. In reality, the fee for the mediation submitted by the mediator would only be for services rendered for a portion of a half day to the parties in each mediation. Any sugges

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tion that the "up to" language is intended to communicate that there is the possibility that the mediator might only dedicate a total of two hours to each half-day mediation would, at the very least, render misleading the fee schedule of the mediator. Even if the parties expressly agreed, the process would be questionable because of the chance that a party might not fully understand the mediation process and, therefore, be incapable of providing an informed consent. The comments to guideline #3 (a) is an applicable provision, as negative perceptions about the appearance of impropriety should be expected.

Common sense alone should lead a mediator to recognize that, no matter how high the mediator's opinion of his or her own ability at multi-tasking, most attorneys and their clients would have concerns about a mediator's ability to conduct two to three mediations simultaneously. This practice must be considered contrary to the spirit of Guideline #2 and the comment in #2 (b). There would be substantial risk of breaches of confidentiality between the simultaneous mediations.

2. The practice violates the ethical guidelines.

The money-back guarantee is in direct violation of Guideline #2, where it is stated that a mediator should not charge a fee that is contingent on the outcome of the mediation. Providing for an "opt-out" for attorneys who were opposed would simply constitute an acknowledgement that there is an appearance of impropriety as referenced in Comment #4 (a). While this marketing plan might seem to provide an incentive for the mediator to perform well, there is the possibility of the guarantee providing an already reluctant participant with an incentive not to negotiate in good faith and, ultimately cause the mediation to fail.

3. Such a practice is not consistent with the ethical guidelines.

As the comment to Guideline #9 states, the "appearance" of bias or partiality is inconsistent with the definition of impartiality. Where a mediator has developed a relationship that might be described as part of a "loyal following" relationship, the situation would clearly fall within the scope of Guideline #4 calling for full disclosure. Providing rewards for this group would give an appearance of a lack of neutrality, an incurable condition. Moreover, because of the relationship between the insurance carrier and the insured in personal injury litigation, such a marketing plan could make the integrity of the process questionable and vulnerable in the event of future onflicts between the carrier and its insured concerning settlement or settlement negotiations. Certainly, the lame purported justification for disparate treatment of parties based upon potential risk avoidance is valueless and could even raise questions about the integrity if the process.

4. This practice would jeopardize the integrity of the mediation process and would constitute a violation of the ethical guidelines.

The objective of the process is for the parties to make their own, voluntary decisions concerning settlement as is referenced in the comment to Guideline #1. It is the responsibility of the mediator to protect the integrity of the process. This practice would do just the opposite. There would be no means of determining the extent to which alcoholic drinks (assuming "adult beverages" does not refer to cappuccino) might have influenced a decision made by a party or an attorney. There is also a potential that a settlement might be jeopardized based upon a defense that a party or an attorney was not of sound mind at the time the settlement was reached. The practice might lead some attorneys and their clients to adopt a policy of avoiding significant negotiation in the hopes that the opposing side might become "liberated" in their negotiations as the time moved beyond "happy hour" at the mediation. It would easily be seen as a disincentive to meaningful negotiations early in the process,

The "gratis celebratory" bottle of champagne, though far less offensive, is still inappropriate. Although it could be of nominal value, it is a return of value contingent on settlement. Obviously, as the grade and vintage of the champagne improves, the more this problem is exacerbated.

COMMENTS:

Creative and innovative? Maybe. Ethical? All of our contributors came up with a resounding "NO!" Ethical Rules (Texas Mediator Credentialing Association), Ethical Guidelines (Texas Supreme Court and the ADR Section of the State Bar of Texas), and Model Standards of Practice (ABA, AAA, and ACR) all have a common goal: to promote quality mediation practices so as to protect the parties, the profession, the public, and the process. These "creative," "innovative," and overzealous marketing practices seem to cheapen the integrity of the process and the profession and to take advantage of the public and parties to the detriment of us all.

Sad to say, like all of the Ethical Puzzlers in this column, these examples are drawn from actual events.

* ***Suzanne Mann 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, trainer, and lecturer 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 Mediation Credentialing Association. She is a former chair of the ADR Section of the State Bar of Texas.*

NEW YORK STOCK EXCHANGE SEEKS ARBITRATORS

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

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

Interested individuals should contact Mr. Robert E. Kreuter, an attorney with NYSE's Arbitration Department, at (212) 656-3728 or rkreuter@nyse.com. For more information, visit NYSE's website at http://www.nyse.com, then click on *Regulation* (left side of the screen). The link for *Dispute Resolution/Arbitration* will appear.

SUBMISSION DATE FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Fall	October 30, 2006	November 30, 2006
Winter	January 15, 2007	February 15, 2007
Spring	March 30, 2007	April 30, 2007
Summer	July10, 2007	August 10, 2007

SEE PUBLICATION POLICIES ON PAGE 38 AND SEND ARTICLES TO:

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

2006 CALENDAR OF EVENTS

International Commercial Arbitration ★ Houston ★ August 15-19, 2006 ★ *University of Houston AA White Dispute Resolution Center* ★ For more information call 713.743.2066 or rpietsch@central.uh.edu or www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation ★ Houston ★ August 18-20 & August 25-27, 2006 ★ *University of Houston AA White Dispute Resolution Center* ★ For more information call 713.743.2066 or rpietsch@central.uh.edu or www.law.uh.edu/blakely/aawhite

Basic 40-Hour Mediation Training ★ Austin ★ August 23, 24, 25, 29 & 30, 2006 ★ November 1, 2, 3, 7 & 8, 2006 ★ Corder/ Thompson & Associates, ★For information, contact the Austin DRC at www.austindrc.org.

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

Evidence and Witness Examination in Arbitration ★ Anchorage, AK ★August 24-25, 2006 ★ Please visit our website: www.fmcs.gov

Family/Divorce 30 Hour Training ★ Dallas ★ September 8, 9, & 15, 16, 2006 ★ Contact DMS at 214 754-0022 or e-mail hcooke@dms-adr.org or download training application from website, www.dms-adr.org.

Mediation Skills for the Workplace ★ San Antonio ★ September 11-15, 2006 ★Please visit our website: www.fmcs.gov Contact Lynda G. Lee, Program Assistant, FMCS Institute for Conflict Management, Phone 206-553-2773, Fax 206-553-0722

Domestic Violence Mediation Training ★ Dallas ★Sept. 16, 2006 ★Contact DMS in Dallas at 214-754-0022 or visit http://www.dms-adr.org for details.

The Civil Collaborative Dispute Resolution Process Dallas ★ September 20, 2006 -★ Boot Camp for Newcomers to the Collaborative Process September 21-22, 2006—Two Day Advanced Training Jointly Sponsored by: Texas Collaborative Law Council, the Collaborative Law Section of the Dallas Bar Association, and the Texas Center for Legal Ethics and Professionalism For more information TCLC website: www.collaborativelaw.us, or contact Sherrie Abney SAbney913@aol.com or Larry Maxwell lmaxwell@adr-attorney.com

Family Mediation ★ Houston ★ September 23 & 24 continuing September 30 & October 1, 2006 ★ *University of Houston AA White Dispute Resolution Center* ★ For more information call 713.743.2066 or rpietsch@central.uh.edu or www.law.uh.edu/blakely/aawhite

Environmental/Land Use ★ Lubbock ★ Dispute Resolution Center of Lubbock County.★ 4 Hour Training ★October 7, 2006. Access www.co.lubbock.tx.us and click on Dispute Resolution or call the Dispute Resolution Center at 866-329-3522.

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

Cultural Diversity ★Lubbock ★ November 4, 2006 ★Dispute Resolution Center of Lubbock County. ★4 Hour Training,.★ For more information go to www.co.lubbock.tx.us and click on Dispute Resolution or call the Dispute Resolution Center at 866-329-3522.

Resolving Medical Malpractice Disputes: Featuring the *Two-Track* Model of Attorney Representation. ★October 13, 2006, St. Paul, MN; October 20, 2006, Baltimore, MD; November 17, 2006, Room 101, State Bar of Texas Law Center, 1414 Colorado, Austin, TX. ★Co-presented by The University of Maryland School of Law Center for Dispute Resolution (C-DRUM) and CHORDA Conflict Management, Inc. ★Contact Kathy Stewart 512-482-0356, ext. 12, kstewart@chorda.com , www.cdrum.org .

40-Hour Basic Mediation Training ★ December 4-8, 2006 ★ ***Center for Public Policy Dispute Resolution - The University of Texas School of Law*★** For more information call 512.471.3507 or Check out this website for more information: www.utexas.edu/law/cppdr

Group Facilitation Training ★ Austin ★December 6, 7, & 8, 2006 ★ Corder/Thompson & Associates ★ For information, contact (512) 458-4427 or www.corderthompson.com

40-Hour Basic Mediation ★ Houston ★ January 12-14 continuing January 19-21, 2007 ★ *University of Houston AA White Dispute Resolution Center* ★ For more information call 713.743.2066 or rpietsch@central.uh.edu or www.law.uh.edu/blakely/aawhite

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

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

40-Hour Basic Mediation Training ★Austin ★June 4-8, 2007 (Tentative) ★ ***Center for Public Policy Dispute Resolution - The University of Texas School of Law*★** For more information call 512.471.3507 or Check out this website for more information: www.utexas.edu/law/cppdr

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

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

Name_____

Public Member_____ Attorney_____

Address_____

Bar Card Number_____

City_____State_____Zip_____

Business Telephone_____Fax_____Cell_____

E-Mail Address:_____

ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. An author who wishes an article to appear in a specific issue of the newsletter should submit the article by the deadline set in the preceding issue of the newsletter.
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. All quotations, titles, names, and dates should be double-checked for accuracy.
5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. If possible, the writer should submit an article via e-mail attachment addressed to Walter Wright at ww05@txstate.edu or Robyn Pietsch at rpietsch@central.uh.edu. If the author does not have access to e-mail, the author may send a diskette containing the article to Walter Wright, c/o Department of Political Science, Texas State University, 601 University Drive, San Marcos, Texas 78666.
8. Each author should send his or her photo (in jpeg format) with the article.
9. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The newsletter 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, 2006, 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

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