ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By Cecilia H. Morgan, Chair, ADR Section

Cecilia H. Morgan

Welcome to you as one of the 1,404 members of the ADR Section of the State Bar of Texas! You are either one of the 1,148 attorneys or 256 non-attorneys who seek peaceful resolution of disputes through negotiation, mediation, arbitration, collaboration, neutral fact finding or other dispute resolution processes. In my last Chair's Corner, I promised that we would talk in this newsletter about our Section's work. The work of this Section is done individually by you and collectively through our Council and our Section. Because I don't know each of you individually, I will focus my explanation on the work of the Council on behalf of the Section.

Your Council consists of 17 individuals from across the State of Texas who meet at least four times annually on behalf of the Section. Feel free to turn to the back cover of this newsletter to see each of their names and contact information. These extremely conscientious and hard- working individuals volunteer their time and effort on your behalf, and they are not compensated for their efforts. In my experience on the Council over the last five years, the vast majority attend every meeting.

At the last meeting of the Council, among the Committee reports were the following:

- the newsletter,
- the website,
- the Arbitration White Paper,
- the Arbitration Ad Hoc Agreement,
- the Ethical Guidelines for Mediators,
- the Annual Meeting (in Houston, Thursday, June 26, 1:30 p.m. to 5:00 p.m.),
- sponsorship of a Securities Arbitration Program, and
- member services committee.

The Newsletter. The newsletter you hold is ably produced quarterly under the chairmanship of Walter A. Wright, as Chairman of the Newsletter Editorial Board, and Robyn G. Pietsch, as Newsletter Editor. You should have received the commemorative Special Edition 2007 20th Anniversary Newsletter in October. The current newsletter includes such standard articles as an Ethical Puzzler, produced by Suzanne M. Duvall, and a book report from Kay Elkins Elliot. Walter and Robyn receive articles from folks all over the United States and the world who regularly write about the search for peace through alternative dispute resolution processes. Included in this edition are articles about international ADR activities in Panama, Slovakia, and Uruguay.

The Website. The website Committee is capably headed by Jay Cantrell, who is transitioning off the Council this year and is now sharing his duties with new Council member Joe Cope. Take a minute and look at the website (www.texasadr.org). It is currently receiving a facelift and will continue to be enhanced over the next year with our new webmaster, Jenni Small. Feel free to contact Jay with any of your suggestions to improve the website.

The Arbitration White Paper. John Boyce and John Allen Chalk are competently chairing a Committee to look at the pros and cons of Texas legislative activity on arbitration in the upcoming term of the Texas Legislature. As a Section of the State Bar of Texas, the Section is generally neutral on legislation but regularly works through its members to provide research and testimony on ADR

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Inside this issue:

PROPOSED CHANGES TO ETHICAL GUIDELINES

By Maxel "Bud" Silverberg* and Mike Patterson**

Last year, the ADR Section's Council asked a committee to review the ABA's Model Standards of Conduct for Mediators that were adopted in August 2005 and to consider whether any changes should be recommended for the Ethical Guidelines for Mediators that the Texas Supreme Court adopted in June 2005. The committee concluded that our guidelines, for the most part, are working well and recommended only three changes. On January 5, 2008, the ADR Section's Council proposed three changes for publication in the ADR Section's newsletter, *Alternative Resolutions*, for the members' consideration before presenting them for adoption by the ADR Section at its annual meeting in Houston on June 27, 2008. Members are encouraged to email any comments regarding the three recommended changes to Mike Patterson at mike@mikepattersonmediation.com.

The first proposed change is in Section 2, which currently provides:

> **2. Mediator Conduct.** A mediator should protect the integrity and confidentiality of the mediation process. The duty to protect the integrity and confidentiality of the mediation process commences with the first communication to the mediator, is continuous in nature, and does not terminate upon the conclusion of the mediation.
>
> *Comment (a).* A mediator should not use information obtained during the mediation for personal gain or advantage.
>
> *Comment (b).* The interests of the parties should always be placed above the personal interests of the mediator.
>
> *Comment (c.).* A mediator should not accept mediations which cannot be completed in a timely manner or as directed by a court.
>
> *Comment (d).* Although a mediator may advertise the mediator's qualifications and availability to mediate, the mediator should not solicit a specific case or matter.
>
> *Comment (e).* A mediator should not mediate a dispute when the mediator has knowledge that another mediator has been appointed or selected without first consulting with the other mediator or the parties unless the previous mediation has been concluded.

The proposed change is an additional comment that would read as follows:

> *Comment (f).* A mediator should not conduct more than one mediation at a time unless all parties agree to do so.

This change is being proposed because there are mediators who are conducting more than one mediation at the same time without informing the participants that this will occur. Unfortunately, this practice appears to be growing. The problem with not informing the participants and obtaining their consent to this practice is that it is deceptive, and the parties are both wasting time and paying their attorneys for the time they are waiting while the mediator is mediating another case. Participants have a right to expect, unless they agree otherwise, that they are paying for the full time and attention of the mediator for the period reserved. If the parties are informed ahead of time that the mediator intends to conduct multiple mediations at the same time, the parties then have an opportunity to consider whether this is acceptable and proceed accordingly.

The second proposed change is in Section 4, which currently provides:

> **4. Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator should make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality. A mediator should not serve in the matter if a party makes an objection to the mediator based upon a conflict or perceived conflict.
>
> *Comment (a).* A mediator should withdraw from a mediation if it is inappropriate to serve.
>
> *Comment (b).* If after commencement of the mediation the mediator discovers that such a relationship exists, the mediator should make full disclosure as soon as practicable.

The proposed change is an addition that is underlined so the section would read as follows:

> **4. Disclosure of Possible Conflicts.** Prior to commencing the mediation, the mediator should make full disclosure <u>of any interest the mediator has in the subject matter of the dispute and</u> of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's neutrality.

This change is being proposed because an oversight caused it to be excluded from the original draft of the Guidelines. A conflict can come from areas other than just relationships. A mediator's interest in the subject matter of the dispute, like a

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CINDY TAYLOR KRIER AND CHARLES R. "BOB" DUNN

WERE THE 2007 RECIPIENTS OF THE JUSTICE FRANK G. EVANS AWARD

By Walter A. Wright

At the ADR Section's annual meeting in San Antonio in June 2007, Cindy Taylor Krier and Charles R. "Bob" Dunn were named recipients of the Justice Frank G. Evans Award, which is presented annually to recognize a recipient's exceptional efforts in furthering the use or research of alternative dispute resolution methods in Texas.

Cyndi Taylor Krier authored the Texas Alternative Dispute Resolution Procedures Act when she was a Texas State Senator (R-San Antonio) and a member of the Senate Jurisprudence Committee. She served two terms in the Texas Senate (1985-1992) before serving as the Bexar County Judge from 1992-2001. Since 2001, she has served on the University of Texas Board of Regents and as Vice President of Texas Government Relations for USAA, a diversified financial services company.

Bob Dunn, of counsel to Godwin Pappas Ronquillo LLP in Houston, graduated from Texas A&M University (B.S. Geological Engineering) and South Texas College of Law. He has served as President of the State Bar of Texas, President of the Houston Bar Association, and Commissioner for the Texas Commission on Judicial Conduct. As Houston Bar Association President, he appointed Texas's first Committee on Alternative Dispute Resolution and led the effort to create Texas's first Dispute Resolution Center. Currently, he serves on the Executive Committee of the Advisory Board of the Frank Evans Center for Conflict Resolution.

Justice Frank G. Evans, after whom the award was named, helped present the award to Krier and Dunn. He had high praise for both recipients.

The ADR Section proudly added the 2007 recipients' names to a distinguished list of prior recipients of the Justice Frank G. Evans Award: Honorable Frank G. Evans (1994); Professor Kimberlee Kovach (1995); Bill Low (1996); Honorable Nancy Atlas (1997); Professor Edward F. Sherman (1998); C. Bruce Stratton (1999); Suzanne Mann Duvall (2000); John Palmer (2001); Gary Condra (2002); Honorable John Coselli (2003); Professor Brian D. Shannon (2004); Maxel "Bud" Silverberg and Rena Silverberg (2005); and Michael J. Schless (2006).

EXPRESSION OF NEWS

On May 18, 2007, the Degree of Master of Laws (LL.M.) in Dispute Resolution was conferred upon **Reed Leverton** by Pepperdine University School of Law - Straus Institute for Dispute Resolution. Mr. Leverton received his B.A. from Wake Forest University in 1977 and his Doctorate of Jurisprudence from the University of Texas School of Law in 1989. He is a full-time mediator and arbitrator and is also a part-time instructor at the University of Texas at El Paso. His areas of ADR practice include personal injury, professional negligence, divorce and conservatorship, employment, commercial, real estate, and contract disputes.

FIFTH CIRCUIT DECISION REITERATES A STANDARD OF REVIEW FOR ARBITRATION AWARDS THAT IS EXCEEDINGLY DEFERENTIAL: EVEN A FAILURE TO CORRECTLY APPLY THE LAW IS NOT A BASIS FOR SETTING ASIDE AN AWARD

By Steven M. Fishburn*

A May 2007 Fifth Circuit Court of Appeals decision, *American Laser Vision, P.A. v. The Laser Vision Institute, L.LC.*,[1] breaks no new ground, but it does underline the standard for judicial review of arbitration awards in the Fifth Circuit, one that relies, significantly, on a U.S. Supreme Court decision and a term of art: "dispensing his own brand of industrial justice."[2] The Fifth Circuit reiterated its established standard for judicial review of arbitration awards, declining to vacate a lower court's affirmation of an arbitrator's award.[3]

The case involved a dispute between an ophthalmologist, Robert Selkin, and a service company, The Laser Vision Institute (LVI). Selkin and his ophthalmologist partner in a company they had formed, American Laser Vision (ALV), had contracted with LVI to provide management services, non-medical staff, and equipment to them in support of eye centers they had established in Texas and Oklahoma, where they performed laser surgeries for the purpose of vision improvement.[4] In exchange for the various services received from LVI, the doctors performed laser surgeries for a fee received from LVI and also shared with LVI in the revenues from the sale of ocular tear plugs the doctors installed. While the service company handled the business affairs—paying the rent, making equipment available , paying vendors for the equipment, and meeting other obligations related to making subleased office space available in Texas and Oklahoma—the doctors took care of medical matters. Written contractual provisions specifically prohibited LVI from interfering with the medical judgment of the surgeons in regard to patient care.[5] Importantly, the contract contained a provision that any disputes between ALV and LVI would be settled by arbitration.[6] Everything went fine for four months, but in June 2002, Selkin wrote a series of letters to LVI claiming he was quitting his obligation to perform surgeries because LVI was interfering with his professional judgment and his treatment of patients by giving patients instructions that conflicted with his orders. He also alleged that LVI was "using an improper solution to clean surgical supplies," had changed "post-operative prescriptions without his knowledge," had instructed "employees not to perform maintenance duties that Selkin requested," had switched "patients to Lewis Frazee, Selkin's partner in ALV, if Selkin thought the patients were bad candidates for surgery, and misrepresented to patients the risks and benefits of surgery."[7] Although Selkin also wrote in his letters that he would like to resume working with LVI if his concerns were addressed, he did not meet with LVI or discuss with them how LVI might address his complaints. After quitting his arrangement with LVI, Selkin continued performing laser eye surgeries at centers in North Carolina and Tennessee for substantial reimbursement.[8] Selkin also alleged that LVI failed to pay vendors, "improperly removed and damaged ALV equipment, and failed to remit revenues to him from ocular plug sales.[9]

LVI did not attempt to replace Selkin after his departure, but it did reach an agreement with Dr. Frazee, who continued performing laser surgeries for LVI. ALV and LVI terminated their agreements in December 2002, and Frazee contracted directly with LVI to continue working at the eye centers.[10] Selkin bought out Frazee's interest in ALV, then filed a breach of contract claim against LVI seeking $4,031,241.55 for damages from 2002-2005, $3,524,966.67 for lost surgery and tear plug revenues, $34,226.84 for surgeries allegedly performed but not paid for, and less than $500,000 in sublease and equipment claims.[11]

The arbitrator awarded Selkin $1,842,220.30 in damages, plus interest, attorneys' fees, and costs after finding that LVI had breached the professional service and sublease agreements. Considering the dollar amount of Selkin's claims against LVI, LVI did not fare too poorly with the arbitrator, but was nonetheless unhappy with the outcome. LVI asked the arbitrator to explain his decision, even though both parties had agreed not to request findings or other explanations from the arbitrator. The arbitrator declined to explain, the parties went to district court, and the court granted LVI's motion for judgment while declining LVI's motion to vacate the arbitrator's award.[12]

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CHOOSING A PARTY-APPOINTED ARBITRATOR (WITHOUT BREACHING IMPARTIALITY AND INDEPENDENCE)

By John Allen Chalk, Sr.*

On March 1, 2004, choosing a party-appointed domestic arbitrator in the United States became difficult and challenging. On that date, the revision of the *Code of Ethics for Commercial Arbitrators* ("Code"), written by special committees appointed by the ABA and the AAA, became effective and reversed the long-established presumption of non-neutrality for party-appointed arbitrators in commercial arbitrations.[1] The revised Code also prohibited "an arbitrator or **prospective arbitrator**" (emphasis added) from discussing a proceeding with any party in the absence of any other party except in six specific instances.[2] One of those specified instances addresses the kind of communication that a party may have when interviewing a **prospective arbitrator** for party-appointment.[3]

What can a party discuss with a **prospective arbitrator** whom the party is considering for appointment? What is the extent of the **prospective arbitrator's** obligation to disclose to all parties the fact and content of these pre-appointment discussions? These are questions created by the March 1, 2004 Code change creating the presumption of neutrality for party-appointed arbitrators. A violation of the Code in these pre-appointment discussions can create conditions for vacatur of an otherwise sound arbitration award.[4]

The Code describes what can be said in these pre-appointment discussions between an arbitration party and a **prospective arbitrator**. The **prospective arbitrator** "may ask about the identities of the parties, counsel, or witnesses and the general nature of the case."[5] The **prospective arbitrator** "may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment."[6] The Code contemplates a "dialogue" between the arbitration party and the **prospective arbitrator** that discloses "the general nature of the dispute" but prohibits a discussion of "the merits of the case."[7] The Code also permits a **party-appointed arbitrator** (but apparently not a **prospective arbitrator**) to discuss with that arbitrator's appointing party "the choice of the third arbitrator" (where the two party-appointed arbitrators are empowered to select the third arbitrator).[8] The Code also allows the **party-appointed arbitrator** to discuss compensation[9] and neutrality status[10] with the appointing party but implies that these discussions should be disclosed to "each other party" to the arbitration.[11]

So what other guidance do the appointing party and the **prospective arbitrator** have regarding these sensitive pre-appointment contacts? The Chartered Institute of Arbitrators, London, in April 2007, issued its *Practice Guideline 16: The Interviewing of Prospective Arbitrators* ("*Practice Guideline 16*") which is helpful.[12] Although aimed at international arbitration practice and shaped by the English Arbitration Act of 1996, the Chartered Institute's Arbitration Practice Sub-Committee attempted to address good arbitration practice, generally including arbitration practice under the U.S. Federal Arbitration Act and the Revised Uniform Arbitration Act. In nineteen numbered paragraphs, *Practice Guideline 16* gives "guidance" to the appointing party and the **prospective arbitrator**, some of which I have summarized by paragraph number used in *Practice Guideline 16*.

1. The **prospective arbitrator** should state the ethical code by which any communications with the appointing party will take place.
2. There should be clear understanding that appointment by a party carries only the obligations of (i) selection of an appropriate third arbitrator and (ii) making sure that the cases of all parties are "understood and fully considered" by the tribunal (but not argued by the party-appointed neutral).
3. A sole neutral arbitrator should always be interviewed jointly by the parties.
4. The mere fact of an interview of a **prospective arbitrator** should not be a ground for challenge.
5. Three matters should not be discussed with the **prospective arbitrator**, "directly or indirectly": (i) specific circumstances or facts giving rise to the dispute; (ii) positions or arguments of the parties; and (iii) merits of the case.
6. "Subject always to the overriding provisions of Guidance 9, . . ." six subjects are described that may be discussed between the appointing party and **prospective arbitrator**.

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SUPREME COURT OF ILLINOIS REVERSES APPELLATE COURT DECISION THAT ARBITRATION AGREEMENTS MUST BE ENTERED INTO KNOWINGLY AND VOLUNTARILY

By Steven M. Fishburn*

In 2004, an Illinois appellate court held, in *Melena v. Anheuser-Busch, Inc*.,[1] that an arbitration agreement was not enforceable because it was not entered into knowingly and voluntarily. With its holding in the 2006 case to be discussed here, the Supreme Court of Illinois has reversed the 2004 decision, finding that an arbitration agreement is enforceable, "like any other contract . . . based on fundamental principles of contract law."[2]

Joann Melena, a nonunion employee at an Anheuser-Busch, Inc. distribution facility in Mt. Vernon, Illinois, began working with the company in February 1999. In February 2000, Anheuser-Busch, Inc. made the first of a number of efforts to communicate a shift in company policy regarding resolution of employee disputes. This first communication in 2000 was a letter informing Melena that the company would be implementing a "Dispute Resolution Program."[3] Other materials describing the new policy were supplied to Melena at the same time, the most important of which may have been the "Dispute Resolution Program Policy Statement."[4] According to the policy statement, employee disputes would be subject to binding arbitration pursuant to the Federal Arbitration Act or the arbitration law in the state where any arbitration hearing was heard.[5] The policy statement also explained that the act of continuing employment or accepting an offer of employment would constitute an agreement, as a condition of employment, to submit "all covered claims to the dispute resolution program."[6] "The statement defined 'covered claims' as 'employment-related claims against the company and individual managers acting within the scope of their employment, regarding termination and/or alleged unlawful or illegal conduct on the part of the company.'"[7]

In addition to the letter and the materials provided, the company held a presentation on February 23, 2000 to explain the new program to the employees, followed by a question-and-answer session. The effective date of the new program was April 1, 2000.[8] In April 2001, the policy was reinforced by the distribution of a handbook titled "The Promotional Products Group [PPG] Distribution Center Handbook" which referred to all of the materials previously distributed and again described the dispute resolution program.[9] On April 27, 2001, Melena was asked to and did sign an "Employee Acknowledgment and Understanding" acknowledging receipt of the PPG employee handbook.[10] On September 11, 2002, Melena suffered a work-related injury for which she filed a workers' compensation claim. While she was still receiving benefits related to her injury, Anheuser-Busch terminated her employment on March 13, 2003. In May 2003, Melena filed a complaint in a Jefferson County, Illinois circuit court alleging she was fired in retaliation for exercising her right to file for workers' compensation. Anheuser-Busch moved to have Melena's complaint dismissed, but the circuit court denied that motion.[11]

The appellate court affirmed the circuit court's order on appeal and held, "in order to be enforceable, an agreement to arbitrate claims like the one at issue must be entered into knowingly and voluntarily."[12] Further, the appellate court "concluded that a remand was not necessary because 'even if the plaintiff entered in the agreement knowingly, she did not do so voluntarily.'"[13] The court expressed "serious reservations about whether an agreement to arbitrate, offered as a condition of employment, 'is ever voluntary' deem[ing] 'illusory' whatever choice plaintiff was said to have had in this matter."[14] The appellate court then remanded the case to the circuit court for further proceedings related to the claim of retaliatory discharge.[15]

The analysis of the Supreme Court of Illinois can be distilled to a conflict in the federal circuits over the knowing and voluntary standard. According to the court, the Illinois appellate court was unduly persuaded by the reasoning in the Ninth Circuit Court of Appeals in *Lai,*[16] wherein the Ninth Circuit Court stated the issue as, "not whether employees may ever agree to arbitrate statutory employment claims; they can. The issue here is whether these particular employees entered into such a binding arbitration agreement, thereby waiving statutory court remedies otherwise available."[17] Although admitting similar reasoning had been adopted by the First Circuit Court of Appeals,[18] the Supreme Court of Illinois found more persuasive "[a] countervailing point of view to the knowing and voluntary standard . . .

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SUPREME COURT OF ILLINOIS REVERSES APPELLATE COURT DECISION THAT ARBITRATION AGREEMENTS MUST BE ENTERED INTO KNOWINGLY AND VOLUNTARILY
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which holds that the determination of the enforceability of a mandatory arbitration agreement between employer and employee turns upon fundamental principles of contract law . . . ."[19] The court cited a Third Circuit Court of Appeals decision, *Seus v. John Nuveen & Co.,*[20] in which the Third Circuit rejected the knowing and voluntary standard, reasoning:

> By "knowing" and "voluntary," Seus means more than with an understanding that a binding agreement is being entered and without fraud or duress. Determining whether an agreement to arbitrate is "knowing" and "voluntary," in her view, requires an inquiry into such matters as the specificity of the language of the agreement, the plaintiff's education and experience, plaintiff's opportunity for deliberation and negotiation, and whether plaintiff was encouraged to consult counsel. She does not contend that this heightened "knowing and voluntary" standard is a generally applicable principle of contract law. Nothing short of a showing of fraud, duress, mistake or some other ground recognized by the law applicable to contracts generally would have excused the district court from enforcing Seus's agreement.[21]

The Illinois high court also cited cases from the Eleventh, Fifth, Eighth, and District of Columbia Circuit Courts of Appeal that rejected the "knowing and voluntary" standard. According to the court, the rejections are contained in these cases, respectively, *Caley v. Gulfstream Aerospace Corp*.[22]; *American Heritage Life Insurance Co. v. Orr*[23]; *Patterson v. Tenet Healthcare, Inc.*[24]; and *Cole v. Burns International Security Services*.[25]

The Illinois court relied on the Eleventh Circuit's *Caley* case as support for its dismissal of the appellate court's argument that the plaintiff, Melena, could not have waived her constitutional (Seventh Amendment) and statutory trial rights of access to the courts and trial by jury through an arbitration agreement unless it could be shown she entered the agreement knowingly and voluntarily.[26] The court quoted from *Caley*, "[A]s the Fifth Circuit has noted, 'the Seventh Amendment does not confer the right to a trial but only the right to have a jury hear the case *once it is determined that the litigation should proceed before a court*. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes . . . . [27] Thus, where a party enters into a valid agreement to arbitrate the party is not entitled to a jury trial or to a judicial forum for covered disputes" (emphasis in original)[28]

The court concluded, "the regular principles of contract law apply in this case [*Melena*]," applied Illinois state contract law to the decision as to whether the parties' agreement to arbitrate was an enforceable contract, and did hold that it was an enforceable contract. Per the court, it reasoned according to straightforward contract principles of offer and acceptance. Anheuser-Busch's introduction of its Dispute Resolution Program and its mailing of materials to the employees was the offer. Plaintiff, Melena, accepted that offer by continuing as an employee, and that continuation was also the necessary consideration to form the contract.[29] The court wrote, "As Anheuser-Busch correctly notes, under Illinois law, continued employment is sufficient consideration for the enforcement of employment agreements."[30]

Leaving no loose ends, the court also rejected the appellate court's assertion that Melena's acceptance of the dispute resolution provisions was illusory because Anheuser-Busch gave her little choice in the matter; it was offered on a take-it-or-leave-it basis and therefore unenforceable. The court quoted from a U.S. Supreme Court case, *Gilmer,*[31] to make its point that inequality in bargaining power "is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment contract."[32]

Similarly, and finally, the court dispatched the appellate court's argument that allowing arbitration in this case, where there was a claim of retaliatory discharge based on the Illinois Workers' Compensation Act, contravened Illinois public policy as expounded in the *Ryherd v. General Cable Co.* case.[33] As the intermediate appellate court pointed out, *Ryherd* stated that "the right to recover for retaliatory discharge is derived from Illinois public policy and 'cannot be negotiated or bargained away.'"[34] This notwithstanding, the high court found that the *Ryherd* case was not controlling because it "did not involve the issue of the enforceability of an agreement to arbitrate a statutory claim nor does its holding preclude enforcement of the agreement to arbitrate this case." On this basis, the court found that the Dispute Resolution Program was an enforceable agreement between plaintiff and Anheuser-Busch" and reversed and remanded the case to the appellate court.[35]

Justice Kilbride wrote a well-reasoned dissent to the majority opinion, which given the size of the majority in *Melena* (6 to 1), is unlikely to hold sway any time in the near future. Justice Kilbride made several points that seemed to speak more directly to the issues and the facts in the case: he noted that the majority opinion in *Melena* effectively extended the scope of control of arbitration provisions to include conduct occurring after termination;[36] he observed that the majority cited only nonprecedential appellate case law for its contention that continued employment was sufficient consideration for the enforcement of employment agreements;[37] he took issue with both the authorities the majority cited in overturning its own long-standing precedent in the *Ryherd* case and with the fact that the majority failed to note that the facts in *Melena* showed "the dispute resolution procedures mandated in the arbitration provision provide far less procedural protection than is available for the vindication of the plaintiff's rights through a judicial forum;"[38] he took issue with the drafting of the dispute resolution language in Anheuser-Busch's Dispute Resolution Program (DRP), which, according to Justice Kilbride, was internally conflicting and should have been construed against Anheuser-Busch. Justice Kilbride argued that when Melena was a salaried or hourly employee of the company, she fit within the definition of a "covered employee" in the DRP. Not so once she was terminated, so she should have been free to pursue a judicial remedy available outside the constraints of the

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SUPREME COURT OF ILLINOIS REVERSES APPELLATE COURT DECISION THAT ARBITRATION AGREEMENTS MUST BE ENTERED INTO KNOWINGLY AND VOLUNTARILY
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DRP's arbitration provision.[39] Finally, Justice Kilbride asserted the majority's analysis was internally flawed and "ignores the real world factors militating against an employee's truly voluntary and knowing agreement to a mandatory binding arbitration provision imposed by an employer in a contract of adhesion."[40] As the Justice had pointed out earlier in his dissent, "empirical studies show[ing] that the majority of employees of all types are ignorant of their legal employment rights, the available legal processes, the procedural and remedial implications of agreeing to arbitration of future disputes, their substantive protections as employees, and that the economic pressures at work in these contracts of adhesion make truly knowing and voluntary consent unlikely."[41]

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

ENDNOTES

[1] Melena v. Anheuser-Busch, Inc., 816 N.E.2d 826 (Ill. App. Ct. [5th Dist.] 2004).
[2] Melena v. Anheuser-Busch, Inc., 816 N.E.2d 826 (Ill. App. Ct. [5th Dist.] 2004), *rev'd*, 847 N.E.2d 99, 103 (Ill. 2006).
[3] Melena v. Anheuser-Busch, Inc., 847 N.E.2d 99, 101 (Ill. 2006).
[4] *Id.* at 101.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 102.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994).
[17] *Melena,* 847 N.E.2d at 106 (citing Prudential Insurance Co. of America v. Lai, 42 F.3d 1299, 1303 (9th Cir. 1994)).
[18] *Id.* at 106 (citing Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999).
[19] *Id.* at 106.
[20] *Id.* (citing Sues v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998).
[21] *Id.* at 107 (citing *Sues*, 146 F.3d at 183-84). *Compare* In re Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004) (adopting a standard for knowing and voluntary that approximates the standard in Brady v. United States, 307 U.S. 742, 748 (1970) for criminal cases); *accord* Mikey's Houses, LLC v. Bank of Am. N.A., 232 S.W.3d 145, 149 (Tex. App.—Fort Worth 2007, mandamus filed) (discussing the knowing and voluntary standard in *In re Prudential* saying, "The constitutional right to trial by jury may be waived via contract so long as the waiver is made knowingly, voluntarily, and intelligently 'with sufficient awareness of the relevant circumstances and likely consequences.' . . .Thus, the Texas Supreme Court equated the Texas standard for a 'knowing and voluntary' prelitigation contractual jury waiver with the 'knowing and voluntary'standard utilized in criminal cases like Brady to assess the validity of a defendant's pretrial waiver of a jury trial via a guilty plea."(internal citations omitted).
[22] *Id.* (citing Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005)).
[23] *Id.* (citing American Heritage Life Insurance Co. v. Orr, 294 F.3d 702 (5th Cir. 2002)).
[24] *Id.* (citing Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997)).
[25] *Id.* (citing Cole v. Burns Int'l Sec. Services, 105 F.3d 1465 (D.C. Cir. 1997)).
[26] *Id.* at 108.
[27] *Id.* at 108 (citing *Caley*, 428 F.3d at 1371-72 which, in turn, cites the Fifth Circuit case, American Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir. 2002)).
[28] *Caley*, 428 F.3d at 1371-72.
[29] *Id.* at 109.
[30] *Id.*
[31] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[32] *Melena* 847 N.E.2d at 109; *Gilmer,* 500 U.S. at 33.
[33] *Id.* at 110.
[34] *Id.* (quoting from Ryherd v. General Cable Co., 530 N.E.2d 431 (Ill. 1988).
[35] *Id.* at 111-12.
[36] Melena v. Anheuser-Busch, Inc., 847 N.E.2d 99, 112 (Ill. 2006) (Kilbride, J., dissenting).
[37] *Id.* at 113.
[38] *Id.* at 114.
[39] *Id.* at 115,
[40] *Id.* at 117.
[41] *Id.* at 116.

FIFTH CIRCUIT VACATES AWARD OF MEDIATION FEES AS TAXABLE COSTS UNDER 28 U.S.C. § 1920

By Walter Clark Martin IV*

David G. Miller ("Mr. Miller") began employment with a company associated with General Consolidated Management, Inc. ("General Consolidated"), which had a welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA").[1] Through ERISA, General Consolidated provided medical benefits to its employees and their beneficiaries.

Mr. Miller had a son, David Miller ("David"), who was born with congenital heart defects. On January 16, 2002, Mr. Miller asked General Consolidated to add his son as a covered dependent under the ERISA plan. At that particular time, Aetna U.S. Healthcare insured General Consolidated's ERISA plan.

In early 2002, General Consolidated replaced the Aetna Plan with a self-funded ERISA plan, which would take effect on April 1, 2002. Under the new ERISA plan, General Consolidated used New England Life Insurance Company ("New England") to provide coverage and administrative services for the plan. The enrollment period for the New England PPO Medical Plan of General Consolidated Management, Inc. ("Plan"), began on March 1, 2002, and ended on March 31, 2002.

Mr. Miller completed the Benefit Plan Enrollment/Change Form for the Plan on March 2, 2002. At this time, Mr. Miller listed David as a dependent within the Plan. Mr. Miller removed David from the plan on March 31, 2002, however, by crossing out David's name on the enrollment form.[2] Furthermore, Mr. Miller informed an employee of General Consolidated that David should not be enrolled in the Plan as a covered dependent. The Plan Administrator, Deborah Hansen ("Plan Administrator"), did not enroll David in the Plan.

Mr. Miller decided not to enroll David in the plan after Medicaid and Social Security Administration ("SSA") representatives told Mr. Miller that Medicaid would cover David's medical care. Medicaid covered David in April 2002, and continued until June 30, 2002. From April 9-22, 2002, David sought medical treatment at Cook Children's Medical Center ("Cook"). Mr. Miller informed Cook that Medicaid covered David's medical care. Cook subsequently filed a claim for David's hospital bills with Medicaid, and Medicaid paid Cook approximately $76,291.63.

The SSA had determined that as of June 30, David would no longer qualify for supplemental security income, and as such, in June 2002, the SSA notified Mr. Miller. Upon receiving notification, Mr. Miller submitted a Benefit Plan Enrollment/ Change Form on June 28, adding David to the Plan effective July 1, 2002. The Plan enrolled David as of July 1, 2002.

Initially accepting payment from Medicaid, Cook returned Medicaid's $76,291.63 payment for David's treatment. On December 31, 2002, Cook sent the Plan a demand letter, requesting payment for David's treatment. The Plan Administrator reviewed Cook's request for payment and determined that David was not eligible for coverage for his treatment at Cook because the Plan did not include David at that time. The Plan Administrator determined that Mr. Miller had removed David from Mr. Miller's Plan before Cook had treated David, thus the Plan Administrator denied Cook's request for payment.

On September 5, 2003, Cook filed a lawsuit against the Plan and the Plan Administrator. Cook alleged that David was a covered dependent under the Plan, and as David's assignee, the Plan was entitled to provide payment for Cook's treatment of David in April 2002. The Plan and Plan Administrator answered Cook's complaint and filed a third-party complaint against New England for indemnification. The parties attempted to mediate, but the mediation failed. Eventually, the parties filed cross-motions for summary judgment. The U.S. District Court for the Northern District of Texas granted summary judgment in favor of the Plan, Plan Administrator, and New England (collectively, "Defendants"), and denied Cook's motion for summary judgment.

The district court held that Mr. Miller's decision not to have David enrolled in the Plan created a valid basis for the Plan Administrator to deny benefits. Moreover, the district court held the Plan Administrator's denial of benefits was not an abuse of discretion. The district court entered a final judgment, dismissed all claims with prejudice, and taxed all costs against Cook under 28 U.S.C. § 1920. The bill of costs submitted by Defendants included mediation fees for $1,000.[3] Cook decided to appeal the district court's judgment and award of mediation costs to the U.S. Court of Appeals for the Fifth Circuit. The appellate court reviewed the case de novo.

Addressing only the issue regarding the award of mediation costs, Cook maintained that the lower court should not have taxed mediation costs against Cook because the mediation expenses did not fall within the limited category of costs that may be taxed under 28 U.S.C. § 1920.[4] Moreover, Cook relied specifically on a Fifth Circuit precedent, *Mota v. University of Texas Houston Health Science Center*,[5] in support of Cook's position.

The appellate court reviewed *Mota* and noted that *Mota* addressed whether the district court had abused its discretion in taxing mediation fees under 28 U.S.C.§ 1920 in a Title VII action. In *Mota*, this appellate court first addressed the case by

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examining 28 U.S.C. § 1920. As noted in *Mota*, 28 U.S.C. § 1920 allows a court to tax several costs, one of which is the compensation of court appointed experts.[6] Furthermore, the appellate court explained that "[t]he Supreme Court ha[d] indicated that federal courts may only award those costs articulated in section 1920 absent explicit statutory or contractual authorization to the contrary."[7]

Specifically referencing *Mota's* discussion regarding the text of section 1920, the appellate court found that the *Mota* court concluded the "district court erred in taxing [the losing party] with costs of mediation [because the expense did not fall] within section 1920."[8] The *Mota* court concluded Title VII did not support the award of mediation fees because the mediation costs did not fall within the limited category of expenses taxable under Title VII.

In the case at bar, the court held that the "reasoning in *Mota* cuts against the district court's decision to award mediation fees in the ERISA case."[9] The court stated two reasons why *Mota* contradicted the district court's action. The court fist held the language in 28 U.S.C. § 1920 had not changed since the *Mota* court ruled on the mediation fees and Title VII. Second, the court stated that, similar to Title VII's provision on costs, the ERISA subsection on costs did not explicitly authorize the award of mediation expenses.

In the case in question, the Defendants claimed that *Mota* was limited to Title VII cases, and should therefore be distinguished from, and not applied to the ERISA action. The Defendants further asserted that mediation fees were recoverable expenses because mediators act as court appointed experts and are therefore recoverable costs under 28 U.S.C. § 1920(6). The Defendants relied on *Gaddis v. United States*[10] to support the defendants' aforementioned assertion.

The appellate court disagreed with the Defendants' assertions and reliance on *Gaddis*. Examining *Gaddis*, the court found that district courts have the authority to tax guardian *ad litem* fees as court costs against nonprevailing parties, including the government in Federal Tort Claims Acts Cases.[11] Moreover, the *Gaddis* court identified three alternative grounds for allowing the taxation of guardian *ad litem* fees. First, the *Graddis* court held that Federal Rule of Civil Procedure 17 (c) constituted the alternative express statutory authorization required by the Supreme Court in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*[12] to provide district courts with the authority and discretion to tax guardian *ad litem* fees as costs against nonprevailing parties. Second, the court stated that guardians *ad litem* fit within the meaning of "court appointed experts" as stated in § 1920(6), thereby providing district courts the authority to tax their compensation as costs per § 1920. Third, the court held that precedent subsequent to *Crawford Fitting* granted taxation of guardian *ad litem* fees as costs.[13] Upon reviewing the three alternative grounds for permitting the taxation of guardian *ad litem* fees, the appellate court held none of the three alternatives as applicable to the taxation of mediation expenses in the case at bar.

First, the appellate court held there was not a statutory or contractual provision that permitted the taxation of the costs in question. The appellate court explained that the ERISA statute on costs did not constitute an explicit authorization to tax mediation costs, nor should one construe the provision as a blanket power to tax costs. Furthermore, the appellate court stated the source of the district court's authority to authorize the use of mediation in a civil action did not support the taxation of mediation fees.[14]

Second, the court noted that unlike the guardian *ad litem* fees in *Gaddis*, mediation expenses did not fit within the statutory language of § 28 U.S.C § 1920(6). The court stated that the statutory language allowed for "[c]ompensation of court appointed experts;" however, the statute does not define "court appointed experts." The *Gaddis* court did, however, identify two characteristics that indicate when one "reasonably serve[s] as [an] expert[ ]."[15] In *Gaddis*, the court noted that guardians *ad litem* were appointed by the court, served as experts in the sense that they interacted with the court, and were given the duty of presenting their insight as to how the judicial process is or is not comporting with the best interests of the individual in question.

Under the *Gaddis* interpretation, experts interact with the court on matters in which the court would require assistance, and the experts are given the duty to provide insight to the court regarding the particular aspect of that case. The *Gaddis* court reasoned that a guardian *ad litem*'s duty was to submit to the court for its consideration every question involving the statutory and constitutional rights of the minor that may be affected by the action; therefore, the court held that guardians *ad litem* fit within the definition of court appointed experts under 28 U.S.C. § 1920(6).

Given the reasoning in Gaddis, the appellate court addressed the issue of whether a mediator fits within the scope of a court appointed expert. The court first looked to the definition and role of a mediator. The court noted that a mediator is "[a] neutral person who tries to help disputing parties reach an agreement."[16] The court next defined the role of a mediator and purpose of mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[17]

Upon clarifying the definition and role of a mediator, the court held, in contrast to guardians *ad litem,* that mediators lack the essential characteristics of court appointed experts, under the general definition and the interpretation of the *Gaddis* court. The appellate court explained that the role of a mediator is to conduct negotiations in an unbiased manner, not to communicate with the court. Due to mediators' roles within negotiations, mediators work directly with the parties during mediation, and because discussions in mediation are typically confidential, the appellate court questioned whether a mediator could ethically communicate an opinion to a court. Given the confidentiality of mediations, the court held that mediators, aside from acting as neutral parties, share no other significant common qualities with court appointed experts; therefore, the court held that mediators fall outside a reasonable interpreta-

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AUSTIN APPEALS COURT DESCISION IMPLIES THAT MEDIATION AGREEMENT AFFECTING TERMINATION OF PARENTAL RIGHTS REQUIRES EXPRESS, COMPLETE COMPLIANCE

By Isaac Villarreal*

Recently, the Austin Court of Appeals issued a memorandum opinion, in *Bunton v. Texas Dept. of Family and Protective Services*,[1] establishing the premise that substantial performance of a mediated settlement agreement will not suffice to preclude consequences of non-compliance.[2]

Toni Bunton appealed a Texas trial court's termination of her parental rights to her three children.[3] After receiving a report that Darrell Allen, Bunton's then-boyfriend and father of one of her children, broke into Bunton's home and threatened her with a knife in view of the children, the Department of Family and Protective Services ("Department") removed the children from the home, citing concerns over the history of domestic violence between Bunton and Allen and the children's living environment in the home.[4]

The Department developed a plan to reunite Bunton with her children that required Bunton to attend therapy, anger management classes, and supervised visitations with her children.[5] However, according to the Department caseworker assigned to the case, Bunton missed "40-50 percent of her visits" with the children as well as several therapy sessions.[6] On October 25, 2005, Bunton voluntarily signed an irrevocable affidavit of relinquishment of parental rights, but the affidavit was not filed at that time.[7]

Instead of filing the affidavit, on November 5, 2005, Bunton and the Department entered into a Mediated Settlement Agreement in which the Department agreed to forestall action on the affidavit of relinquishment of Bunton's parental rights in favor of the plan of reunification, provided that Bunton comply with the requirements of the mediated settlement agreement.[8] Under the agreement, Bunton was required to:

1. obtain housing approved by the Department by or before February 1, 2006, and provide the Department proof of a lease lasting at least six months;
2. attend visitation with the children once a week for a minimum of one hour each week, obtain transportation to the visits, and call the caseworker 24 hours in advance of each visit to confirm her attendance;
3. attend individual therapy with a therapist approved by the Department once a week beginning the week of November 15, 2005, until successful discharge from therapy;
4. maintain employment and provide actual proof of employment to the Department in writing from her employer; and
5. attend family therapy with A.B. (one of her children) once she had established housing.[9]

Bunton and the Department agreed that if Bunton did not perform the required actions, the Department would file Bunton's affidavit of relinquishment and proceed to terminate her parental rights.[10] Bunton violated the terms of the agreement by failing to obtain housing approved by the Department and by missing several visits with the children as well as therapy sessions. As a result, the Department filed suit to terminate Bunton's parental rights to the children. On May 22, 2006, after hearing testimony from several witness and reviewing the mediated settlement agreement and Bunton's affidavit of relinquishment of parental rights (which had been properly admitted into evidence), the trial court found by clear and convincing evidence that Bunton had voluntarily signed an irrevocable affidavit of relinquishment of parental rights and that such termination was in the best interest of the children.[11]

On appeal, Bunton argued that the trial court erred by terminating her parental rights because the evidence was legally and factually insufficient to establish that she "failed to substantially comply with the terms of the mediated settlement agreement."[12]

On review, the Austin Court of Appeals considered several undisputed facts, including that under the mediated settlement agreement, the Department would file Bunton's signed affidavit of relinquishment and proceed to termination if Bunton:

1. failed to obtain Department-approved housing by February 1, 2006;

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2. missed two visits with her children;
3. was unsuccessfully discharged from individual therapy;
4. was unemployed at ay time after November 4, 2005, for 30 consecutive days; and
5. failed to attend or participate in individual or family therapy.[13]

The appeals court noted that it was undisputed that Bunton failed to obtain Department-approved housing by February 1, 2005 and that she missed two visits with her children and two individual therapy sessions.[14] However, Bunton's contention was that she "substantially complied" with the terms of the mediated settlement agreement because she obtained housing on February 9, 2005, shortly after the February 1 deadline, and that the two missed visits with her children were not her fault.[15] She also argued that although she missed two therapy sessions, two misses out of thirty sessions should not be considered significant and should not affect her contention that she substantially complied with the requirements of the mediated settlement agreement.[16]

Bunton asserted that substantial compliance with the terms of the mediated settlement agreement should have prevented the Department from pursuing termination with the affidavit of relinquishment (she proffered this argument at the termination hearing and again at the hearing on her motion for new trial).[17] The Department, on the other hand, argued that Ms. Bunton did not comply with the express terms of the mediated settlement agreement and that the mediated settlement agreement did not provide that substantial compliance would be sufficient.[18]

The appellate court explained that Texas law clearly establishes that a trial court has no authority to enter any judgment that varies from the terms of a mediated settlement agreement.[19] Despite the established law and, according to the appellate court, the clear absence of any language allowing for substantial compliance, Bunton asked the Austin Court of Appeals to find as a matter of law that substantial compliance with the terms of the mediated settlement agreement was sufficient.[20]

The court noted that a similar argument was advanced in *In re D.H.L.*[21] In that case, the trial court entered an order requiring the parents of the child to comply with the Department's service plans and warned them that their failure to "fully comply" with the court's order might result in the termination of their parental rights.[22] The Department's service plan required the parents to perform certain actions, including weekly visits with the child and attendance at counseling.[23] After the parents missed numerous visits with the child and counseling sessions, their parental rights were terminated based upon the trial court's finding that they failed to comply with a court order.[24] On appeal, the parents argued they had "substantially complied" with the court's order by completing most, but not all, of the detailed provisions of the Department's service plan.[25] The *D.H.L.* court determined the substantial compliance argument failed to negate the fact that the parents missed numerous visits with the child and counseling sessions.[26] The court further concluded, "[m]ore importantly, neither party has provided, and we have not found, any legal authority for the premise of their arguments that 'substantial compliance' renders undisputed evidence of a failure to comply somehow insufficient to support a trial court's finding."[27]

The Austin Court of Appeals ultimately declined to address the "substantial compliance" issue as a matter of law.[28] Instead, the court held, "even if substantial compliance were enough, the evidence is conclusive that Bunton did not substantially comply with the terms of the agreement in [the] case.[29] The court also concluded that despite the Bunton children's desire to return home with their mother, termination was in each child's best interest.[30]

Despite the court's decision not to address the issue relating to the legal effect of "substantial compliance" with a mediated settlement agreement, one could infer that the court's concerted effort to explain the holding in *In re D.H.L.*[31] would lead to the conclusion that "substantial compliance" with a mediated settlement agreement *will not* suffice to preclude consequences of non-compliance unless the mediated settlement agreement expressly provides that "substantial compliance" will be sufficient. In such case, a party would still be required to establish that it has substantially complied with an agreement and that such compliance is consistent with the terms of the agreement. Until a case that properly establishes "substantial compliance" absent any language allowing for such compliance is raised before a Texas Court of Appeals, the question lingers… Is substantial compliance sufficient?

****Isaac Villarreal** *is a third-year law student at Thurgood Marshall School of Law at Texas Southern University. He is the Editor-in-Chief of the Thurgood Marshall Law Review and an employee of Ashby Crinion LLP in Houston, where he will practice as an associate attorney upon completion of his law degree and passing the Texas Bar Exam. He holds a mediation certificate, a M.A with a major in Legal Studies, and a B.A with a major in English from Southwest Texas State University (now Texas State) in San Marcos, Texas.*

ENDNOTES

1 Bunton v. Tex. Dept. of Family & Protective Servs., No. 03-06-00329-CV, 2007 WL 1451757 (Tex. App.—Austin May 16, 2007, no pet.).
2 Id. at *3-*4.
3 Id. at *1.
4 Id.
5 Id.
6 Id.
7 Id.

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TO BE EFFECTIVE, THE PROVISIONS OF MEDIATED SETTLEMENT AGREEMENTS MUST BE INCORPORATED INTO THE ORIGINAL DIVORCE DECREE—THERE ARE LIMITS TO A COURT'S POWER TO "CLARIFY" A FINAL DECREE

By Steven M. Fishburn*

A recent Houston Court of Appeals decision, in *Metzger v. Metzger*,[1] may serve to advise practitioners that the provisions of any mediated settlement agreement should be incorporated into the original divorce because there may not be an opportunity to do so later. According to the court, there are limits placed on a trial court, largely by the Texas Family Code, regarding how much "clarification" of the provisions of the division of property a trial court will be allowed.[2]

The Metzgers were divorced on July 1, 2002.[3] The part of the final divorce decree that provided the grist to the mill for subsequent proceedings was that the decree awarded to each party as their separate property, "[a]ll shares of stock personally owned."[4] However, the decree did not name the shares of stock that each of the Metzgers would personally own.[5] In October 2002, Westbo (formerly Patricia Westbo Metzer) moved for a clarification of the divorce decree's division of property, but after the divorce court's plenary jurisdiction had expired.[6] The ambiguous language in the final decree regarding the shares of stock personally owned became apparent when Mark Metzger had everything removed from the premises of one of two corporations (Lacy Creekside, Inc. and Respiratory, Inc.) that each had fifty percent ownership in and did so without notice to Westbo. It was this alleged denial of Westbo's property rights that motivated her to file a Motion for Clarification of Prior Order to "modify, correct or reform the judgment previous entered."[7] Westbo's clarification motion as well as a suit for trespass to try title were eventually mediated by the parties and a mediated settlement agreement signed that: (1) awarded Westbo 1,000 shares of stock in Lacy Creekside, Inc. and (2) led to Westbo disclaiming or conveying her interest in any share of a family trust (The Wayne Elliott Broyles, Sr. and Lucretia Helen Broyles Trust set up to benefit Mark Metzger), as well as Westbo's interest in 1,000 shares of stock in Respiratory, Inc. All of the provisions contained in the mediated settlement agreement were adopted in a new clarification order urged by Westbo, and the trial court signed the order on June 18, 2004. "The remainder of the clarification order, among doing other things, awarded property and assigned debts that had not been mentioned expressly in the divorce decree and also ordered cash sums to Westbo from Metzger pursuant to the mediated settlement agreement."[8] Apparently rankling under this revised division of property, Metzger appealed the trial court's clarification order in a somewhat poorly drafted petition, considering the court's disposition, because the appellate court ultimately heard only one of the four issues Metzger attempted to argue. According to the court, his third and fourth issues did not cite any authority to support them, and his second issue—that the trial court had erred by signing the clarification order because Metzger had withdrawn his consent for the mediated settlement agreement before the clarification order was entered—was not preserved. There was no record in the trial court that he had withdrawn his consent to the settlement.[9] However, Metzger's argument that the trial court lacked subject matter jurisdiction "to enter 'the stock division' portion of the clarification order because that portion of the order impermissibly modified the divorce decree's property division, rather than merely clarifying it" did gain some traction with the court. Metzger's accompanying assertion that the mediated settlement agreement was, therefore, a nullity for the same reason (no subject matter jurisdiction) did not fare as well.[10]

The appellate court began its discussion of the case with an acknowledgment that typically, a court rendering a divorce decree "retains continuing subject-matter jurisdiction to clarify and to enforce the decree's property division."[11] But, importantly, the court went on to quote from section 9.006(b) of the Texas Family Code emphasizing the "[t]he court may specify more precisely the manner of effecting the property division previously made *if the substantive division of property is not altered or changed*."[12] The court pointed to section 9.007(a) and (b) of the Texas Family Code as further emphasis for the point that any clarification order that "amends, modifies, alters or changes the actual, substantive division of property made or approved in a final decree of divorce or annulment is beyond the power of the divorce court and is unenforceable."[13] The court went on to cite a number of Texas cases on the issue of what is permissible in regard to clarification, what is not, and what may amount to an impermissible alteration of the substantive division of property made by the trial court.[14]

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ELEVENTH CIRCUIT CONSTRUES EFFECT OF DEFAULT PROVISION ON MEDIATION PROVISION IN EARNEST MONEY CONTRACT

By Amy M. Reyes*

Does a contractual obligation to mediate disputes survive a default under a contract? On September 12, 2007, the Eleventh Circuit ruled that breach of contract abates a mediation provision in a contract for the sale of land.[1]

In August 2005, USA Flea Market, LLC and EVMC Real Estate Consultants, Inc. ("EVMC") entered into a written contract for the sale of real property.[2] The contract required EVCM, the buyer, to deposit earnest money with a title company.[3] In November 2005, EVMC failed to appear at the scheduled closing.[4] USA Flea Market immediately sent a notice of default to EVMC.[5] According to USA Flea Market, EVMC did not cure the default within the time allotted in the contract.[6] USA Flea Market then served EVMC with a demand for payment of the earnest money deposit.[7] EVMC apparently had failed to tender the earnest money to the title company, so USA Flea Market commenced action against EVMC for that failure. USA Flea Market also sued the title company for falsely representing that it had received the earnest money.[8] After EVMC was served, it moved for a motion for extension of time to answer to "complete reorganization and to retain local counsel."[9] The motion was denied.[10] USA Flea Market filed an amended complaint.[11] More than a month passed without an answer by EVMC, and upon USA Flea Market's motion, the clerk entered a default.[12] More than two months later, EVMC moved to set aside the default.[13] Although USA Flea Market objected to the motion, the district court vacated the entry of default.[14]

EVMC moved to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment.[15] EVMC argued that, because USA Flea Market failed to comply with its contractual agreement to mediate disagreements before commencing litigation, the breach of contract claim failed as a matter of law.[16] EVMC relied on paragraph 13 of the contact, which required the parties to first mediate disputes:

> 13. RESOLUTION OF DISPUTES. All claims, disputes or controversies arising out of, or in connection with, or in relation to this Contract, shall initially be submitted to mediation in Pinellas County, Florida . . . . If a dispute has not been resolved within forty-five (45) days after the selection or designation of the mediator . . . the parties shall have the right to pursue resolution of the claim, dispute or controversy by any available legal proceedings in the County of Pinellas, State of Florida.[17]

USA Flea Market did not dispute that it failed to attempt mediation, but argued that paragraph 27.1 of the contract controlled the dispute.[18] Paragraph 27.1, governing "Buyer's Default" and provided that:

> A. If the Buyer shall be in breach or default of any of the terms or conditions of this Agreement, then Seller shall give Buyer and Escrow Agent written notice specifying the nature of the default.
> B. Buyer shall have ten (10) days from receipt of Seller's notice of default within which to cure the specified default. If Buyer does not cure such default within said ten (10) day period or if such default is not waived in writing by Seller, then the Earnest Money Deposit shall be paid over to Seller [,] this Agreement shall automatically terminate[,] and Seller and Buyer shall have no further rights, duties or obligations hereunder except as expressly survive the termination hereof…[19]

While the contract provided that all of paragraph 27 would survive termination, it did not provide that the agreement to mediate would survive termination.

The district court granted EVMC's motion to vacate the default judgment, then it granted summary judgment in favor of EVMC because USA Flea Market had failed to mediate the dispute prior to filing suit.

USA Flea Market presented two issues on appeal. The first issue was whether the district court erred when it granted summary judgment in favor of EVMC.[20] The Eleventh Circuit found that USA Flea Market had persuasively explained that the mediation provision did not survive termination of the contract. The appellate court reasoned that if USA Flea Market's allegations about EVMC's default and the termination of the contract were true, the mediation provision had abated upon termination. The appellate court further reasoned that because a material issue of fact existed regarding EVMC's default, the district court should not have granted summary judgment in EVMC's favor.[21]

The second issue on appeal was whether the district court abused its discretion when it vacated the entry of default

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SIXTH CIRCUIT HOLDS RAILROAD EMPLOYER NOT REQUIRED TO NEGOTIATE OUTSIDE OF PARTIES' ONGOING MEDIATION

By Anna Bartkowski*

The United States Court of Appeals for the Sixth Circuit decided in 2007 that a railroad employer's refusal to negotiate directly with its disputing labor union, outside of the recessed mediation, did not violate its obligation to make "every reasonable effort" to settle the dispute.[1]

In December 2004, The Brotherhood of Maintenance of Way Employees Division ("the Union"), which represents employees of Grand Trunk Western Railroad ("GTW"), served notices to GTW under section 6 of the Railway Labor Act ("RLA"), seeking changes to the parties' Collective Bargaining Agreements ("CBAs"). GTW and the Union met and negotiated, exchanging proposals and counter-proposals for nine months, until the Union unilaterally terminated negotiations, declaring them "futile."

Four days after the Union halted negotiations, GTW applied for mediation with the National Mediation Board ("NMB").[2] The parties attended numerous mediation sessions conducted by the NMB from November 2005 through March 2006, during which the Union continually sought to be released from mediation. Following the last session in March, the NMB recessed the mediation and refused to schedule any further sessions until the parties reevaluated their respective positions.

From May through July 2006, the Union sent numerous letters to GTW, demanding that GTW meet with the Union to negotiate outside of the mediation. GTW forwarded the correspondence to the NMB and responded that it was willing to meet with the Union under the NMB's established guidance. On July 17, 2006, the Union filed a complaint against GTW in the district court, alleging that GTW violated the RLA by refusing to meet outside the mediation. Two days later, the Union conducted a strike.

On July 21, 2006, GTW began negotiating directly with the Union again, and two further NMB mediation sessions followed in August. The NMB once again halted the mediation and told the parties that no additional sessions would be scheduled until the parties had "reassessed their position and [were] prepared to engage in productive negotiations." On August 29, 2006, the Union again demanded that GTW negotiate outside the mediation on threat of strike renewal. GTW reiterated its willingness to participate in mediation but refused to negotiate outside of the NMB mediation.

GTW sought, and was granted, a preliminary injunction against the Union, preventing it from striking while the parties were in mediation with the NMB. The Union appealed this decision, arguing that the district court lacked jurisdiction to enter the injunction because GTW failed to satisfy the requirements of section 8 of the Norris-LaGuardia Act ("NLGA") by refusing to negotiate outside the mediation.

The Sixth Circuit noted that the NLGA, except in strict conformity with the provisions therein, withdraws jurisdiction from the federal courts to issue an injunction in a labor dispute.[3] The court "review[s] *de novo* the existence of subject matter jurisdiction as a question of law; factual determinations regarding jurisdictional issues are reviewed for clear error."[4]

The Union argued that GTW violated section 8 of the NLGA, thereby depriving the district court of jurisdiction to grant an injunction to GTW. Section 8 of the NLGA provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or mediation or voluntary arbitration.[5]

The Union argued that GTW's conduct failed to satisfy section 8 for two reasons: (1) it constituted a failure to comply with an obligation imposed by law because it violated section 2, First and Second, of the RLA,[6] and (2) it constituted a failure to make "every reasonable effort" to settle the dispute as required by the NLGA. Section 2, First and Second, of the RLA provides:

> **First. Duty of carriers and employees to settle disputes**
> It shall be the duty of all carriers, their officers, agents, and employees to exert *every reasonable effort* . . . to settle all disputes . . . . **Second. Consideration of disputes by representatives** All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.[7]

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SIXTH CIRCUIT HOLDS RAILROAD EMPLOYER NOT REQUIRED TONEGOTIATE OUTSIDE OF PARTIES' ONGOING MEDIATION
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The court concluded that the NLGA and the RLA imposed "almost identical" requirements on a party seeking an injunction and that it need not analyze those requirements separately; if GTW made "every reasonable effort", it would have satisfied the requirements of both statutes. Because there were no disagreements regarding the facts surrounding GTW's efforts to resolve the dispute, the question of law became whether those efforts constituted "every reasonable effort."

The court reasoned that GTW twice engaged in direct negotiations and mediations with the Union, while the Union unilaterally terminated the "futile" negotiations and sought release from the mediations. The NMB concluded that further negotiations would not be productive until the parties modified their positions. Since those positions remained unchanged, the Court deduced that it would not be reasonable to require GTW to engage in a third round of direct negotiations that were unlikely to succeed where two previous rounds of negotiation and mediation had failed. Therefore, GTW satisfied the requirements imposed by the law, and the district court had jurisdiction to enter the preliminary injunction.

**** Anna Bartkowski*** *holds a Master of Arts degree in Legal Studies with a Concentration in Alternative Dispute Resolution from Texas State University. She conducts mediations regularly in and around Central Texas. She would like to thank Walter Wright for his support and encouragement to participate in the field of Mediation.*

ENDNOTES

1 Grand Trunk W. R.R., Inc. v. Bhd. of Maint. of Way Employees Div., 497 F.3d 568 (6th Cir. 2007).
2 The services of the NMB may be invoked by either party to mediate between employees and a carrier concerning disputes in rates of pay, rules, or working conditions. 29 C.F.R. § 1202.1.
3 29 U.S.C. § 101.
4 The services Wright v. Gen. Motors Corp., 262 F.3d 610, 613 (6th Cir. 2001; see also see also Westmoreland Coal Co. v. Int'l Union, United Mine Workers, 910 F.2d 130, 135 (4th Cir. 1990) (reviewing jurisdiction under the NLGA *de novo*).
5 29 U.S.C. § 108.
6 45 U.S.C. § 152.
7 *Id.*

ELEVENTH CIRCUIT CONSTRUES EFFECT OF DEFAULT PROVISION ON MEDIATION PROVISION IN EARNEST MONEY CONTRACT
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against EVMC.[22] The appellate court found no abuse of discretion, as EVMC had shown good cause for setting aside the default judgment.[23]

The lesson of this case is that parties should take care when including mediation provisions in their contracts. Drafters must take special care to consider the relationship of the mediation clause to the termination clause. Placement of a mediation clause in a contract will not guarantee its enforcement when a termination clause, located elsewhere in the contract, effectively abates it. To ensure the mediation clause's survival, a contract, if it contains a termination clause that nullifies all contractual obligations except those that expressly survive termination, should provide for the express survival of the mediation requirement.

**** Amy M. Reyes*** *is currently a law student at St. Marys University School of Law. She was formerly a law student of Thurgood Marshall School of Law, where she won first place in the ABA's National Mediation Competition. She holds a Master of Arts degree with a major in Legal Studies from Texas State University in San Marcos. While attending Texas State, Amy earned a mediation certificate and a paralegal certificate. She earned a Bachelor of Arts degree in Criminal Justice from St. Marys University.*

ENDNOTES

1 *USA Flea Market, LLC v. EMVC Real Estate Consultants, Inc.,* No.07-11486, 2007 U.S. App. LEXIS 22006 (11th Cir. Sept. 12, 2007)
2 *USA Flea Market, 2007 U.S. App. LEXIS 22006, at *1*
3 *Id.*, at *1
4 *Id.,* at *2
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*, at *3
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*, at *4
20 *Id.*
21 *Id.*, at *5.
22 *Id.*
23 *F.R.C.P.* 55c (a district court can set aside an entry of default for good cause shown)

IDAHO FEDERAL DISTRICT COURT HOLDS INFORMATION OBTAINED DURING STATE AGENCY'S CONCILIATION PROCESS IS PRIVILEGED AND PROTECTED FROM DISCLOSURE

By Sarah Klebo*

A United States District Court in Idaho issued a 2007 memorandum decision and order, in *Duarte v. City of Nampa*, denying disclosure of information obtained during the conciliation process.[1]

Steven Duarte ("Duarte") sued the City of Nampa and the Nampa Police Department (collectively referred to as "Defendants").[2] The complaint alleged that Duarte was wrongfully discharged from the Nampa Police Department after he suffered an anxiety attack and after a series of reassignments to "light-duty" positions within the Nampa Police Department proved unsuccessful.[3] In addition to wrongful discharge, Duarte alleged violations of the Americans with Disabilities Act ("ADA"), the Idaho Human Rights Act ("IHRA"), intentional and negligent infliction of emotional distress, negligent training, libel, slander, and loss of consortium.[4]

Prior to filing the lawsuit, Duarte had filed a charge of discrimination with the Idaho Human Rights Commission ("IHRC") against the Nampa Police Department.[5] The IHRC determined there was evidence of discrimination and proceeded with a conciliation between Duarte and the Nampa Police Department.[6] The purpose of the conciliation effort was to correct the police department's violation of the law, as IHRC perceived it. While the IHRC attempted conciliation, the parties also scheduled a mediation, but the mediation never took place.

Shortly before the (subsequently cancelled) mediation was scheduled to begin, the Defendants asked the IHRC for the entire file regarding its investigation of Duarte's charges.[7] Based on Idaho Rules of Evidence 408[8] and 507,[9] the IHRC denied Defendants' request as to certain documents because it considered the contents to be privileged.[10] The withheld documents included handwritten notes and email correspondence between Duarte's attorney and the IHRC that occurred during the conciliation process.[11]

Duarte requested that the IHRC dismiss the charges of discrimination against the Nampa Police Department and then filed a lawsuit.[12] The Defendants' attorney again requested disclosure of the previously withheld information.[13] The IHRC again denied the request and maintained that it still considered the documents to be privileged information.[14] Subsequently, during the course of the lawsuit, the Defendants subpoenaed the IHRC to produce the documents.[15] Objecting to the subpoena, the IHRC again cited Idaho Rules of Evidence 408 and 507 and added an objection based upon Fed. R. Civ. P. 26(b)(1), which provides that, "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim . . . ."[16]

Defendants argued that I.R.E. 408 was inapplicable because they only wanted to discover the information and not admit it into evidence.[17] Additionally, Defendants asserted that I.R.E. 507 was inapplicable because the IHRC was not acting as a mediator, but as a partial party advocating on behalf of the Plaintiff.[18] Defendants further argued that I.C. § 9-340B(8) of the Idaho Public Records Act was inapplicable because the documents were requested pursuant to a federal subpoena and not pursuant to a public records request.[19] Lastly, because Defendants were parties to the charge of discrimination with the IHRC and were parties in the judicial proceeding regarding that charge, there was no need to show public interest as required under the Idaho Public Records Act.[20]

In response to Defendants' arguments, the IHRC changed its claim from privileged information to "official information" under federal common law privilege as the reason for objecting to disclosure of the information to the Defendants. The IHRC asserted that disclosure of those documents would be contrary to the public interest because the IHRC's conciliation efforts are significant in the scheme of anti-discrimination law and require open and candid communication with the alleged victim.[21] The IHRC asserted there was no legitimate benefit deriving from the disclosure of the documents to the Defendants, but there would be a "chilling effect on communications between the IHRC and victims, and an adverse effect on the process as a whole."[22] Duarte likewise opposed enforcement of the subpoena and argued that, under 42 U.S.C. § 2000e-5(b), conciliation communications are privileged and that disclosure of conciliation efforts would have a chilling effect on the conciliation process. This federal statute provides that, "nothing said or done…may be made public…or used as evidence in a subsequent proceeding without the written consent of the persons concerned."[23]

Defendants argued that protection of the information was not warranted by the statutes cited by Duarte and the IHRC because (1) 42 U.S.C. § 2000e-5(b) applies only to the Equal Employment Opportunity Commission ("EEOC") and not to the

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STEP ONE IN COLLABORATIVE LAW

By Sherrie R. Abney*

Recently, a lawyer was heard stating, "Everything about Collaborative Law is in direct competition with the courthouse and everyone associated with it." The listener, who was a collaborative lawyer, was made somewhat uneasy by the comment and immediately replied, "That isn't true."

Perhaps the listener's response should have been, "That should not be true." The statement may have been true for the speaker, but there are two very good reasons that the statement should not be true for the legal community. The first reason is that competition is NOT the true purpose of Collaborative Law, and the second reason is that the statement places the focus of the collaborative process on the wrong people. Collaborative Law is intended to serve clients rather than protect the comfort zone of lawyers.

The legal profession, like most other professions, resists change. Change disrupts the familiar by altering and replacing what is "known." When change encroaches on people's comfort zones, they become uneasy and feel threatened. Collaborative Law is coming, and some in the legal community are threatened by this movement. Those who feel most threatened are those who know least about the collaborative process.

Step One: Understanding the Purpose

The purpose of the collaborative process is not to compete with any person or entity. The purpose is to provide relief for people who have legal disputes. Some lawyers have never become acquainted with the true purpose of the process. Unfortunately, a few collaborative lawyers may have lost sight of the purpose as they have struggled to gain acceptance for interest-based negotiation in a positional-bargaining legal community. Nevertheless, Collaborative Law was originally created for the sole purpose of providing relief to people whose lives were made worse than necessary by litigation.

Justice Sandra Day O'Connor once said, "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried." Justice O'Connor's statement does not appear to have been made to promote competition between dispute resolution processes and our judicial system. It is more likely that the Justice was speaking from wisdom gained during her years of dealing with "unnecessary" litigation.

So how does one know when litigation is necessary, and when it is not necessary? In the medical profession, a conscientious physician will treat a patient according to the facts that exist at the time the patient is examined. People suffering from extreme trauma, broken bones or multiple injuries are usually rushed to surgery as soon as possible. The cost of delay might mean the patient's life. However, most patients who visit their doctors are suffering from injuries or aliments that do not require immediate surgical treatment, and those patients are treated in other ways in order to attempt a cure prior to the physician recommending anything as radical as surgery. When surgery is recommended, it is generally recommended as a last resort, and then only after a second opinion.

General practitioners and surgeons work together for the common good of their patients. When it appears surgery is necessary, patients are told their options, and they decide how they wish to proceed. Perhaps collaborative lawyers and litigation attorneys should consider following this example.

When a client walks into an attorney's office to discuss a dispute, how many options are available? Depending on the facts of the case, there may be many. The options for settlement might include an invitation to the other parties to the dispute to discuss the problem, to mediate, or to participate in the collaborative process prior to filing any legal action. If suit has already been filed, these very same options exist and can be suggested prior to diving headlong into costly discovery battles.

Sometimes clients, just as accident victims, need immediate relief. The dispute may require first aid in the form of a temporary restraining order. But once the emergency relief has been obtained, an investigation of the facts of the dispute should be started to determine if "radical surgery" is necessary. Before depositions are scheduled and the discovery questions and requests are served, the same settlement options are available as in any other disputed situation. If a settlement option is chosen by the client, the worst thing that can happen is that the other parties will refuse to discuss early settlement. A flat "No" is not likely when a serious offer to negotiate is made in a commercial case. In fact, given the opportunity, almost any party would prefer to settle rather than go forward with litigation.

So How Do You Settle Early?

The first step in finding the best way to settle a dispute is to take the focus off the attorneys and concentrate on the clients and what they need and want to accomplish. After all, the disputes belong to the clients. They are the ones paying to have the disputes settled, and they are the ones who must live with the results.

Currently, explaining settlement options to a client usually consists of telling the client that the lawyer is going to send a demand letter, and if the other party does not comply with the demand, the lawyer will file suit. A demand letter stating the party's position is sent, and the attorney waits for an answer. The party receiving the letter generally does not agree with the sender's position, or may be unable to comply with the demand. So there is often a surly denial or no response at all, and a lawsuit is filed.

What would happen if the client was given the option of sending a letter simply stating that there is a problem that needs to

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STEP ONE IN COLLABORATIVE LAW
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be addressed and the parties are invited to meet face-to-face to discuss the possibility of resolving the dispute without litigation? If the finger pointing, blame laying, and position taking usually present in demand letters are replaced with a simple invitation to talk things over, more lawyers might receive favorable responses to proposals for early settlement discussions. Some cases will always result in litigation, but a different approach could possibly settle more cases sooner and provide a huge savings of time, money, and stress for all of the parties.

If the client has already been sued or is about to be sued, a similar letter may be sent. In this instance, the response would state that the client does not agree with the demands (or, if suit has already been filed, the Original Petition), but the letter would make clear that the client realizes that there is a problem that needs to be addressed. Through the attorney, the client would request a face-to-face meeting to discuss early settlement.

It is important that the clients and their lawyers meet face-to-face; otherwise, the lawyers will fall back on making offers and demands over the telephone. The lag time between offers and answers increases the chance that communication will break down. Allowing the lawyers to maintain complete control of all communication totally eliminates the parties having a meaningful discussion that could reduce the chances of misunderstandings. The "he said, she said" method of communication, with messages going back and forth, is both ineffective and inefficient. It serves to entrench the parties in their positions and is a hindrance to any understanding of the other parties or their situation.

Taking a non-adversarial approach to settlement is the first step in learning to be a collaborative lawyer. It is certainly not the "whole ball of wax," but it is a great beginning.

Is this approach to dispute resolution an impossible dream? Apparently, the American Bar Association (ABA) does not think so. Collaborative Law has received enough attention to cause the ABA Standing Committee on Ethics and Professional Responsibility to publish Formal Opinion 07-447 on August 9, 2007. The opinion clarifies that it is perfectly ethical for a lawyer to represent a party in a collaborative case, provided that the lawyer thoroughly explains the process so clients will understand what benefits and risks they are taking. Perhaps the ABA, one day, will require lawyers to give the same explanation regarding the risks and benefits of litigation.

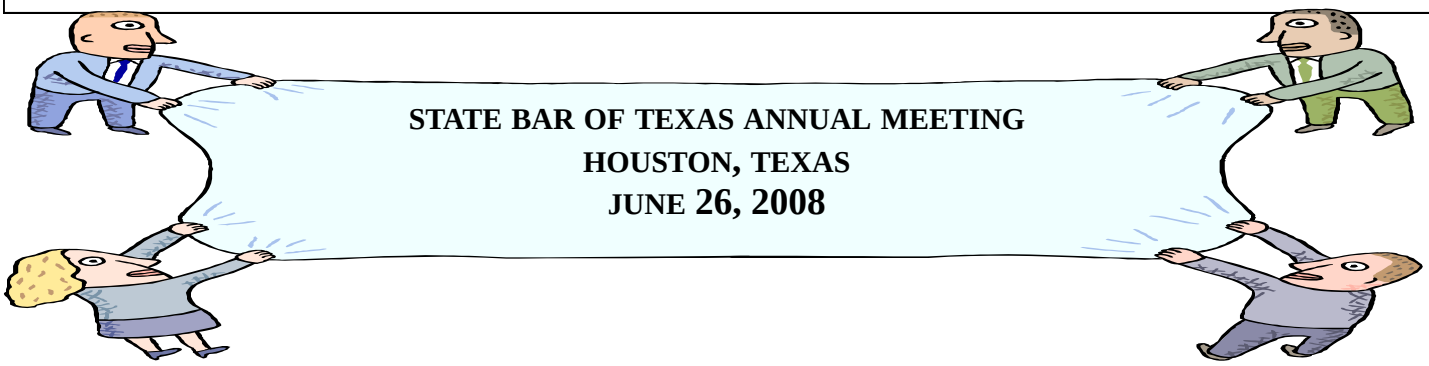
Although Collaborative Law began in family law, it is rapidly being acknowledged as an important addition to all areas of civil practice. The Dispute Resolution Section of the ABA established a Collaborative Law Committee in February 2007. The committee voted to pursue the promotion of the collaborative process in both family and civil cases. Since that time, lawyers practicing in probate and business law have begun to use the process to avoid litigation. In addition, the National Conference of Commissioners on Uniform State Laws (NCCUSL) expects to have a Uniform Collaborative Law Statute completed by the summer of 2009, which will include all areas of civil law.

Some jurisdictions require lawyers to explain alternative dispute resolution options to their clients before committing them to litigation or any other dispute resolution process. It is time that all attorneys learn to use more than one resolution tool. If the only tool in the legal tool box is a hammer, everything that is going to get fixed better only require nails. The problem with "fixing" disputes is not the number of tools; the problem is that many lawyers only know how to use a hammer. The time is coming when more skill will be necessary to survive in the practice of law. If lawyers want to provide quality services to their clients, they had better learn some new tricks or consider a working relationship with lawyers who think outside of the box on settlement issues.

Understanding that the purpose of Collaborative Law is to bring relief to people in legal disputes is the first step to a collaborative practice. The next step is to put that purpose into practice. Lawyers can begin by giving their clients the option of taking a non-adversarial approach to settlement. Today would be a good time to start.

To learn more about Collaborative Law, interest-based negotiation, and other forms of dispute resolution, go to www.collaborativelaw.us; www.collaborativepractice.com; www.collablawtexas.com; or www.adr-attorneys.com.

* ***Sherrie R. Abney*** *is a collaborative lawyer, mediator, arbitrator and collaborative trainer. She has served as chair of DBA's ADR and Collaborative Law Sections and is a founding director of the Texas Collaborative Law Council. Sherrie is member and past secretary of AAM, presenter and trainer for the International Academy of Collaborative Professionals, and a member of the Civil Committee of the Dispute Resolution Section of the*



THE PANAMA INITIATIVE: AN INTERDISCIPLINARY AND COLLABORATIVE APPROACH FOR THE SOLUTION OF EMERGING DEVELOPMENT ISSUES IN PANAMA, LATIN AMERICA, AND THE CARIBBEAN

By Al Amado* and Frank G. Evans**

Project Overview

The Panama Initiative is an innovative, collaborative, interdisciplinary program directed by the Latin American Collaborative Education Project (LACEP). A newly created non-profit, LACEP will be based at the Lozano Long Institute of Latin American Studies (LLILAS) at The University of Texas – Austin. LACEP will work to create an expansive network of relationships with other educational institutions, governmental and non-governmental entities, and professionals interested in Latin America and the use of collaborative and problem-solving processes. LACEP's Panama Initiative provides those interested in its work with:

- continuing education and conference opportunities;
- opportunities to partner with leading educational, governmental, nongovernmental, and business entities; and
- interdisciplinary, clinical, research, and exchange opportunities.

Why the Panama Initiative: Background and Importance of Panama

Panama holds a position of geographically strategic importance in Latin America and is the international hub for commerce in the region because of the Panama Canal. It is the international crossroad to Latin America. It also has had historic ties to the United States since the early 1900s, during the building and later the operation of the Canal, and English is widely spoken there. Thus, Panama has become a hub for global business. The growth outlook for Panama over the next several years is also tremendous due to the planned creation of a third set of locks at the Canal. This expansion will create greater opportunities for international business, not only due to the construction project, but also due to the growth in shipping and commerce for decades to come.

With the anticipated growth also comes the potential for problems: litigation due to construction and increased flow of commerce, environmental and social issues related to development, and policy disputes related to sociojuridical and socioeconomic issues. Additionally, the explosive growth Panama has been experiencing has given rise to conflicts relating to development and implicating the triad of social, economic, and environmental interests. Also, like many court systems in Latin America, the Panamanian legal system is regarded as overloaded, slow, and inefficient. As a result, the government and business leaders of Panama are searching for innovative solutions for the resolution of disputes outside the court system. Anticipating these growth issues, Panama is reaching out and seeking collaborative, helpful relationships and opportunities to address these matters. There is particular interest in providing alternative processes for the resolution of these disputes that will not only enable Panama to continue welcoming business and investment from around the world, but also permit its government and people to arrive at solutions to developmental and societal problems.

For these reasons of geographic, commercial, historic, and governmental interest, Panama is a logical hub in the region for the creation of an efficient, effective, streamlined system for the resolution of commercial disputes, especially maritime disputes. Moreover, Panama's willingness to utilize alternative dispute resolution processes is an opportunity to apply collaborative problem-solving techniques to broad-ranging social issues. Further, a wide variety of Panamanian and international nonprofit entities, including the United Nations, and businesses have established their bases of operations for the region in Panama at the City of Knowledge, also known in Spanish as *Ciudad del Saber*. *See* http://www.cdspanama.org. These developments provide further opportunities for cooperation at an international level on a wide array of issues that are vitally important to the region.

All of these factors combine to present an interdisciplinary environment full of opportunities for interested lawyers, mediators, educators, academic institutions, and non-profits interested in a comprehensive, interdisciplinary, multifaceted, synergistic project.

Strategic Partners in Panama Supporting This Initiative

Over the past several years, the founders of this project, Frank Evans and Al Amado, have established important strategic and personal relationships with leaders at the highest levels of the Panamanian government and private sector. The relationships

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will facilitate development of LACEP's projects throughout Latin America, using Panama as a base of operations. The Panamanian Supreme Court is keenly interested in developing a more efficient, affordable, and accessible judicial system, and it seeks opportunities to develop alternative dispute resolutions processes. This commitment extends not only to the use of ADR processes in a traditional setting, but also to the more innovative use of these processes in situations involving community redevelopment, land use, environmental issues, labor conflicts, and student protests, to name just a few. Other governmental entities, including the Solicitor General and Attorney General, as well as non-governmental entities within Panama, including the Panama Canal Authority and Panama Maritime Authority, are similarly committed to developing more effective and transparent processes that benefit not just the flow of commerce, but also the people of Panama. Universities in Panama, and in particular the law faculty of the University of Panama, have an interest in educational exchanges with faculty and students. The Panama mediators and maritime lawyers are interested in developing educational exchange opportunities. Finally, through its International Center for Sustainable Development (CIDES), the City of Knowledge is committed to this project as a means of increasing the use and awareness of collaborative processes in conflicts related to sustainable development issues.

Overview of the Project

The purpose of LACEP is to create an interdisciplinary center that fosters a collaborative approach –involving professionals, educational institutions, and NGOs interested in collaborative processes and utilizing varied conflict resolution processes such as facilitation, mediation, arbitration, and collaboration – to research, address, and propose solutions vital to development issues facing Latin America. The Executive Director of LACEP is Al Amado, and the Senior Advisor is Frank Evans. Judge Evans is widely regarded as the founding father of alternative dispute resolution in Texas and was named one of the "100 Legal Legends" of Texas. Al Amado has over twenty years of legal experience as a trial and appellate lawyer in diverse litigation matters and as the director of business affairs and the Latin American division of a global fitness company. The initial phase of this project is five years, and during this time, LACEP will develop and seek grant funding for various projects in Panama, Latin America, and the Caribbean. The project initially will rely on the expertise within, and participation of LLILAS, which will serve as the institutional base for LACEP. LACEP will then actively work to build relationships with other educational, governmental, and non-governmental entities interested in collaborating on projects with LACEP and its partners, thus creating a network of collaboration that is both interdisciplinary and inter-institutional.

Project Format: Research Projects, Annual Conferences, and Information Exchanges

Each year, LACEP will coordinate interdisciplinary research projects on emerging development issues in Latin America. These projects will involve practicing attorneys, members of the judiciary, mediators, and students, faculty, and staff of varied educational institutions to generate scholarly research on subjects of vital interest.

This scholarly research will be further developed and presented at annual conferences to be held either in Panama, at The University of Texas, or on the campuses of other national and international educational institutions with inter-institutional relationships with LACEP and interest in its projects. The general format for the conference series will be to identify various developmental issues facing Latin America, and the conflicts that these issues generate, then conduct research and present policy papers with proposed interdisciplinary solutions. LACEP will then hold conferences that focus on the interdisciplinary approaches that minimize and resolve the inherent conflicts that accompany development with the objective of proposing viable, sustainable development solutions.

The focus of all work at LACEP will be on interdisciplinary and collaborative approaches to the resolution of conflicts related to development in Latin America. The project founders posit that one vital key to the resolution of these conflicts is through collaboration and the exchange of information and technology. Thus, LACEP facilitates resolution of conflict while providing a research and learning environment that combines clinical, international, and interdisciplinary approaches. LACEP fosters the overlap between legal studies and other disciplines, plus clinical opportunities and international perspectives, in a format that Dean Sager of The University of Texas School of Law has noted has special educational "importance and value." Larry Sager, *Texas Law School Deans Discuss the Future of the Law School Curriculum*, 69 TEX. B.J. 764, 766-67 (2006). This overlap of disciplines, cross-pollination, and collaboration among disciplines in a collegial atmosphere with leading educational, governmental, and nongovernmental institutions in Panama and Latin America will further stimulate the educational and research process.

Because of its geographic location, position of prominence in global commerce, ease of telecommunications, use of the U.S. dollar, prevalence of English as the language of commerce within the Republic, and due to strategic relationships that the project founders have developed over the past several years in the Republic of Panama, Panama will be the hub for LACEP's work in the region. However, following the research/ conference/exchange model set out above, LACEP will identify and develop similar projects and strategic relationships in other Latin American countries with the objective of developing a series of conferences similar to those outlined above. Such conferences in subsequent years would address themes related to conflict and sustainable development in other countries in Latin America. *See* Long-Term Projects, *infra*. For example, future sites for conferences and projects might include Veracruz, Mexico (focusing on energy), Brazil (focusing

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on race and indigenous rights), and Bolivia (focusing on international, cooperative, development arrangements such as BITs [bilateral investment treaties]).

Seminar Classes: Advanced Collaborative Processes and Conflict Resolution

To foster and develop the cooperative approaches to the resolution of conflict through the exchange of technology and information, LACEP proposes to hold a graduate seminar class each academic year at LLILAS at The University of Texas. The seminar will focus on collaborative approaches to resolving problems, advanced conflict resolution skills and issues, and the use of interdisciplinary approaches to address developmental issues. This seminar would be developed and led by the project founders and involve visiting speakers from different Schools to address topics of particular interest. The types of topics that will be covered are emerging conflict issues in Latin America, technology and information exchange to solve problems, the effects of globalization on development, intercultural communication styles, sources of conflict, cross-cultural issues, among others, and how these affect conflict and its resolution. Course participants would write a paper focusing on one of the issues raised, the barriers to the solution of conflict discussed during the seminar, or the policy implications discussed during the course, and propose solutions to overcome the problems, barriers, or issues mentioned. The course would be cross-listed and open to graduate students in diverse schools within The University of Texas, and offered as a course fulfilling the requirements of the Graduate Portfolio Program in Dispute Resolution (GPPDR). Thus, this course would interconnect with and complement the GPPDR, as well as course offerings and research interests at The LBJ School, LLILAS, McCombs, and the recently created Robert Strauss Institute. Further, the course would offer students an opportunity to perform research and writing tasks alongside graduate students in other disciplines, thus enriching the academic experience of all students. It is anticipated that the course could first be offered in the Spring Semester 2009. Students interested in pursuing internship opportunities through LACEP would register for this seminar and begin developing work in a specific area of interest, which would then be further developed and practically applied in an internship opportunity. *See infra*. Again, these internship opportunities would be open to students of diverse schools.

Exchanges: Student Internships and Collaborative Exchanges

The exchange of ideas, technology, and cultures is an integral part of LACEP's work. Accordingly, LACEP will encourage international exchanges of students, faculty, and staff as part of its activities. As early as the Summer Session 2009, it is expected that LACEP will host an interdisciplinary group of students who will serve as interns in the offices of the Supreme Court of Panama (regional mediation centers), the Attorney General of Panama (mediation of domestic violence or victimless crimes cases), the Solicitor General of Panama (diversion of cases from the JP courts to mediation), the Panama Canal Authority (contract, labor, environmental, or security conflicts and policy), the Panama Maritime Authority (policy issues regarding maritime commerce), and the University of Panama (diverse courses and issues within the law school and related programs). The interns will focus their work on research and writing tasks related to those specific issues that the particular office has identified as a priority. Again, this internship dovetails with the GPPDR as well as public policy research interests at the Schools. Further, LACEP will facilitate and encourage professional, educational exchanges involving lawyers, judges, and academicians from Texas/USA and Panama/Latin America. The project founders would lead and facilitate the internship program working in conjunction with interested representatives of the Schools and strategic partners in Panama.

Academic Research Projects: Analyses and Consultancies

As part of its work in the region, LACEP will identify emerging issues and develop strategic relationships that will foster opportunities for consultancies and research for professionals and students, educational institutions, and NGOs interested in collaborative processes. Such consultancies and academic projects will further provide opportunities for future training courses, policy analysis and formulation, or other internships to continue fieldwork. The objective here is to identify interdisciplinary consultancy prospects and fieldwork opportunities, while enhancing the LACEP reputation and brand throughout Latin America. These opportunities will also foster public/private partnerships (between LACEP and business) as well as inter-institutional relationships (between LACEP and government/nongovernmental entities and LACEP and other educational institutions).

CERCA: Creation of Panama Nonprofit as Counterpart to LACEP

On July 5, 2007, several governmental and nongovernmental entities in Panama entered into a formal agreement to create a Panama nonprofit center –the Center for Knowledge and Resolution of Conflict in the Americas (CERCA). Judge Frank G. Evans and Al Amado facilitated the formation of CERCA. For several years, both gentlemen have advised various parties in Panama regarding collaborative approaches to the solution of conflict. Pledging to work together to reach these objectives, the signers entered into an agreement to create CERCA. Essentially, the Panamanian counterpart to LACEP would be CERCA, and the two centers would work cooperatively to address developing issues in Panama and the region through collaborative processes.

Organizational Chart

The accompanying organizational chart shows LACEP's relationship with CERCA, as well as with educational institutions and NGOs, and Panama.

Project Timeline for Five Years

In December 2007, LACEP organized a conference and summit in Austin entitled *The Panama Initiative: Collaborative*

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Conflict Resolutions Strategies for the Americas and the Caribbean. The event brought together approximately twenty professionals from diverse Panama governmental entities interested in the use of collaborative processes in their respective agencies for training and planning further, similar events. Faculty included interdisciplinary professionals from Texas State University, The University of Houston Law Center, South Texas College of Law, and The University of Texas. A follow-up conference is slated for Spring 2008 in Panama and will expand the faculty to include other U.S. and international educational institutions. Accompanying is a bullet-point timeline for additional, proposed LACEP projects for Academic Years 2008-2012. Please refer to this attachment for possible future research projects and conference topics.

Near-Term Projects

Further projects for future development during the upcoming academic years include the following:

- *Internships*: More interdisciplinary internship opportunities will be identified and established within those institutions with which LACEP establishes cooperative relationships. In the upcoming years, LACEP will be working to develop and expand internship opportunities with the following international organizations and nonprofits, which have a significant presence in Panama:
    - Forest Stewardship Council
    - CATHALAC (water resources)
    - OAS
    - International Organization for Migration
    - PLAN (global development issues)
    - UNICEF
    - UN Refugee Agency
    - UN Development Programme
- *Mediation Training Program in Public Administration*: A training program will be developed to train mediators or ombudspersons within areas that involve public administration functions. This program will be set up in cooperation with INADEH, a government agency in Panama that directs vocational training and human development in Panama. INADEH cooperated in the development and funding of the December 2007 conference and summit in Austin.
- *Mediation Program for Supreme Court Mediators*: The Supreme Court's mediation arm has indicated a desire for skills courses and a policy analysis of whether and how domestic/family violence cases should be mediated.
- *Workshops*: Educational workshops covering specific themes of interest to parties interested in developing cooperative agreements with LACEP will be developed and implemented. *See* Academic Research Projects, *supra* at 6.
- *Research Projects*: Interdisciplinary research and investigative projects related to sustainable development will be identified, and grant funding will be sought for those projects. *See* Academic Research Projects, *supra*.
- *Student Exchanges*: Academic institutions in Panama and Latin America with which the project founders have had contact express interest in having their students visit U.S. universities and take courses related to interdisciplinary approaches to the resolution of conflict. While such opportunities exist for degree-seeking, international graduate students, the project founders propose to develop new opportunities for international students seeking short-term study in both an academic and clinical settings.

Long-Term Projects

Conflictive issues related to development exist worldwide, and while the issues and projects outlined above and herein focus on issues that are emerging in Panama, similar issues are facing other Latin American countries. Thus, while Panama has been selected for strategic reasons as the Latin American base for this project, the project founders have been following emerging issues in other Latin American countries and have begun developing related projects in those countries. Examples of other projects, which the founders propose to develop through LACEP in future years, include the following:

- U.S.-Mexico
    - Border violence and narcotraffic violence
    - Cross-border conflicts, including environmental, transportation, and immigration
    - Trade pact between northeastern Mexican states (Coahuila, Nuevo Leon, Chihuahua, and Tamaulipas) and Texas/California
- Ecuador
    - Mediation training
    - Agricultural and land development conflict
    - Graffiti art
- Brazil
    - Sustainable energy, growth, and security
    - Race and indigenous rights
- Guatemala: sustainable peace and democracy and conflict

Funding

All funding for LACEP will be from donations, grants, and other governmental and non-governmental third-party funding, plus whatever institutional resources participating educational institutions and NGOs bring to the table.

Conclusion

The Latin American Collaborative Education Project is an opportunity for diverse professionals, educational institutions, and NGOs interested in varied conflict resolution processes such as facilitation, mediation, arbitration, and collaboration to research, address, and propose solutions to vital development issues facing Latin America. LACEP creates an interdisciplinary and collaborative learning environment that enhances the academic and clinical experience of interested professionals

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THE PANAMA INITIATIVE FIVE-YEAR TIMELINE

By Al Amado* and Frank G. Evans**

Year 0:

- Planning and creation of LACEP and CERCA (Fall-Winter 2007)
- Panama Initiative Conference and Summit (Austin, TX, December 10-14, 2007)
- Panama Initiative Conference: Sustainable Development and Conflict (Panama City, Republic of Panama, February or March 2008, dates to be confirmed)
- Initial grant funding (Spring 2008)

Year 1: Academic Year 2008-2009

- Planning and Development (Sep-Dec 2008)
- Seminar Course Planning and Development (Sep-Dec 2008)
- Project Planning and Initial Research (Jan-May 2009)
- Seminar Course (Jan-May 2009)
- Education Course for Panama Mediators (Jun 2009)
- Student Internship (UT → Panama) (May-Aug 2009)
    - Canal Authority
    - Supreme Court
    - Supreme Court Mediators
    - Office of Solicitor General
    - JP Courts' Mediation Program
    - Panama Maritime Authority
    - U. of Panama

Year 2: Academic Year 2009-2010

- Research Project (Mediation in the JP Courts) (Sep-Dec 2009)
- Conference-Austin (*The Challenges to Sustainable Development in Latin America*) (Oct 2009)
- Mediator Educational Exchange (Panama → Texas) (Dec 2009)
- Seminar Course (Jan-May 2010)
- Conference-Panama (*Sustainable Development Solutions in Latin America*) (Apr 2010)
- Student Internship and Visiting Student Exchange (US Universities ←→ U. Panama) (May-Aug 2010)
    - Canal Authority
    - Supreme Court
    - Supreme Court Mediators
    - Office of Solicitor General
    - JP Courts' Mediation Program
    - Panama Maritime Authority
    - U. of Panama

Year 3: Academic Year 2010-2011

- Research Project (*Technology, Globalization, and Sustainable Development: The Challenges and Solutions – Panama Case Study*) (Sep 2010-Aug 2011)
- Judicial Educational Exchange (Panama → Texas) (Dec 2010)
- Seminar Course (Jan-May 2011)
- Conference-Austin (*Energy: Sustainable Solutions and Synergy in Latin America*) (Apr 2011)
- Student Internship and Visiting Student Exchange (US Universities ←→ U. Panama) (May-Aug 2011)
    - Canal Authority
    - Supreme Court
    - Supreme Court Mediators
    - Office of Solicitor General
    - JP Courts' Mediation Program
    - Panama Maritime Authority
    - U. of Panama

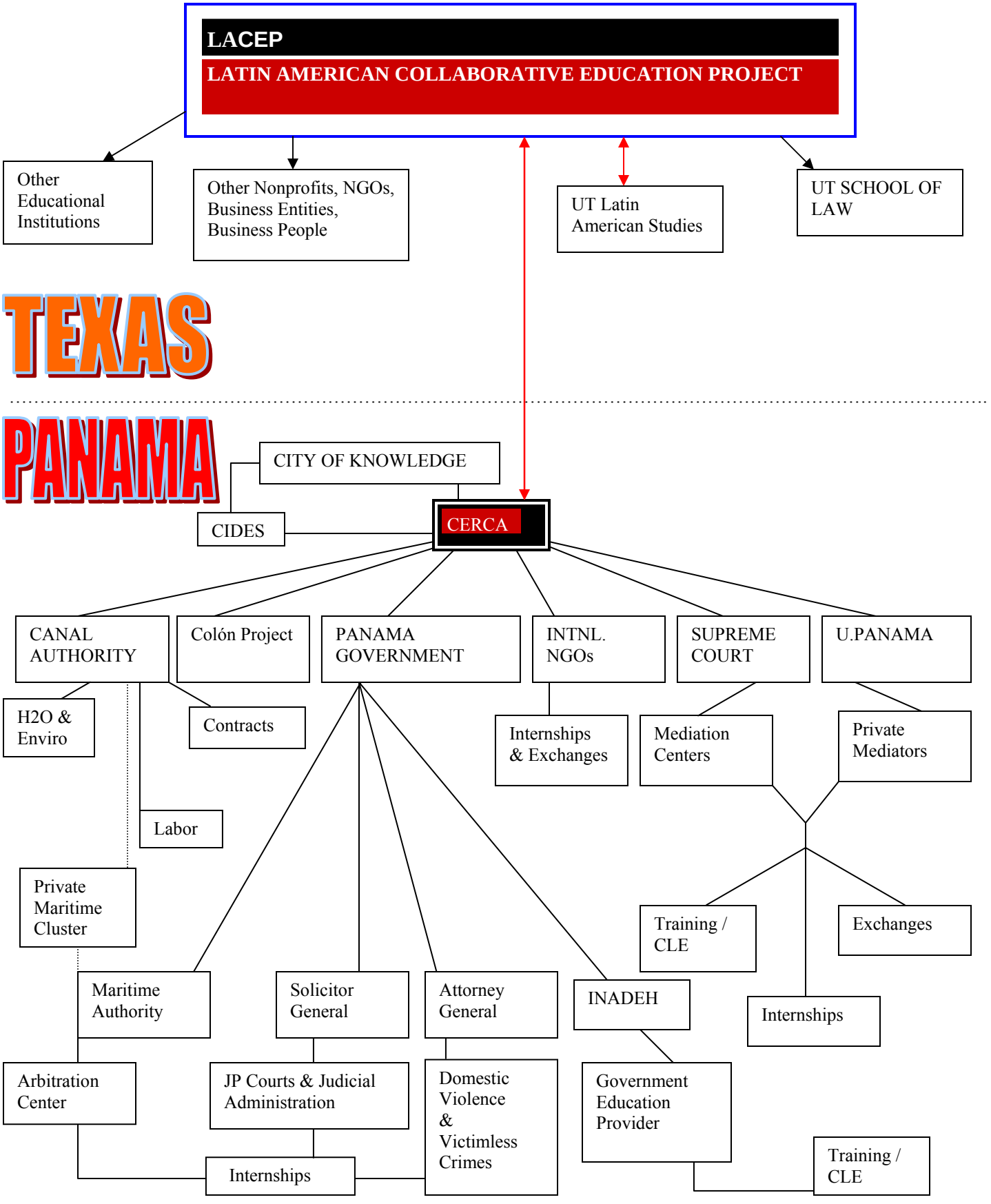
Year 4: Academic Year 2011-2012

- Research Project (*Technology, Sustainable Development, and Security in Latin America*) (Sep 2011-Aug 2012)
- Mediator Educational Exchange (Panama ←→ Texas) (Dec 2011)
- Seminar Course (Jan-May 2012)
- Conference-Panama (*Globalization, Transparency, and Government Processes: The Effects of Public Policy*) (Apr 2012)
- Student Internship and Visiting Student Exchange (US Universities ←→ U. Panama) (May-Aug 2012)
    - Canal Authority
    - Supreme Court
    - Supreme Court Mediators
    - Office of Solicitor General
    - JP Courts' Mediation Program
    - Panama Maritime Authority
    - U. of Panama

Year 5: Academic Year 2012-2013

- Research Project (*Growth, Globalization, and Security in Latin America: Food, Energy, and Commerce*) (Sep 2012-Aug 2013)
- Lawyer Educational Exchange (Texas → Panama) (Dec 2012)
- Seminar Course (Jan-May 2013)
- Conference-Austin (*Trade-Offs: The Effects of Agricultural, Energy, and Growth Policies on Security*) (Apr 2013)
- Student Internship and Visiting Student Exchange (US Universities ←→ U. Panama) (May-Aug 2013)
    - Canal Authority
    - Supreme Court
    - Supreme Court Mediators
    - Office of Solicitor General
    - JP Courts' Mediation Program
    - Panama Maritime Authority
    - U. of Panama

THE PANAMA INITIATIVE



A "MEXICANISM" ON THE MEDIATION TABLE

By Bernardo Fernández Christlieb*

Introduction

Spanish, for the last several decades, has been the second-most-spoken language in the United States, and the number of Spanish speakers settling all over this land has increaed impressively in the last ten years. If we add to those numbers all the U.S. citizens and permanent residents who are fluent in English, but prefer Spanish when it comes to expressing their deepest emotions or when seeking clarity, the percentage of Spanish speakers in this country then would be counted in the tens of millions, making the U.S. one of the countries with the highest number of Spanish-speaking people in the world. (Los Angeles has been the world's second largest Spanish-speaking city for a long time, just behind Mexico City).

Texas, along with California, deals with the biggest challenge of providing a wide range of bilingual and bicultural services and resources, and in seeking to reach the highest level of accuracy in their implementation. Mediation services in our state are urgently demanding that accuracy as well. Since most of the native Spanish speakers in our state are originally from Mexico, shedding light on the distinctive characteristics of Mexicans can be helpful, particularly at the mediation table, where effective verbal communication is critical.

Here is a brief analysis of perhaps the most obvious verbal indicator of Mexican identity used throughout the Mexican Republic, and certainly beyond its borders and throughout the United States. Used by Mexicans from all sociological and economic levels, this colloquial expression shows its importance during any kind of dispute.

_____ o _____

The word and its many derivatives

Perhaps there is not a more distinctive trait for a true Mexican than his manner of speech. Within the Mexican lingo, without a doubt, there is a word that differentiates a Mexican from the rest of the Spanish-speaking world. The word *chingar* and its derivations instantly unveil a person's Mexican upbringing. *Chingar* is used extensively, particularly in the popular language. During conflict, it is commonly used to quickly express how good or how bad a situation may be. By using *chingar*, a person can express how he *really* feels about something or someone.

Chingar is, for some unjustified reason, listed almost entirely in the category of the "bad words." Undeniably, it can come across as a vulgar expression, particularly when used in the presence of the refined or the conservative, or addressed to the elderly or to any other respected figure. Mexicans, as a rule, know the subtlety of usage and know that in certain company, the sound of this word would be a reason for embarrassment and disgust. But beyond those formal settings, where one's speech is usually limited, *chingar* is welcome as an ice breaker and as an indicator of commonality of those nearby. While a relaxed moment can immediately become tense if the word is said in anger, in the same way, a tense situation can quickly dissipate if the word is introduced in one of its multiple comical versions. This word is such a part of Mexicans that a mild, clean, and totally acceptable version of it was created: the expression *chin* is widely used as an exclamation that children, the elderly, members of the clergy, and the fanciest *señorita* can confidently say in public and no one will perk up his ears.

Chingar is such a versatile expression that it includes many forms: strong adjectives: "Tus hijos son muy *chingones"* (your kids are really sharp*),* or "tu coche está muy *chingón"* (your car is pretty nice); direct nouns: "esa *chingadera* de máquina " (that lousy machine); and a full range of conjugated verbs: "Yo *chingo*, tú *chingas*, él *chinga*, nosotros *chingamos,* vosotros *chingáis*, ellos *chingan.*" It can be modified or adapted as one pleases: "¡Esta clase es una *chinga!"* (this class is a pain in the butt!), and new variations of it can simply be made up as one needs them to be, such as "esa *chingadera* que tiene él por esposa" (that pitiful thing he has as a wife). It can easily indicate size of the noun: "una *chingaderita*" (tiny) or "una *chingaderota"* (enormous), or even a combination of adjectives in one word: "Él es un *chingaquedito*" (a subtle persistent annoyance). *La chingada* is also an imaginary and undesirable place where, for various reasons, millions of Mexicans recommend other Mexicans go. Foreigners can also be sent to *la chingada*, but it has to be under the precise recommendation of a Mexican. It can scratch, rip, break and hurt both beings and things. When something breaks, we say "se *chingó*." When someone carries out a senseless, unlawful act, we comment "hizo una *chingadera*." *Chingar* is often aggressive (the perpetrator), lo *chingado* (the recipient) is passive. All the derivations are too many to list. Furthermore, additional forms can be created by just playing with the intonation, facial expression, and body language. It's a magic voice, just a slight change in the tone, just a small inflexion, and the meaning changes. It has as many colors and shades as meanings and feelings.

The word's origins and its significance in Mexico

Chingar's roots can be traced back to the Aztec Indians. It is believed that it comes from the Nahuatl words *xinachtli* (vegetable seed) or *xinaxtli* (fermented fruit drink). Author Victoriano Álvarez Salado, in his book "Méjico Peregrino: Surviving Mexicanisms in the North American English," presents various origins of the word *chingar*, stating that several of them probably originated in the American continent. Joan Corominas and José A. Pascual make reference in their dictionary of *"Vocalos Brazileiros"* (Vizconde de Beaupaire-Roban,

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A "MEXICANISM" ON THE MEDIATION TABLE
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Rio de Janeiro, 1889), to the use of the word *xingar,* or *chingar*, in Brazil as a verbal insult.

Meanwhile, in addition to Brazil, Angola is discussed as a place of origin for this word. In Kimbundu, an old tribal language of this East African nation, *kuxinga* means to injure, to attack. Furtheremore, other studies suggest that this word and its derivations came to us from the gipsy culture in Eastern Europe.

Notwithstanding its possible origins, the Mexican word c*hingar* has a profound cultural connotation. It is strongly related to the spark that lit the colonization of the "New World" and the oppression of the Spanish conquerors over the Aztec Empire. Historians tell us that an indigenous woman named *La Malinche* worked as an interpreter between the arriving Spaniards to the coast of Yucatán and Veracruz, and the existing native tribes. (How this woman knew enough Spanish to function as interpreter is an interesting story based on a fascinating theory, but I will not get in to that now.) Hernán Cortez, the conqueror of Mexico, or "La Nueva España," met *La Malinche* on the east coast of Yucatán and took her along his conquering way to Mexico City (then know as Tenoshtitlan), to use her as communicator between the Spaniards and the leaders of the indigenous tribes. Thanks to her, Cortez and his troops had many peaceful encounters instead of battles along the way to Mexico City. He gained support on his endeavors, instead of facing enemies. It would, therefore, be safe to assume that *La Malinche* was the first mediator of the Americas.

It has been said that Cortez got *La Malinche* pregnant, thereby creating the first case of *mestizaje* (a mix of a Spaniard and a native Indian of the Americas). This is often viewed as a symbol of the oppression and the abuse of one invading culture (the white man) raping the other one (the Indian woman). This mix gave birth to a new race and to the history of the Mexican people. This profane violation was called "*chingar*" (literally, to rape, to screw up someone else) and *La Malinche* became "*La Chingada*" or the "raped one," the very first one of so many. From then on, every *mestizo* is seen as some sort of a product of a forced fusion of two cultures, the product of one culture's oppression of another one, something shameful, unwanted, something imposed. And for five centuries, we Mexicans have called ourselves (actually with some strange pride) "Hijos de la *Chingada*" ("sons of the raped one"), the descendents of an undesired colonization.

All the tense anguish that inhabits us is expressed in a phrase that comes to our mouths when rage, joy, or enthusiasm makes us show our Mexican pride: "¡Viva México, hijos de La C*hingada!*" (long live Mexico, sons of La C*hingada*). "A true war cry loaded with a particular electricity, this phrase is a challenge, an affirmation, a shot aiming at an imaginary enemy" says one of the most proficient Mexican writers of the 20th century, Octavio Paz, in his famous work *El Laberinto de la Soledad* (*The Labyrinth of Solitude*). And, he adds: "Who is La *Chingada*? Before anything else, she is a mother. Not flesh and blood, but a mythical figure. La *Chingada* is one of those Mexican representations of maternity. La *Chingada* is the mother who has suffered, realistically or metaphorically. If La *Chingada* is a representation of a raped mother, it is not a forced thing to relate it with the country's conquest, which was also a type of rape, not only historically speaking, but also literally in the bodies of all the Indian women who were raped by the invading Spaniards."

Today, *chingar* seldom refers to anything close to rape, and many of its versions are simply used as adjectives, nouns, etc. Certainly it is not just a curse word with a bad message. It is so versatile that many of its derivatives can indicate nothing but good*: "* Este trabajo nuevo que tengo está muy *chingón"* ("My new job is really good"), or "Está muy *chingona* tu casa" ("Your house is really pretty"), or "Eres un *Chingonazo*" ("You are absolutely great").

The word's use in other countries

There are, in other Latin American countries, and even in Spain, what seem to be direct variations of the word *chingar*, but they have different meanings. In Spain, for example, *chingar* means to drink a lot, while in Colombia it means to get drunk, and *chingarse* to have a disappointment. C*hinga* in Venezuela is a cigarette butt. *Chingana* in Argentina is a party among lower-class people and *chingado* is something that is twisted or uneven, particularly in popular language. C*hinganear* in Peru means to party all night long. *Chinguiar* in Panama is to gamble, *chingue* in Chile is a type of skunk, *chingo* in Costa Rica is used to make reference to an animal with a long tail, and *chinguirito* in Cuba is a sip of a specific alcoholic drink. *Chingolo* is a bird in Bolivia, and in Guatemala and in El Salvador *chingaste* are the drink residues left in a glass. Even in Mexico itself, there is a type of a mescal called *chinguere* that has no connection to c*hingar*.

The word's use in mediation

If *chingar* or one of its derivatives is spoken at the mediation table, the mediator must pay close attention to how it was said and in what context it was used. Parties can mediate for a couple of hours not moving towards any kind of compromise, and all of the sudden this word (or any of its derivations) is finally said by one of the parties as a sign of frustration: "Este vecino, por seis años, me ha estado *chingue y chingue y chingue . . ."* ("My neighbor has been consistently bothering me for six years . . ."), clearly stating that he has reached his level of tolerance and finally cannot take it anymore. If a woman, during a family mediation, states, "Cuando nos casamos, mi esposo me *chingó"* (my husband messed me up when we got married), it is not the same as to say, "Cuando me casé, me *chingué*" (when I got married, I messed up), in the sense of getting locked in to a bad situation, and possibly denoting that there was previous knowledge that things could go wrong if she accepted that marriage proposal. If a mediating party indicates to the other, "Tú me quieres *chingar,"* it would be showing that one is well aware that the other one wants to take advantage of him/her, or that one is wishing the other one bad, regardless of the communication and/or the negotiation they are having at that moment.

In formal settings, such as a conflict resolution, this word generally will not be pronounced casually with a soft meaning, but instead it will be used to make a point. From then on, the process most likely will change, either for good or for bad.

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Even during a smooth negotiation where everything seems to fall right in to place, a very positive agreement is reached, and all parties are happy, this word can suddenly appear dressed up with a tone of celebration: "Esta mediación estuvo muy *chingona,"* indicating the absolute satisfaction of the participants about the mediation session that just ended. Whether in joy or anger, a person using c*hingar* is left with a good feeling, with a sense of satisfaction that his thought was expressed accurately and in just one single word. There is no need to elaborate or follow up with further explanations. *Chingar* can say it all; it's a word that encompasses a very unique range of feelings for Mexicans.

If someone says in all seriousness, particularly in a group setting, "Ya nos llevó la *chingada,*" it would indicate a very bad conflict, something that has gone terribly wrong. Whether there are two people, or a whole nation, facing a situation that will undoubtedly bring serious moral, legal, physical, or psychological consequences, this usage would deliver the strongest message of the word: something bad is about to happen or it just did, and there is no longer a way of fighting it out; it is a lost cause. Sad and desperate situations can bring the thought of "Ya me llevó la *Chingada*," making it clear with this expression that a bad outcome has been accepted. This expression is probably running quite often through the minds of those in litigation.

Personal examples demonstrating varieties of the word's use

A few years ago, during our family's usual annual trip to visit our extended family in Mexico City, I bought a navy blue t-shirt in the Coyoacán market for my now eleven-year-old son, Alonso. The t-shirt is plain, except for the clear white bold letters across the front that read: "Favor De No Estar *Chingando*", which translates into the simple phrase: "Please leave me alone." Nothing is really special about it, except that the phrase uses *chingar* in an obviously Mexican way. Written on a t-shirt and worn by a little boy, it produces many smiles from Mexicans who read it as they walk by. But more than the funny responses, it has been interesting to observe my son, who, being totally bilingual and bicultural, is not a stranger to the word. Therefore, at his young age, he has some well-defined feelings about the writing on his t-shirt when he wears it. He may put it on without thinking much of it, except if it is a school day or if he is going to see his paternal Mexican grandparents. He senses that the message on his chest is kind of funny, but he also senses that it can be puzzling to a teacher of very conservative heritage and Mexican ancestry who may understand Spanish. Although my son has visited Mexico many times, he has never lived there; however he understands the weight of the word c*hingando* and some mild repercussions that its use could have. When I use any variation of the verb *chingar* in front of my two kids, and I probably do almost every day without even thinking (the amusing versions of it that is), I see this half-smile drawn in their little faces as they clearly understand that I use those words to put emphasis on a concept, to joke around, or just as a simple comment, but they also choose not to use it themselves. Not yet anyway.

Many years ago, when I was part of the diplomatic delegation at the Consulate General of Mexico in Austin, Texas, I remember having used the word *chingar* a couple of times as a simple but reliable test when trying to find out if a person, claiming to be a Mexican national, was really one. From time to time, a national of Guatemala would come to the Consulate stating that he had lost all of his documentation and that he wanted to obtain a Consular ID in order to enter Mexico (something very convenient for citizens of the Central American countries to have, in order to avoid paying the high cost of transit visas and import taxes when traveling over land through Mexico). In the past, Mexican folks who had no Mexican documents with them while living in the U.S., could obtain these Consular ID cards by convincing the Consulate staff that indeed they were Mexican nationals since, of course, most undocumented people, by definition, do not carry documents. Asking these individuals to recite the Mexican National Anthem was one way of proving their national origin to the diplomatic body, except that Guatemalans quickly learned the trick and they could pass the test since there is hardly any distinction between their accent and that of a Mexican (all other nationals of Central American countries simply can't hide their national accents when comparing it to a Mexican accent). So the ultimate test I had to use on more than one occasion was to ask that person to conjugate the verb *chingar* in all its forms, in first, second, and third person. Even if someone would expect this grammatical quiz and prepare for it, he or she could eventually be caught with so many existing variations to the word, and with so many different meanings to each of the variations depending on the tone of voice, the gestures, and if it is being used for positive or negative communication, as an insult or as a praise. In order to recite and master all the possible forms and applications without hesitation of this national trademark, one has to have a significant Mexican upbringing and therefore a natural connection to that vocabulary. If a non-Mexican would ever pass this test, he would be, without a doubt, *muy chingón*!

**** Bernardo Fernandez Christlieb** is a native of Mexico City, Mexico. He attended Ouachita University in Arkadelphia, Arkansas, where he obtained his B.A. degree majoring in Sociology, Psychology, and Spanish. Upon graduation, he felt the urge to see the world. With little money and a big backpack, he hit the road, hitchhiking thousands of miles through North America, Western Europe, North Africa, the Middle East, and Asia. He worked his way from country to country, laboring in a wide variety of jobs from commercial fishing in Alaska to assisting the poorest of the poor in Calcutta under the guidance of Mother Teresa. Bernardo has performed a variety of temporary jobs in faraway lands with the purpose of learning about the peoples of the world and merging as closely as possible with the cultures at hand. Visiting a total of sixty countries over many years, he has spent a significant amount of time in some of them. He has worked for fifteen years in Austin, Texas, providing social services to the most needy through various governmental and nonprofit organizations. He is a graduate student on his last semester of the Advanced Certificate in Conflict Resolution and Mediation, with emphasis in Intercultural & Bilingual Mediation at St Edward's University.*

ARBITRATION IN SLOVAKIA

By Katarína Chovancová, Ph.D.*

1. Introduction

"And time, that old common arbitrator,
Will one day end it."

[Shakespeare, Troilus & Cressida, IV, V, 225]

With this poetic opening statement, it is possible to begin the study conducted in the area of arbitration developments in Slovakia, the small, young democratic state located in the very heart of Central Europe. However, it is necessary to point out that Slovakia is not so young as it seems at first sight. During the socialist era, both Slovakia and the Czech Republic sailed under the united flag of "Czechoslovakia" for not less than 40 years. Arbitration during those times was possible only before the Permanent Court of Arbitration attached to the Czechoslovak Chamber of Commerce and Industry, which covered the whole territory of socialist Czechoslovakia.[1] In those times, this was a very important arbitral institution, singled out for deciding international commercial disputes between the socialist "East" and the capitalist "West." As it was seated in Prague, Prague automatically arose as a main centre of international commercial arbitration during that era.[2]

After the fall of socialism in Eastern Europe in 1989, the previous CSSR became the Czech-Slovak Federative Republic. This artificial federation did not last long. A quiet and peaceful separation came about in 1993, and two separate independent states—the Czech Republic and the Slovak Republic—were finally formed. Both states entered the European Union (EU) on May 1, 2004. Since entering the EU, both states have quickly established themselves as modern, progressive European countries.

This article does not aspire to provide the reader with a complete analysis of Slovak arbitration law. The author felt no desire to confound the reader with the painstaking recitation of every section of the Slovak Act on Arbitration. Nor did the author desire to throw at the reader a deeply inaccessible insight into the specifics of the relevant provisions of the Slovak Code of Civil Procedure, though connected to arbitral procedures conducted in Slovakia. Accordingly, this article will focus only on the main provisions of the new Slovak arbitration law.

2. The Legal Background for Arbitration in Slovakia

Slovakia adopted its current arbitral legal regulation in 2002. The Slovak arbitration law— Act No.244/2002 on Arbitral Proceedings[3] (hereinafter referred to as the "Act")—is generally considered a modern cornerstone of national arbitration in Slovakia. It applies to both domestic and international arbitral proceedings when the place of arbitration is located in Slovakia (section 1). The Act, strictly following the 1985 UNCITRAL Model Law, applies both to ad hoc and institutional arbitration.

Unlike in international commercial matters, arbitration of domestic business relationships is infrequent in Slovakia. As a matter of fact, it is still less popular and not as widely used as in the Czech Republic. This situation simply cannot be described with words other than "disappointing" or "pitiful." Luckily, the parochial approach to domestic arbitration does not extend to the area of international commercial arbitration. Use of international arbitration has increased recently by the total acceptance of international arbitration in the entire Slovak business community, together with an ongoing increase of foreign investment.

Available figures suggest that international commercial arbitration is mostly practiced in a few foreign legal firms, while local legal firms still prefer litigation. The most probable reasons for preferring court litigation to the arbitral procedure may be explained as a consequence of society's current approach toward arbitration on the whole. Quite apart from these, another reason parties only occasionally turn to the arbitration panel may be the real interest of only one party (usually the claimant) in quick resolution of the dispute, as the other party (usually the defendant) plays the role of a saboteur in the arbitration game, always causing delays. The aforementioned observation has been confirmed also by Škrinár[4]:"*The level of the legal consciousness in Slovakia still has not reached the point at which both parties make all the endeavours to solve the dispute quickly."* However, the term "legal consciousness" might as well be replaced with the unflattering term, "the legal intelligence." Due to this lack of cognitive intelligence the consideration of arbitration as a "lesser litigation" is still alive in Slovakia.

The oldest and the most important provider of institutional arbitration in Slovakia is the Court of Arbitration of the Slovak Chamber of Commerce and Industry (hereinafter referred to as the "Court"), established in 1992. The Court is regarded as a successor of the Court of Arbitration of the previous Czechoslovak Chamber of Commerce and Industry.[5] After the Court was established in 1992, its arbitral activities were focused only on deciding disputes arising in international commerce and trade. In 1994, the substantive arbitration law valid at that time[6] was amended, and the Court was enabled to decide disputes arising out of national commercial relationships. Nevertheless, the real deciding power of the Court was quite limited. The heavily criticized 1994 Act was abolished in 2002 and replaced by the current Act on Arbitral Proceedings. The Court of Arbitration administers arbitral proceedings according to its Statute and Rules of Procedure. The Court offers both ordinary and expedited arbitration, but the parties have to agree to pay an increased registration fee depending on the speed of the final decision's issuance.

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3. The New Slovak Arbitration Law – Basic Analysis

3.1 Arbitration Agreement

A. Matters Subject to Arbitration

An arbitration agreement may be applicable to any disputes arising from national or international commercial or civil legal relationships unless arbitration is forbidden or excluded by law.[7] Expansive interpretations of arbitrability have determined that arbitration may be used for the settlement of disputes both in commercial and civil matters, which in court proceedings could be subject to judicial resolution. Negative interpretations of arbitrability have determined that the Act excluded from arbitration those disputes concerning ownership rights and other rights in rem to immovable property, disputes concerning personal status or related to compulsory enforcement, and disputes arising in the course of bankruptcy or composition proceedings. It is generally thought that arbitrability has been defined in the Act in a progressive way, without any unreasonable restriction of arbitrable disputes to "property disputes" as it the case in the Czech Republic.[8]

B. Effect on Proceedings before State Courts; Role of State Courts in Arbitral Proceedings

Three cardinal principles were laid down by the Act with regard to the Slovak courts' interference in arbitral procedures. First, in cases of pending litigation, the parties are still able to agree (either before the court or outside it) in writing on solving their dispute in arbitration (section 2 of the Act). Second, a court may grant an interim injunction if asked to do so by either party before the arbitration has started. Third, the court is also empowered with execution of evidence if the arbitral panel has proved to be unable to do so. Moreover, the right to grant an injunction as well as to execute the proofs may also be exercised by the court when the place of arbitration has not yet been determined or it has not been chosen in Slovakia (section 2 of the Act). Practitioners generally think that the possible interference by state courts in the arbitral proceedings may cause a negative "slow-down effect" of the whole arbitral procedure.[9] The inability of arbitrating parties to exclude the Slovak court's authority by their agreement is also often considered among the practitioners an obstacle in arbitral proceedings as well as the "half" right of the arbitral panel to order interim measures (upon a party's request), but simultaneously not to order their execution, thus being forced to ask a court for "help."

C. Writing Requirement

In order to be valid, an arbitration agreement must be in written form and signed by all parties. This requirement must be treated with caution, because the written form is maintained also through exchange of letters, facsimiles or other means of telecommunication[10] provided they include a record of the arbitration agreement's content and identification of its parties. Parties may also conclude their arbitration agreement later by declaring their submission to the arbitral panel's jurisdiction in front of an arbitrator, but only until the commencement of arbitral proceedings. The separability of the arbitral clause from the contract in which it is included was fully accepted (section 5 of the Act).

3.2 Arbitral Panel

A. Composition[11]

Virtually every individual of full age and having full legal capacity may become an arbitrator. The prospective arbitrator must also be considered to be an impeccable person and their serving as the arbitrator has to comply with the special legal act.[12] The arbitrator is also bound to keep all the information he acquired during the arbitral proceedings strictly confidential, even after his function of arbitrator is terminated, let alone doing so in the course of its execution.[13] Under the Act, no one is obliged to accept the function of arbitrator. On the other hand, once it has been accepted, the arbitrator is generally expected to fulfill his duties in arbitral proceedings to the fullest. Logically—and this is something that still waits for full acceptance in Slovak society—the function of arbitrator has to be perceived as a matter of honour and not just another working duty.

B. Replacement of Arbitrator

There are five reasons, the occurrence of which will result in replacing the arbitrator (section 10 of the Act). Naturally, the arbitrator's death or mental incapacity are the strongest grounds on which the arbitrator must be replaced. Actually, the Act doesn't use the term "mental incapacity," but prefers a more detailed term, "losing or restricting the legal capacity to act as an arbitrator." Unlike the aforementioned reasons, the arbitrator's resignation or revocation as well as his replacement by the decision of a court or a chosen person are regulated in more descriptive ways in the Act in order to avoid later difficulties that might arise with regard to whether the arbitrator really has to be replaced (and by whom).[14]

3.3 Arbitral Proceedings

A. Commencement and Conduct of Proceedings

Unless the parties agree otherwise, the case will be considered pending and the arbitration is commenced as soon as the statement of claim has been received by the defendant (in case the arbitrators have not been appointed yet) or by the sole arbitrator or by the presiding arbitrator (in case of a three-member panel). Parties may influence the procedural rules early in their arbitration agreement.[15] While the notification of the prospective claimant plays no role in the Slovak arbitration because the arbitration simply starts by receiving the claimant's statement of claim by persons stipulated in the Act, there's also no need for setting a special time limit by the arbitral panel, as in Finland,[16] for the claimant to file the statement of claim. Of course, this rule doesn't apply to filing the statement of defense by the defendant.

The statement of claim has to be followed by enclosures which include the arbitration agreement, the list of evidence and also the "declaration of arbitrator," which is the consent of the respective arbitrator with their nomination (section 18 of the Act). Secondly—and this is the similarity mentioned above—

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the arbitral panel may safeguard against the parties' never-ending amendments of their statements by simply not allowing an unsuitable modification, considering the possible delay in arbitral proceedings.

The defendant may use a counterclaim within the time limit given by the Act, if filing the concrete counterclaim concerns the dispute within the scope of arbitration agreement (section 20 of the Act). The Act fully accepted the competence-competence rule by allowing the arbitral panel to decide on its own jurisdiction. The trouble is that by the time the panel's order confirming its jurisdiction has been issued, the objecting party will have been able to ask the court to decide its objection again and there's no possibility to appeal against the court's decision. Consequently, although the panel may proceed continuously with the arbitral proceedings while the court is deciding the objection and even to issue an award, a problem may occur later if the award is set aside due to the court ruling against the panel's jurisdiction (section 21 of the Act). In the course of proceedings, the arbitral panel may also ask for an expert opinion and appoint the expert. Parties are not allowed to call in their own experts. The arbitral panel will execute only the proofs proposed by parties. However, it does not play a very active role**,** not being entitled to ask parties to submit other evidence the panel may consider important (section 27 of the Act).

B. End of Arbitral Proceedings

The arbitral panel may end the proceedings by termination if the parties settle their dispute during the proceedings.[17] The panel will also terminate the arbitral proceedings if the claimant did not submit a properly prepared statement of claim or the statement has not been completed properly within the time limit given in the Act. The same decision will be rendered if the claimant (or both parties, according to the panel's decision) doesn't pay an advance payment on expected costs of proceedings within a period of time prescribed by the arbitral panel.

Pursuant to section 31 of the Act, the arbitral panel will decide the dispute based on the applicable law agreed by the parties. If the parties didn't agree on the substantive applicable law, the panel shall decide in accordance with the law determined by the Slovak rules of conflicts of law.[18] What is interesting about issuing the award according to the Act is that in reality the arbitral panel issues not the different types of "awards" as is the usual practice in international arbitration (e.g., arbitral award on the merits, interim awards, additional awards), but renders only the arbitral award on the merits and the so called "arbitral decree," in which various procedural matters of the arbitral proceedings are decided. Unlike in international arbitration, the award may be reviewed by other arbitrators upon a party's request made within the time limit set by the Act.[19]

3.4 Remedies and Execution

The arbitral award is invalid if it is against the Slovak public order or if it has not been issued in writing and signed by a majority of the arbitrators. The Act also expressly prohibits the arbitral panel from adjudicating anything infringing the law or good manners or imposing an impossible obligation. The only formal remedy against the arbitral award is an application to the ordinary court to set aside the award within thirty days of its receipt. There is no automatic suspension of the award's effectiveness, but the award stays effective until the state court renders its decision on the aforementioned application. Section 43, subsection 2 of the Act empowers the court to refer the case back to the new panel for the renewed arbitral proceedings. An effective arbitral award has to be declared executable by the ordinary court (section 44 of the Act) upon submitting the corresponding application by the requesting party with the original or a certified copy of the arbitral award in enclosure.[20] The Act gives the court the power to suspend the enforceability of the arbitral award on its own initiative. Practitioners generally regard this power as a considerable disadvantage of arbitral proceedings, notwithstanding the fact that the court is able to do so only in cases in which it finds the insufficiencies of arbitral award prescribed by the Act. In all other circumstances, the court is capable of ordering the suspension of the arbitral award's enforcement and execution only upon a request of the party against which it is invoked.

3.5 Enforcement of Arbitral Awards

The arbitral award becomes valid either on the day when it is delivered to the parties (thus becoming also enforceable by the courts) or after fulfilling the specific conditions included in section 37 (Review of the Award). A legally valid arbitral award has the same effect as the final and binding judgement of the court, including the same *res iudicata* effect. Recognition and enforcement of the arbitral award has been regulated in a separate part of the Act (sections 44–50). The procedures for recognizing and enforcing domestic and foreign awards are neither similar, nor identical. According to section 44 of the Act, the legally valid domestic arbitral award will be enforceable in Slovakia in accordance with the relevant rules of law[21] after the period of time allowed for fulfilling the obligation has expired.

The court competent to enforce the domestic award may suspend the enforcement procedure upon the application of the party against the enforcement of award (e.g., the party claims that the award was rendered in the non arbitrable dispute). Moreover, the court will also suspend the enforcement procedure due to the *res iudicata* effect or because the award binds the party with obligations which are impossible, prohibited by the law or contra *boni mores* (section 45, subsection 1, letter c/ of the Act). In order to allow the award to be enforced at all, it is possible to file an appeal against the aforementioned court's suspension.[22]

Introducing the subject of recognition and enforcement of foreign arbitral awards in Slovakia, the first thing to mention is the admission of Slovakia as a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the "New York Convention"). Slovakia acceded to the New York Convention on January 1 1993 and subsequently implemented it.

The enforcement of foreign awards has been regulated in sections 46–50 of the Act. Section 46 stresses the definition of the foreign arbitral award. The arbitral award is considered to be foreign when it was rendered as a decision on the merits outside the Slovak territory. Secondly, the recognition and enforcement of a "foreign" award, qualified under the Act, will be possible only through the procedure incorporated in sections 47-50 of the Act. As stated in section 46, subsection 2 of the Act, no other law with other relevant possible enforcement procedures exists in Slovakia concerning the recognition and enforcement of foreign awards.

The party seeking enforcement of a foreign award in Slovakia must comply with the formal procedure, noted in section 47 of the Act. This procedure comprises proposing the written appli-

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cation, with the original of the award and the arbitration agreement (or its certified copy). However, the enforceability of the foreign arbitral award may be postponed according to section 48 of the Act. Accordingly, if the application for setting aside the foreign award has been made abroad, the enforcement court may postpone enforcing the award upon the application of the party that requested the award be set aside. Consequently, the whole process of enforcement will be slowed down.

The fact that the act of recognition of the foreign arbitral award itself does not need a separate decision may be viewed as a positive one. This recognition has the form of court's consideration that is similar to treatment and consideration of a domestic arbitral award. Therefore, according to section 49, subsection 2 of the Act, the foreign arbitral award will be enforced in the same way as the domestic arbitral award. The grounds for refusal of the recognition and enforcement of the award are very similar to the grounds for refusal included in Article V of the New York Convention. Similarly, the parties have the right to appeal against the decision, denying the recognition and enforcement of the foreign arbitral award.[23]

Finalizing the analysis of recognition and enforcement of foreign arbitral awards subjected to the Slovak legal order, one more specific feature of the Act should have not been omitted. The aforementioned feature concerns foreign interim measures, issued in support of arbitral procedures. The Act neither expressly provides for the recognition and enforcement of foreign interim measures, nor says anything at all about the issue. Moreover, as the valid PILA[24] in Slovakia determines, foreign rulings which are not decisions on the merits cannot be enforced. Although this rule of law applies to foreign judgements, it would hardly be reasonable to assume its sudden inapplicability to foreign interim measures, issued by either a foreign court or a private arbitral panel in favor of arbitration.

4. Conclusions

Slovakia adopted a newly developed arbitration system, and it is possible to predict that the frequency of its use may considerably increase in the future in both international and national disputes. On the other hand, it would be too easy to claim that the process of arbitration law reforms in Slovakia is over. Consequently, the constant search for possible improvement in the area of arbitration in Slovakia is driven by pure practical reasons: it is still very important to improve the overall level of knowledge of arbitration and its advantages, not just among the practitioners and businessmen, but among ordinary citizens. To sum up, there are two important ideas regarding Slovak arbitration: (1) both national and international arbitration are on the increase in Slovakia, but (2) it will take some time and much effort to melt the conservatism of society and to provide Slovak commerce with reliable and speedy arbitration procedures.

* ***Katarína Chovancová**, PhD., is an Assistant Professor of Commercial Law at the Institute of Private Law of the Bratislava School of Law, Slovak Republic.*

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ENDNOTES

[1] BĚLOHLÁVEK, A., Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů, pXV.

[2] HORVATH, E., Arbitration in Central and Eastern Europe, p.5.

[3] Act No.244/2002 Coll. on Arbitral Proceedings as amended by Act. No 521/2005 Coll.

[4] ŠKRINÁR,A., Actual issues in arbitration.

[5] After the Czecho-Slovak Federal Republic split up, the Court became the successor of the previous united Czechoslovak Court of Arbitration in the territory of Slovakia.

[6] Act No.98/1963 Coll. On arbitration in international commerce.

[7] Except for the Act, the legal framework of arbitration also consists of Civil Procedure Code No.99/1963 Coll. as amended later /CPC/; the special legislation /Act No. 510/2002 on Payment Systems as amended by Act No.747/2004 Coll.; by-laws, arbitration rules and the rules of the permanent arbitration courts; UNCITRAL Model Law as well as New York Convention /Regulation No.74/1959 Slg./ and European Convention on International Commercial Arbitration /Regulation No.176/1964 Slg./.

[8] Section 1 of Czech Act No.216/1994 Coll. on Arbitral Proceedings and Enforcement of Arbitral Awards.

[9] State courts are also entitled, e.g., to nominate and subsequently appoint arbitrators in specific situations (Part III., Article 8 of the Act), to order and also execute preliminary measures as well as to set aside the already issued arbitral award (Part V., Articles 27 of the Act, Part VII., Article 40 of the Act).

[10] Art.3 of Act No. 195/2000 Coll., on telecommunications.

[11] In accordance with the Act, a case submitted to arbitration will be decided either by sole arbitrator or by several arbitrators (the number of arbitrators must be odd). Unless otherwise agreed by parties, each party shall appoint one arbitrator. The two nominees in turn agree on the chairman.

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ADMINISTRATION OF JUSTICE AND EFFECTIVE MODELS IN URUGUAY

By Dra. Rosana Hernandez*

"The purpose of human development is to expand people's options. In principle, these options can be infinite and can change with time. The objective of human development is to create the conditions in which people can enjoy long, healthy and creative lives." (Mahbub Ul Haq, Author. Phrase quoted in monographic work, CALEN library publishers, Montevideo, Uruguay, 2003.)

Introduction

This article describes the justice model organized within the Judicial Branch of the Republic of Uruguay.

Studies of the justice systems of other countries were compiled and adapted to Uruguay. This work was supported by the International Development Bank's program for strengthening equity. The process began in 1992 with a module for the improvement of the efficient administration of the judicial system. This program included a component for Alternative Methods of Conflict Resolution.

In order to provide objective skills training to the first teachers of mediation, practical training and demonstrations were carried out in Boston and Harvard Law Schools and during visits to courts and mediation organizations in Washington, Boston, and New York, among others.

In 1995, an agreement of inter-institutional cooperation was reached between the Judicial Branch and the Department of Public Health (Executive Branch). Mediation Centers were formed in areas of the department of Montevideo with demographic compositions and socio-cultural characteristics most in need of direct access to these services.

Background

Justice is obtained by strengthening the legal system and its processes, while social peace is obtained by providing alternative dispute resolution methods like mediation and conciliation. If the goal is to instill or revive community values, it can be achieved by a process of law that pursues justice. On the other hand, if the goal is social harmony, it can be achieved through mediation and the use of mediators as facilitators of communication.

Mediation can help increase the populace's quality of life by facilitating a reduction of conflict and an increase in understanding among its members. The harmony obtained through mediation, as well as other problem-solving, non-adversarial systems, allows justice between two or more parties and diminishes belligerence in society.

In Uruguay, mediation is already part of the law. It is one more way of doing justice that is in the hands of the parties. The agreements achieved in Uruguayan mediation centers dissolve or diminish disputes in Montevideo, increase social unity, and help avoid trial and its emotional consequences.

Humans have common needs that range from the most basic and primitive to the more spiritual and less tangible: food, clothes, safety, love, respect, affection, prestige, reputation, and since "nothing happens in a vacuum," there also exist economic, environmental, managerial and political factors that provide one more incentive and the biggest benefit. Mediation is a process that often results in outcomes that satisfy those needs legitimately. It ennobles self-determination by generating possibilities that open the door for the parties' negotiation.

Voluntarily and through agreement, the process of mediation ends litigation, in a way that is now considered a normal alternative to a judicial decree. Mediation also reaffirms social peace as opposed to the lack of understanding among people.

For those reasons, the five mediation centers in Montevideo, though not under the jurisdiction of the judicial Branch, are still within its organizational "flow-chart" with the purpose of preventing the escalation of conflict from developing within its zones of influence. The basic purpose of these centers is to bring participants together to the mediation so that they can reach agreements and consequently avoid or diminish their need to go to an adversarial process.

By the results obtained in Uruguay, with its population of three million, it is believed that mediation is now a reliable alternative to the administration of justice.

Development

Our national mediation system operates "outside the box" of adjudication. In adjudication a third party decides who is right and how to solve the problem. Instead in mediation, the parties themselves, assisted by a mediator, negotiate and find an end to their dispute.

The different perspectives that can end a conflict also result in the ultimate objective of building a growing and sustainable peace through mediation. Since 1992, this consciousness-raising work has brought the gradual idea that conflict exists naturally, that it must be managed effectively and that there are mechanisms that allow for a peaceful solution. There are the added benefits of reducing the time, emotional and economic costs involved, as well as the resulting pacifying effects of the process.

There is also the compounded effect of the decrease in social conflict and the improvement of the quality of life on the citizens who use the system and on the Montevidean community as a whole. These effective and influential results can be felt

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throughout the system starting with the Judicial Branch's Mediation Coordinator, at the helm, all the way down to the centers with their experience and quality of work.

National statistics

The index of human development (IHD) is a synthetic measurement of the achievements of a society in terms of human development. It attempts to quantify a country's achievements in three fundamental dimensions: attainment of a long and healthy life (health dimension), acquisition of useful knowledge (education dimension) and acquisition of the necessary resources to enjoy a proper standard of living (standard of living/access to resources). In the world scale, Uruguay is in 46th place - the upper intermediate level. The Mediation Centers of the Judicial Branch are a part of an attempt to improve the quality of life.

With an IHD value of .777 in 2002, Latin America and the Caribbean fell into the average category of human development. Of Latin-American countries, six fell into the high category. These were Argentina, Uruguay, Costa Rica, Chile, Cuba and Mexico. Uruguay's favorable position in the region is surpassed only by Argentina, Chile and Costa Rica. In general terms, this order in the region has remained stable throughout the decade, Uruguay remaining in the higher category even after a decline in 2002.

Mediation Centers and Access to Justice

Our Republic has extended lines of access to justice to the more vulnerable sectors of our population, such as children, adolescents, women, and the poor, among others.

Conflicts handled by the National Judicial Branch's mediation centers, exclude domestic violence cases that have reached the hearing stage. Nevertheless, the population receives legal advice from lawyers and social advice from social workers in all areas that may arise, including domestic violence, prior to reaching the appropriate public or private institutions if they are not mediated.

The five centers work within maternal - infantile health institutions belonging to the Department of Public Health, Executive Branch, in the department of Montevideo. Such situation facilitates outreach, especially with women who request advice regarding family matters. One must not forget that, at present, most homes in Uruguay are single-parent homes with female heads of households and with a revenue below minimal salary or U.S. $271.

Subject-matter of Consultations
The following statistics show the percentage of mediations over approximately 1.3 years.

Year 2006
Corresponding to 5 Centers
Community 33 %, Family 39%, Civil 19%, Workplace & Other 3 %,
Domestic violence 3 %, Juveniles 3 %
Agreements: 88,6%
PEOPLE SERVED: 4.009

January-April 2007
Corresponding to 5 Centers
Community 377 %, Family 31%, Civil 15%, Workplace & other 2 %
Domestic violence 1 %, Juveniles 4%
Agreements: 90,7%
PEOPLE SERVED: 1.480 (approximated)

(Source: www.poderjudicial.gub.uy administrative sector)

The statistics confirm that the most-common issues at our centers are family and community, the areas involving most daily personal interrelationships.

The national community has experienced important changes in its population composition, economy and culture at the level of values. Women are seeking employment outside the home, resulting in a great number of single-parent, female-led households. Simultaneously, due to low birth rates, the average age of the population has increased.

By the 1990s, approximately half the female population entered the workforce. This contributed financially to the family nucleus, modified traditional roles within the family, and provoked an impression of separation among its members. This, in turn, resulted in unattended minors, difficult coexistence between family members, low-paying multi-employment, lack of understanding of the needs of individuals in the home, and increasing family conflict.

With regard to community mediation, the program encompasses all of Montevideo, especially areas affected by the increase of adverse possession of land by low-income settlers or "squatters." Hamlets are being constructed in these areas with very basic services, generating problems of coexistence. Channeled by the mediation centers, complicated issues in need of responses are processed so that conflict does not escalate or harden within the physical or emotional horizon of the people involved.

These matters often do not have legal recourse; therefore mediation becomes an effective alternative.

For the above reasons, family and community mediations are the Centers' areas of specialization. Law # 17,823 of 9/24/04 (approving the Child & Adolescent Code) allows the suspension of court proceedings in order for the judge to send a victim and a juvenile offender (under 18 years of age) to mediation. This referral to mediation helps the parties avoid the rigidity of court and encourages them to move from conflict to more cooperative scenarios and to handle problems with reciprocity and damage repair. This system is presently being coordinated and has not yet been evaluated.

Style of Mediation

The style of mediation in Uruguay is reflective of a community with changing values. Uruguayan mediation is performed by interdisciplinary teams, generally a lawyer or law clerk with a social worker or psychologist. There are two mediators for each of the five mediation centers. The centers are located in diverse, poor neighborhoods that are largely populated by those who lack easy access to justice.

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Co-mediation appears as an additional aspect that enriches communication. The professional interdisciplinary approach presents itself as a cardinal tool for a better mediation.

The centers are established in response to the needs of low-income individuals with little access to the courts. Therefore, in order to facilitate access to these people, mediation centers are decentralized from the principal axis of Montevideo. The strategies used by mediators respond to the parties' demand based on different models: such as contracts, property boundaries, land possession, small debts, and neighborhood problems in general. The therapeutic model is also used which, without thwarting the emotional experiences of the parties, analyzes problems of neighborhood and family relations.

Social Impact of Mediation Services – Assessment

The social impact of mediation can be seen in a population that clearly recognizes the way to seek justice. This justice formerly was obtained through the warnings of neighbors that would often encourage spontaneous action or through the penal system and social networks that would encourage use of the police or the courts.

With the passing of time, we can succeed in sensitizing a large part of the community to believe that conflicts can be solved with dialogue. Individuals are empowered to make their own decisions. The quality of life of the citizens can improve systematically and progressively, ultimately creating a healthier society.

Progressively there are more and more examples in our society that show the reconciliation of differences between individuals and the clarification of their problems. This is done from a multidisciplinary approach that integrates the different points of views within our nation.

These actions are helping generate changes in behavior patterns resulting in the more frequent use of mediation, as well as greater personal participation in the search for solutions and a greater satisfaction in the justice system. This is turn, provides effective interventions by the parties themselves that reduce the system of violence. Early intervention and the self-generated resolution processes outdo the work done in trial court, reduce costs and build the capacity to manage conflict.

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* ***Dra. Rosana Hernández*** *is a mediator in Montevideo, Uruguay. Josefina M. Rendón translated her article from Spanish to English.*

We are all born with wonderful gifts. We use these gifts to express ourselves, to amuse, to strengthen, and to communicate. We begin as children to explore and develop our talents, often unaware that we are unique, that not everyone can do what we're doing!

Lynn Johnston,
Lynn on Idea
Canadian cartoonist (1947 -)

REFLECTIONS FROM THE EDGE

THE BOOKS THAT ARTICULATE THE MAGIC OF MEDIATION

By Kay Elkins-Elliott*

(Note from the Chair of the Newsletter Editorial Board: This article continues a series entitled "Reflections from the Edge," written by Kay Elkins-Elliott and Frank W. Elliott. In this series, Kay and Frank review the latest research and literature in the interdisciplinary field of dispute resolution, and they explore possible applications of the research and literature to everyday practice.)

In another part of this newsletter is my review of *The Power of a Positive No.* Writing it gave me the idea that most of what we know about being mediators comes from a handful of thoughtful and diligent scholars. When I am not mediating, I am a law professor, coach, and trainer. These writers are indispensable to me because I teach students to mediate by first referring them to the body of scholarly research that is only a few decades old.

It must have been difficult to teach mediation, or for that matter negotiation, before that research was done. When I went to law school in the 1960s, no courses on negotiation or mediation existed. Lawyers were negotiating every day, of course, but it was mostly of the "haggle, struggle, name and blame" variety. According to the Online Community Library Center's Worldcat database, by 1976 (the year of the Pound Conference), 324 books about negotiation and 501 books about mediation had been published. Since 1976, 8,889 books have been published about negotiation, and 6,324 have been published on mediation. The growth of information about negotiation and mediation has been phenomenal.

Now we often take for granted the lexicon for what we do as mediators. We throw the terms around carelessly as if they are part of ordinary usage: BATNA, reservation point, non-adversarial communication, creating and maximizing value, going to the balcony, external standards, self-help alternatives, risk preference, and collaborative problem solving. That is our strange taxonomy.

During the holiday season, I decided to give thanks for the hard work done by a few conflict resolution specialists. For many of you, this article is a reminder of what you already know. For some of you, the magic you do is more intuitive than learned from books. What scholars and researchers give to all of us, however, is a foundation for that magic. They are able to articulate, even substantiate, that what we do works for a reason. It is good to be reminded that though we have become enamored of our process, new research and writing is done constantly. In the last few weeks, at four different ADR seminars, I have become aware of new approaches that, hopefully, will improve my technique as well as my teaching. There is even a well-funded neurobiology project that may someday give mediators the cognitive science explanation for what we do and for how to do it better!

If any of my favorites, listed below in no particular order of preference, resonate for you, maybe you will choose to give yourself a book for a belated Christmas present. Consider this my New Year's present to you. In the spirit of the reciprocity norm, please help me by sending me an e-mail (k4mede8@swbell.net) about your favorites and how you incorporate the insights you gained from those books or articles. **HAPPY NEW YEAR!**

In the beginning, there was *GETTING TO YES.* As you know, this is the first book on integrative bargaining that reached a wide audience. What you may not know is that it was originally written for mediators, not for negotiators. Since there were no mediators to speak of in the early 1980s, it was repurposed as a book for negotiators. This seminal, short, easy-to-read book is sold all over the world (in many languages) and is still used as the textbook for many negotiation and mediation courses in business and law schools around the country. It is often referred to as the bible of integrative bargaining. The straightforward style is deceptively simple. I have had law students derisively say, "But this is too easy to be a text book!" My reply is usually something like this: "OK, if it is so easy, show me how you negotiate this way." The concepts are easy to understand at the cognitive level, perhaps, but the techniques are not easy to use. Negotiation and mediation are not really intuitive. Bargaining or haggling, marketplace-style is part of being human; according to anthropologists, we are "hard-wired" for it! Creating value through uncovering interests, brainstorming options, and using special communication skills, however, must be learned and practiced. If it were as simple as just reading a book, frankly I don't think any of us would be able to earn a living as mediators. Disputants would just read the book, use the skills, and probably work out their own solutions. As we know, that is not what happens when people are in conflict.

The intellectual capital of the book can be summarized: (1) plan your negotiation by determining your alternatives to getting a deal with the other party, then improve the alternatives and choose the best alternative (your BATNA); (2) decide whether you prefer your BATNA or a successful outcome to this negotiation/mediation and give your NO a value; (3) research applicable, objective, external standards that can be used

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as a sword or a shield to find fair outcomes; (4) list your underlying motivations (your concerns, hopes, expectations, attitudes, perceptions, beliefs, feelings, and values) and those of the other party; (5) create possible solutions (options) that will meet your needs and those of the other side, both before the mediation and during it; (6) separate the people issues (feelings, communication patterns, perceptions, cultural differences) from the substantive issues (the subject of the dispute) and be soft on the people while remaining tough on the problem; (7) use a framework agreement to work toward closure; and finally (8) strive to improve the working relationship with the other side as you remain focused on getting a mutually beneficial solution.

Getting to Yes, according to William Ury (one of the three authors—Roger Fisher and Bruce Patton are the other two) was written as an antidote to the adversarial negotiation that was prevalent at the time. It was soon followed by *Getting Past No,* Ury's explication of the problem of getting the other side to say yes. If *Getting to Yes* was how to do the negotiation dance, then *Getting Past No*, was how to convince the other side to dance. Some of the familiar and useful concepts in that treatise include (1) Going to the Balcony—that is, detaching emotionally from the conflict and seeing it in a calmer, more global way—just as mediators do, (2) Stepping to the Side of your opponent—a role-reversal or at least empathic approach, and (3) Building a Golden Bridge of Communication—changing the communication style from asserting your position to actively listening and reframing *their* position before searching for mutual benefit.

The last of the trilogy, according to Ury, is the *Power of a Positive No,* using a three-step process to go from saying Yes to your own interests, No to the last proposal, and identifying what proposal you would say Yes to. That method is summarized in my book review elsewhere in this newsletter.

The earliest, but perhaps less well known, seminal work on **negotiation** is the wonderful book by Howard Raiffa, *The Art and Science of Negotiation.* Because he teaches in a business school and has a foundation in math and science, Raiffa approaches settlement science in a different way than Fisher and Patton (law professors) and Ury (cultural anthropologist). The most useful parts for me are the completely rational and mathematical proofs that show why collaborative outcomes are inherently superior to compromises (the usual result of the haggling and bartering approach to resolution). In one example, with parents disputing whether to call the payments to the wife alimony (tax deductible for the husband who is in the highest marginal tax bracket) or child support (paid with after-tax dollars by the husband and taxed to the wife who is in the lowest marginal tax bracket), Raiffa graphs the Pareto optimal outcomes to characterizing the payments as alimony. The graph indisputably shows that every line on the alimony curve is better for *both* parties than every line on the child support line, because the wife cares strongly about getting the most dollars in the budget and the husband cares much more about paying with before-tax dollars. He can be much more generous to her if she agrees to alimony. Both parties get what they care most about—both satisfy their primary interests, and the children are better off!

Raiffa also simplifies the process of determining the reservation value or point (RP) each party should ascertain before negotiation. Once the BATNA is established, and whether it is preferred over the outcome of this negotiation, each party can analyze the consequences of no agreement and can therefore establish the threshold value each needs. If the minimum seller's RP is less than the maximum buyer's RP, there is a Zone of Possible Agreement (ZOPA). If not, there will be no agreement. This simply stated method for rationally planning negotiation is extremely valuable for all decision making in conditions of uncertainty. As usual, the devil is in the details: some BATNAs (like going to court) are not completely predictable, so accurately attributing an exact value to your RP is difficult, if not impossible. That is not information a lawyer's client wants to hear, but mediators are useful in conveying that reality without creating conflict between lawyer and client.

Raiffa's latest book is *Negotiation Analysis,* in which he brings together a lifetime of scholarly research, contemplation, and application of these principles in one brilliant composite. Raiffa has the ability to explain the differences between and among the four basic approaches to decision making: Decision Analysis (how individuals should and could decide); Behavioral Decision Theory (the psychology of decisions and how real people do decide); Game Theory (how rational beings should decide separately in interactive situations—remember the movie *A Beautiful Mind?*); and finally, Negotiation Analysis (how we all could and should collaborate with others to get better results as well as less destructive conflict). The book is too complex to be a textbook in my classes, but I use excerpts when a concept needs to be really clear. In a recent exercise in my negotiation class, I took a chapter from this book, and the students created a mathematical template, negotiated their own first-job contract as a lawyer, and evaluated their own success based on the values they assigned to each of the eleven targets (e.g., salary, benefits) of the employment relationship.

No list would be complete without mention of a group of excellent writers on mediation: Christopher Moore's *The Mediation Process: Practical Strategies for Resolving Conflict* (one of the earliest and best authors, who is particularly clear about the causes of conflict and how to move through them systematically to achieve resolution); Kimberlee Kovach, whose articles and textbooks are used by me and many other mediation trainers and professors; Carrie Menkel-Meadow, Lela Porter Love, and Andrea Kupfer Schneider (*Mediation: Practice, Policy and Ethics);* Jay Folberg (*A Comprehensive Guide to Resolving Conflicts Without Litigation);* R. B. Baruch, and J. Folger, *The Promise of Mediation*; and Eric Galton with Kimberlee Kovach, *Representing Clients in Mediation.*

The next two books are probably unknown to most of you: *Non-Adversarial Communication: Speaking and Listening from the Heart (*2007), by Arlene Brownell with Thomas Bache-Wiig; and *Nonviolent Communication: A Language of Life* by Marshall Rosenberg (see www.CNVC.org for further information on this worldwide approach to preventing, managing and

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BOOK REVIEW
THE POWER OF A POSITIVE NO

Reviewed By Kay Elliott*

One of the most prolific writers in the conflict resolution field, William Ury, has authored the third of a series that began with the iconic *Getting to Yes* (coauthored with Roger Fisher and Bruce Patton). That book was followed by Ury's second, authored alone, *Getting Past No.* According to the writer, *The Power of a Positive No* should have been written first, because it is about getting ready for negotiation, whereas *Getting to Yes* deals with doing the dance of negotiation with the other side, and *Getting Past No* focuses on techniques to use when the other side won't dance. This last book must therefore be considered logically as the first step in preparing to negotiate and then in implementing that strategy. The question is, how does this translate for mediators?

Recently the book has been a topic at two mediation programs, one presented by the Association of Attorney-Mediators and the other, the Texas Mediator Credentialing Association. At the first, the presenter was a cognitive scientist who praised the book for its practical application of some rather esoteric realities of brain science. At the second, the presenter, who is a very experienced mediator, basically took the view that the book is hard to apply in everyday civil litigation mediation. I mention these facts because I find the book provocative and useful, but admit that I have not yet incorporated it completely into my own process or even into my teaching of negotiation and mediation.

At the October 2007 ACR conference in Phoenix, Arizona, William Ury was a keynote speaker. He chose to talk about the book and shared with the audience of mediators that during the five years it took him to write it, his youngest daughter was undergoing extensive and intensive medical procedures. In fact, the book grew out of his experiences with her medical team and the hospitals where she was treated, as well as Ury's own extensive international conflict resolution work.

The book is divided into three stages: Preparing Your No, Delivering Your No, and Following Through on it - turning the other's resistance to your No into acceptance. Each stage has three chapters. The preface sets the stage: the ordeal faced by parents (Ury and his wife) of a child born with serious problems in her spinal column. In looking back over the eight years of surgeries, consultations, treatments and fear, Ury realized that in addition to getting to yes with the medical providers, he needed even more to develop the skill of saying NO, to protect his daughter and his family **from** them! He took all of his experience and skills, focusing it, like a laser, on how to begin any negotiation: knowing the interests you are protecting, why the offer of the other person doesn't meet that interest, and what offer would meet it and would cause you to say YES. Prime Minister Tony Blair put it this way: "The art of leadership is not saying Yes, it's saying No."

In the introductory chapter, we are introduced to the *Three A Trap*, which is the all too recognizable set of stress responses we see in mediation and in our own life: Attacking (setting up negativity), Avoiding and Accommodating. When we attack we damage the relationship, when we avoid we just postpone resolution, and when we accommodate we sacrifice our own interests to protect the relationship. Neither is an optimal outcome. These stress responses, triggered by our biochemistry, are designed to save us from perceived threat. In prehistoric days, that meant a sudden rush of energy to run from the saber-toothed tiger. In negotiating or mediating, as Ury explains, the problem is not so much escaping from danger as it is the tension between exercising our own power or tending to a relationship. In negotiating, we need a way to do both - we need to collaborate or compromise- we need to exercise our power while tending to our relationship. The rest of the book (240 pages in all) sets up the structure for this calculated response, from reactive to proactive.

When Ury refers to Step One, he frames it as a way to start from Yes, rather than starting from No. There are three parts to preparing your No: Uncovering Your Yes, Empowering Your No, and Respecting Your Way to Yes. Borrowing from his earlier works, he advises negotiators to *Go To The Balcony*, a phrase most of us know means taking psychological distance from the dispute, listening to your emotions, finding your interests and your needs. Often attorneys and parties have not done this work, though they may be ready for trial. Mediators can use this part of the book to help the parties be clearer about what is most important to them. Even if the case is about money, since that is what is recovered in court, there are almost always other needs and wants: an apology, more clarity about data, a change in policy, a recognition that the future relationship must be different from the past one, etc. Mediators can use this first stage in the early part of the process. Actually, we already do since much of it because we are not emotionally involved in the conflict, we do not stand to gain from the outcome, we are trained to be facilitative, and we do not have a long and confusing history with the problem.

What I particularly enjoyed about this first stage is the explanation of human needs. In early negotiation literature, the common human needs were not addressed. Here, Ury simplifies them for all of us: all human beings have the same needs, though not at the same time: safety or survival; food, drink, and other life necessities; belonging and love; respect and meaning; freedom and control over one's fate. When these needs are not met, negative emotions are triggered and we fall into the Three A Trap described above. It really pays to dig deep in uncovering needs during mediation. Alongside the

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BOOK REVIEW THE POWER OF A POSITIVE NO
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needs that drive us are the values that motivate us. Ury points out that in every culture, these values are important: honesty, integrity, respect, tolerance, kindness, solidarity, fairness, courage, and peace. Just as unmet needs cause one to say No ("your proposal does not meet my needs"), values can also provide strong motivation to act, to take a stand for something larger than ourselves.. How often have mediators heard this phrase: "I can't say yes because my principles have been violated!

By helping to uncover the parties' deepest needs, interests and values, mediators can crystallize them into a Yes. This may be the part of the book that is most useful to mediators since we often see parties arriving without having done any of this internal preparation. My experience is that attorneys may have approached the dispute from a different perspective, focusing on the legal merits of the case and determining the bargaining zone primarily or exclusively in terms of financial interests. Admittedly, this book's approach may not be easy for powerful litigators to tolerate, and mediators can of course adapt this step to the context in which they work; but my experience is that the actual parties in interest are all too ready to talk about their feelings, needs, values and expectations - given the chance. One of the advantages of mediation is that they get this chance - so instead of just venting, or telling their story (as in narrative mediation), the first part of mediation can be a search for the single intention: the single, concentrated intention - the Yes! This single intention must be backed up with a practical strategy designed to achieve it. Ury depicts this as a fork in the road: from the main road of saying No, one can either go to Plan A (Acceptance) or Plan B (Backup).

Plan B is what will be done if a party cannot get what he needs from the other party - it is the familiar BATNA. Often negotiators do not really have a clear and stable BATNA. If going to trial is the BATNA, is the value of the Reservation Point exact? The answer has to be no because no one can guarantee in advance what the outcome at trial will be. Most mediators help parties see the risk of having trial as the only BATNA, so Ury articulates the reasons for what we do. He advises negotiators to have a variety of alternate plans. This may seem impractical when the case is already in litigation, but many cases are resolved not just through compromise but through a clearer evaluation of the Plan B. When the case is not in litigation, having several other alternatives (not options) to consider helps parties see whether saying No is really in their best interest. Ideally, this work is done prior to mediation, but that is not always part of external preparation. Mediators can inquire about the Plan B early in the process. If a brainstorming session is helpful to the parties, mediators can recommend using the mediation session as a way to see whether other alternatives exist or to reevaluate the best of them.

In the third chapter of this first stage, Ury recommends treating the other side with dignity, quoting Frank Barron: "Never take a person's dignity; it is worth everything to them, and nothing to you." Those familiar with *Getting to Yes* can connect this to the advice: "The harder you need to be on the problem, the softer you need to be on the people." Ury approaches this as beginning with self-respect (for the importance of your own needs and values), then recognizing that, even if you don't like or agree with the other party, it is important to give value to the other person, just as you would have them give value to you. He points out that professionals in criminal justice settings know how important it is to be polite. Hostage negotiators specialize in saying No to the terrorists' demands while giving them respect as a human being. The nastier the criminal, the more important it is to be respectful, to understand what is going on in his mind. As mediators know, there are several reasons to behave respectfully: it works and we are modeling the behavior we want them to adopt. Ury points out that role reversal works well because by listening first and putting yourself in the other person's shoes, you are better able to respect your way to Yes. His intriguing example of this is the fact that while Nelson Mandela was in prison, one of the first subjects he undertook to study was Afrikaans, the language of his enemy. Then he studied their history, acquiring a profound understanding of their group psychology and culture. He developed a deep respect for the Afrikaners, which served him well when it came to persuading the government to accept his forthright No to the cruel and unjust system of apartheid. Since I lived in South Africa during that period, this example resonated for me. One way mediators exemplify this part of the book is in behaving with courtesy and even compassion to both sides, while not agreeing that either is right. Perhaps one of the reasons mediation is so effective is that the process itself is respectful.

Stage two, the delivery stage, is the heart of the process and is the part of the book mediators will probably find most useful. Chapter four explains how to express the Yes. An example is given: Nelson Mandela was put on trial for treason in South Africa in 1964 and insisted on making a public statement in court, going against the advice of his lawyers, who warned him that his statement might trigger a death sentence. He risked his life to affirm his intention publicly to the people of South Africa by saying: "I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if need be, it is an ideal for which I am prepared to die." His behavior crystallizes what Ury is teaching: *Affirming your intention is a creative act.* Ury gives concrete and practical advice on how to do this, which can be utilized by mediators: (1) be objective and in your statements stick to the facts; (2) replace accusations (the "you did it" statements) with neutral statements,(instead of "You delayed the shipment," negotiators or mediators can say "The shipment was delayed as a result of the many changes that were made"; and (3) use I-Statements (and combine them with "the" statements) to produce this kind of mediator-type statement - "When situation X happens, I feel disappointed because I need for Z to happen".

Finally, we get to asserting your No - the very heart of the Positive No method. Ury makes a powerful case for the importance of mastering this skill. Rather than summarizing, I invite all mediators to buy the book and start putting into practice its lessons. Here, Ury has gone beyond the usual negotiation book by incorporating some of the most important principles of the non-violent communication writer, Dr. Marshall Rosenberg.

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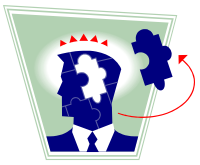
ETHICAL PUZZLER

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, or fax it to her at 214.368.7528.

This issue brings back a favorite wherein ADR specialists are asked, "What has been the most difficult ethical dilemma you have faced as a mediator (or arbitrator), and how have you handled it?" Here's what they had to say.



John Dowdy (Fort Worth): This case involved beneficiaries' (plaintiffs') allegations of a trustee's (defendant's) breaches of fiduciary duty. The trustee/defendant was a licensed attorney. The mediation resulted in a full settlement. However, during the mediation, the mediator discovered that the case went beyond mere allegations of breaches of fiduciary duty. Indeed, the mediator (also an attorney) discovered that the trustee/defendant had diverted cash from trust assets (transactions which he characterized as "loans"), which he had used to construct an expensive home for himself and his wife. The settlement agreement contained a confidentiality agreement.

The question I asked myself was, "What is the duty of an attorney-mediator, in view of Rule 8.03 of the State Bar of Texas Rules of Professional Conduct* and Section 154.053 (b) and (c) of the Texas Civil Practices and Remedies Code**?"

> * …a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trust-worthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.
>
> ** (b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.
>
> (c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

Editor's note: John did as we all so often do, and he answered a question with a question. He wants to know how you would handle this dilemma. Any answers? Please send them to me at this address below and they will be included in the next *Ethical Puzzler*.

Anonymous Mediator (Somewhere in Texas): Danger in the Workplace: I was a corporate in-house mediator working in an organization with a relatively new conflict resolution program. The corporation felt the program was very important to provide employees with a method to handle many different kinds of conflicts and resolving them in the least invasive and disruptive manner. The company had invested considerable time and money promoting the program. I was in a pre-mediation conference with an employee and had explained all the features of mediation, including confidentiality with the few exceptions of imminent danger or harm. After some initial exploration of the issues that had precipitated the employee's request for mediation, the employee raised the topic of some potential violence in the workplace. The employee felt that another employee (not the other party to the conflict) was very frustrated with the company and had talked about vandalizing the workplace, which could have created an unsafe condition dangerous to other employees. A flag went up immediately. I appreciated that the organization had to be alerted to the situation; however, there was a dilemma. The company had stressed the confidentiality of the program. If I called the manager of HR, I could jeopardize the confidentiality feature of the program, which had been a major selling point of the program. During the early stages of the program, there had been much skepticism that the program could maintain confidentiality, and the program had made significant progress in winning the trust of the organization. After explaining that the organization had to be alerted to this situation, we explored various options other than me being the one to do that. We eventually settled on the employee going back to her manager and revealing the situation. The employee agreed to call me back with the details so I could know whether I needed to intervene any further. All went well,

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Ethical Puzzler

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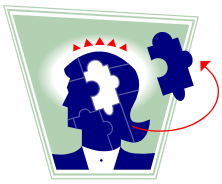
the potential harm was dealt with, and the confidentiality of the mediation and the program was maintained.



Cheryl Miller (Victoria): Volunteering as a mediator for Texas Department of Criminal Justice Victim Services through the Victim Offender Mediation Dialogue (VOMD) program presented many challenging situations over the years. An ethical dilemma that has occurred in the past, and unfortunately occurs more often than not, is the area of confidentiality between parties.

The VOMD program is designed so that the mediator meets with both the victim and offender at least three times prior to bringing the parties together in a face-to-face meeting in the prison where the offender is incarcerated. TDCI has done an incredible job in designing a program that allows a mediator the greatest opportunity possible to determine the appropriateness of bringing together two parties to a very difficult dialogue. The preparation phase of the VOMD program is highly significant for the overall process. It is in the preparation/pre-mediation session that the mediator must determine the appropriateness of bringing the two parties together face-to-face. Because of the intensity of the situation, it is vital to make sure the mediation is a safe place for both victim and offender.

In the preparation, both the victim and offender tell their story and work to untangle the emotions and thoughts that have been such a huge part of their lives since the trauma of the violent crime. As a mediator, I hear amazing stories and statements about how both the victim and offender view each other. More times than not, both parties have incorrect concepts of how the other views them. Often, offenders are sure the victims are extremely angry and hate them and only want to come and tell them horrible things. This can be quite the opposite of what a victim is expressing. I have heard more than one victim state that the purpose of wanting mediation is to ask questions and tell the offender they have forgiven them. The ethical dilemma comes in the temptation to state the motives and paraphrase what the victim has said in confidential pre-mediation preparation.

It would seem logical that a mediator would not be tempted to share information discussed in pre-mediation sessions. But in victim/offender mediation, sometimes it would seem beneficial to share motives and statements made because they could assure the other party that the process is not necessarily as horrible as they might be imagining. When one of the parties has discussed appropriate and noble reasons, such as forgiveness, in pre-mediation sessions, it may seem that sharing those motives or statements could only benefit the other party in preparing for the actual mediation. While it may seem appropriate in some cases to share this information, ethically it is vital to maintain confidentiality of the dialogue in the preparation sessions.

There are two reasons why a mediator should not divulge specific statements made by the other party in confidential sessions. The first is obvious: it is confidential. Both parties must feel free to share their concerns and emotions in those sessions. Because VOMD is a dialogue process, there is a great deal of information shared, along with sometimes intense emotions. It is unhealthy and inappropriate to stop a party in the story/sharing to ask whether this is something that should be shared with the other party. The best method of determining what should be shared with the other party is to maintain complete confidentiality in what is said and emotions expressed, unless specifically instructed otherwise.

The second reason it is inappropriate for the mediator to discuss specific motives and statements made by the parties in preparation is that there is no way to be sure that is how either party will feel or behave during the actual mediation. The intensity of the emotions and the situation make the process highly unpredictable. A victim may not be angry with the offender during the preparation, but seeing the offender's face for the first time in years may stir emotions the victim did not expect. It is also likely one of the parties may say a word or make a statement during the mediation process that will change what the other party had planned to say or do. Just as I often have heard victims say, in preparation for mediation, they want to forgive the offender, I have also heard victims state adamantly they will *never* forgive the offender. However, during the course of the dialogue, the offender will say something or his demeanor is such that the victim is moved and does indeed forgive.

The following is an example of a scenario where it might seem appropriate to share the motive of one party to the other. A victim and offender are preparing for mediation. The victim is very calm and clear about what is desired as a goal for mediation. The victim has stated she wants to let the offender know how he has completely changed her life. She also wants to tell the offender she forgives him. All during the preparation, the victim shares appropriate statements and comments and a desire that the process will benefit both of them. Her disposition is gentle and kind. The offender, on the other hand, is very nervous about the process. Even though he has agreed, he has reservations about his ability to proceed. He frequently asks questions like, "Why does she want to meet with me?" "What has she said about me?" "Does she hate me?" He also states, on more than one occasion, that he is not sure he wants to continue the process. It would appear that it might be appropriate to share with him the victim's statements, demeanor, and motives as a reassurance that it is okay to continue. It might also appear that it would be in the victim's best interest to share the motives and statements with the offender to help him continue in the process. It is important to state here that the victim initiates the process, so if the offender backs out because he is afraid, the victim will be greatly disappointed. Is it ethical to go ahead and share details, statements and motives of the victim, in the preparation phase, if the victim has not specifically stated they can be shared, if the sharing is for the purpose of reassuring the offender and thereby apparently benefiting both the victim and the offender? Well, read on.

The actual day of the mediation arrives and the victim informs the mediator of some additional questions and statement that she wants to bring to the mediation table. The statements and

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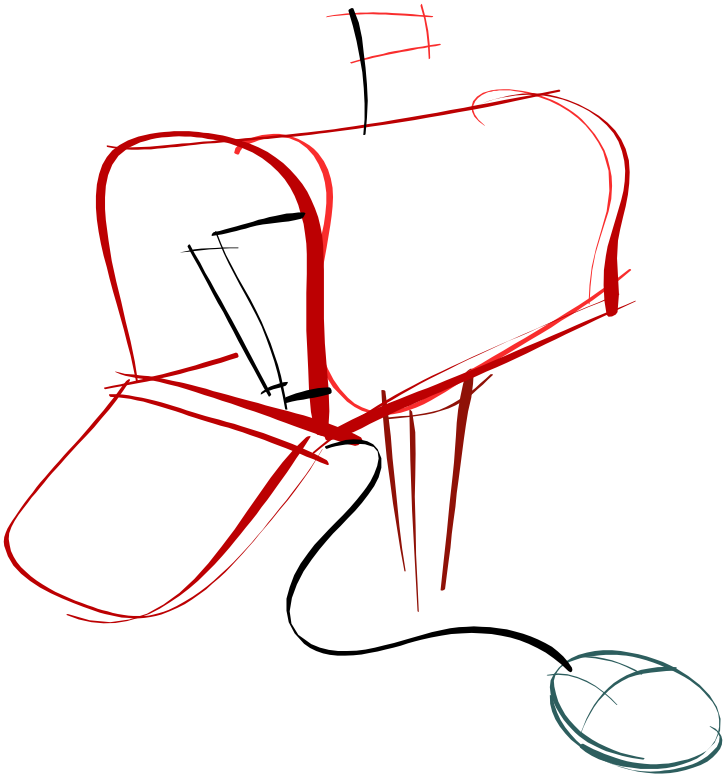


ADR on the Web

By Mary Thompson*

Settle It Now Negotiation Blog

http://www.negotiationlawblog.com/

Settle It Now was developed by California–based attorney and mediator, Victoria Pynchon. Offering a broad array of content on mediation, arbitration and legal issues, the blog is one of the better-written and more engaging sites in the rapidly-expanding world of ADR blogs.

Over twenty categories are available to explore. Although much of the content is written by Pynchon, the blog does provide articles and links to the opinions of other ADR professionals, including some well-known leaders of our field.

A sampling illustrates the scope of the content:

"Business Development" offers articles and video interviews of attorneys and mediators talking about issues of practice development.

"Negotiation/Money" includes a number of articles about the challenges of negotiations and mediations where money is the focus of the negotiation, and where an interest-based approach is difficult, ineffective or inappropriate.

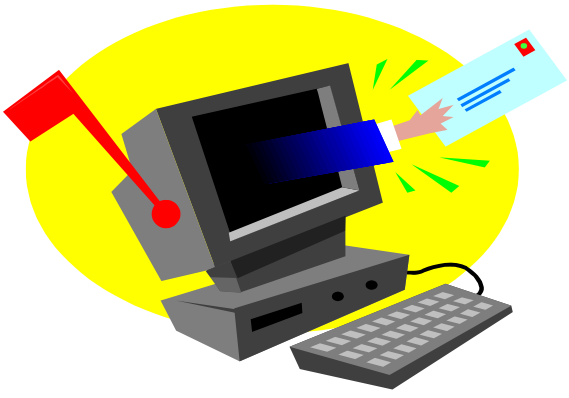
"New Cases in Mediation" reviews twelve examples of mediation case law involving confidentiality, malpractice, enforceability and mediator coercion.

"Social Psychology/Neuroscience" contains articles on cognition and its relationship to impasse, risk aversion, decision cycles and deception.

According to blogger Diane Levin (http://adrblogs.com), there are currently over 116 ADR blogs, representing 22 countries. Despite some frivolous content, they can be engaging, controversial and eclectic. They actively refer to each other, comment on each other's ideas and offer changing, up-to-date (some, literally) information. Settle It Now is a fascinating, sometimes off-beat look at the world of negotiation and ADR.

* ***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



Ethical Puzzler
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questions, while very appropriate, are powerful and use very strong language. This occurs because the closer it gets to the actual mediation date, the more strongly the victim feels about the offender. If the offender has been prepped that this victim is sweet and kind and wants to come and forgive him, he will have been blindsided by the new development. In victim-offender mediation, these types of surprises can cause the most problems. Because the offender is never told exactly what to expect, he is able to hear what she has to say and respond appropriately. The result is profound for both parties.

This scenario reinforces the vital need to stay within ethical boundaries determined for professional mediators. Because victim-offender mediation is so complex, it is vitally important to remain focused on the process and not the outcome. If the mediator remains focused on the process and stays within ethical boundaries, the victim and offender have the opportunity to participate in what can be a profound, life-changing process.

Comment: From the probate courts, to the workplace, to the Texas Department of Criminal Justice, the dilemmas we face all seem to reflect the same issue – our duty of confidentiality. At times we are put in the untenable situation of weighing the duty against a real or perceived "higher good" or "higher duty." How we handle such situations requires all of our professional skills and provides many an *Ethical Puzzler!*

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

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Spring	March 15, 2008	May 15, 2008
Summer	June 30, 2008	August 30, 2008
Fall	October 15, 2008	December 15, 2008
Winter	December 15, 2008	February 15, 2009

SEE PUBLICATION POLICIES ON PAGE 36 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 or rpietsch@central.uh.edu

PROPOSED CHANGES TO ETHICAL GUIDELINES
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financial interest in a corporation or involvement in the past with a product or patent, may affect the neutrality of the mediator. Just as with the disclosure of relationships, the parties or their counsel should have an opportunity to consider any conflict with the subject matter before agreeing to proceed.

The third proposed change is in Section 10, which currently provides:

> **10. Disclosure and Exchange of Information.** A mediator should encourage the disclosure of information and should assist the parties in considering the benefits, risks, and the alternatives available to them.

The proposed change is an additional comment that would read as follows:

> *Comment.* A mediator should not knowingly misrepresent any material fact or circumstance in the course of a mediation.

The third change is being proposed to make clear that in protecting the integrity of the mediation process, the mediator should not knowingly misrepresent any material fact or circumstance. Those involved in the mediation negotiations may engage in some puffing or exaggerating in an attempt to minimize weaknesses or magnify strengths. However, the mediator should not cross the line and knowingly misrepresent any material fact or circumstance during the mediation.

* ***Maxel (Bud) Silverberg****, BBA, MBA, JD, of Dallas, has mediated and arbitrated over 3,000 cases. He chaired the committee that created the Ethical Guidelines for Mediators, later adopted by the Texas Supreme Court. An adjunct professor at SMU Law School, past president of Association of Attorney-Mediators, member of the Texas Supreme Court Advisory Committee on Court-Annexed Mediations, and member of the SBOT ADR Council, Bud received the American Arbitration Association's Steve Brutsché Award, and with his wife, Rena, the Justice Frank Evans Award.*

** ***Mike Patterson****, of Tyler, serves on the ADR Section's Council. He has almost twenty years of experience as a trial lawyer in state and federal courts, plus more than ten years of experience as a full-time mediator, having conducted over 1,400 mediations. A member of TAM and AAM, he has been president of the East Texas Trial Lawyers Association (1993-1994) and the Smith County Bar Association (1987). He received a J.D. from Southern Methodist University in 1977.*

Chair's Corner
continued from front page

legislation. This last legislative term, several arbitration bills were proposed. This year, this Committee is working with several stakeholders to develop a balanced report on the bills that may be presented to the next Texas Legislature. The Committee hopes to conduct roundtable discussions in various Texas locations to discuss arbitration. If you would like to be part of this effort, contact John Boyce.

The Arbitration Ad Hoc Agreement. In the next issue of Alternative Resolutions, the Section will publish an Arbitration Ad Hoc Agreement for review and comment by our Section. As arbitration has developed in the State of Texas, there have been many arbitrations conducted without administration by a third party. Preparation of the Ad Hoc Agreement has been a two-year project of the Council to provide Texas practitioners with a practice guide. William H. Lemons began work on this project and John Boyce is now heading up this project. Final touches are being added to the Ad Hoc Agreement, so watch for it in the next newsletter.

Ethical Guidelines for Mediators. Following this Chair's Corner, you will see Maxel "Bud" Silverberg and Mike Patterson's article, *Proposed Changes to Ethical Guidelines*. This Section began working on and publishing Ethical Guidelines in the early 1990s. In 2005, the Texas Supreme Court adopted a slightly modified version of this Section's Ethical Guidelines. Since that time, several organizations have weighed in with their own ethical standards. Now the American Bar Association ("ABA"), the American Arbitration Association ("AAA"), JAMS The Resolution Experts ("JAMS"), and the Association for Conflict Resolution ("ACR") have published new ethical standards. The article highlights the changes that your Council has unanimously proposed after comparing all of these new ethical pronouncements. Mike Patterson, Suzanne Duvall, Kris Donley, and Maxel "Bud" Silverberg have worked painstakingly on this Committee to keep Texas mediators ethically current.

Annual Meeting. Mark your calendars now to attend the annual meeting in Houston on June 26. The Section will meet at 1:30 p.m. for its annual meeting, followed by two hours of CLE concentrating on arbitration and concluding with the Council meeting. If you want to participate in this program, contact John Boyce.

Member Services Committee. Susan Schultz has agreed to chair this new Committee of the Council to look into the various member services and activities of the Section. We want to serve you better! If you have ideas on other services that this Section can provide to you as a dispute resolutionist, please contact Susan at sschultz@law.utexas.edu. My final Chair's Corner will report on the work of this Committee with focus on the future of ADR in Texas.

We've now looked at the present state of ADR in Texas through the work of this Section. My final Chair's Corner will contemplate the future of Texas ADR. Again, I invite all clairvoyant members to email me at cmorgan@jamsadr.com with their crystal-ball predictions. Until then, Peace . . . CHM

FIFTH CIRCUIT DECISION REITERATES A STANDARD OF REVIEW FOR ARBITRATION AWARDS THAT IS EXCEEDINGLY DEFERENTIAL: EVEN A FAILURE TO CORRECTLY APPLY THE LAW IS NOT A BASIS FOR SETTING ASIDE AN AWARD
continued from page 4

The Fifth Circuit Court of Appeals began its analysis with an overview of the standards for judicial review of arbitration awards, stating,

> Judicial review of an arbitration award is "exceedingly deferential."[13] Vacatur is available "only on very narrow grounds,"[14] and federal courts must "defer to the arbitrator's decision when possible."[15] An award must be upheld as long as it "is rationally inferable from the letter or purpose of the underlying agreement."[16] Even "the failure of an arbitrator to correctly apply the law is not a basis for setting aside an arbitrator's award."[17] "It is only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable."[18] Moreover, "the arbitrator's selection or a particular remedy is given even more deference than his reading of the underlying contract," and "the remedy lies beyond the arbitrator's jurisdiction only if there is no rational way to explain the remedy…as a logical means of furthering the aims of the contract."[19]

LVI's arguments to the appellate court to vacate were two-fold: that the arbitrator "manifestly disregarded the law" and that the award "does not draw its essence from the contract, i.e., that the arbitrator had exceeded his powers and the award was not "rationally inferable from the contract."[20] However, LVI's arguments regarding vacatur and the amount of damages availed them of nothing with an appeals court that had determined, "We will not second-guess multiple, implicit findings and conclusions underpinning the award. We do not decide if the award was free from error. We decide only that it is not the kind of extraordinary award that ineluctably leads to the conclusion that the arbitrator was 'dispensing his own brand of industrial justice.'"[21]

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

ENDNOTES

1 Am. Laser Vision, P.A. v. Laser Vision Inst. L.L.C., 487 F.3d 255 (5th Cir. 2007).
2 Major League Baseball Players Assoc. v. Garvey, 532 U.S. 504, 509 (2001).
3 *Am Laser Vision,* 487 F.3d at 257.
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at 257-58.
9 *Id.* at 258.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* (citing Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 352 (5th Cir. 2004)).
14 *Id.* (citing Brabham v. A.G. Edwards & Sons, Inc., 376 F.3d 377, 380 (5th Cir. 2004)).
15 *Id.* (citing Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413, (5th Cir. 1990)).
16 *Id.* (citing Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc., 138 F.3d 160, 164-65 (5th Cir. 1998)).
17 *Id.* (citing *Kergosian*, 390 F3d at 356).
18 *Id.* (citing the U.S. Supreme Court decision in Major League Baseball Players Assoc. v. Garvey, 532 U.S. 504, 509 (2001), which quoted from Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960), saying, "Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement. Paperworkers v. Misco, Inc., 484 U.S. 29, 36 (1987). We recently reiterated that if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'" Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000). (quoting Misco, 484 U.S. at 38). It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispenses his own brand of industrial justice" that his decision may be unenforceable. Steelworkers v. Enterprise Wheel & Car Corp., U.S. 593, 597 (1960). When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's "improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award. Misco, 484 U.S. at 39.")
19 *Id.* at 259 (citing Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1325 (5th Cir. 1994)).
20 *Id.*
21 *Id.* at 260.

CIRCUIT VACATES AWARD OF MEDIATIOFEES AS TAXABLE COSTS UNDER 28 U.S.C. § 1920
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tion of court appointed experts.

Third, the court noted that case law from the Fifth Circuit and other circuits did not support the taxation of mediation fees as cost under 28 U.S.C. § 1920. Once again, providing an example of case law, the court referred to *Mota,* holding that mediation fees were not taxable costs under 28 U.S.C. § 1920.[18]

Concluding, the court held that the district court abused its discretion in awarding mediation expenses as taxable costs to Defendants under 28 U.S.C. § 1920 in the ERISA action because mediation fees were not explicitly authorized by 28 U.S.C. § 1920, and because the Fifth Circuit's decision in *Gaddis* did not support the district court's award of mediation fees as taxable costs. The appellate court vacated the award of mediation fees as taxable costs under 28 U.S.C. § 1920.

***Walter Clark Martin IV** is a native Texan from Houston. He received a Bachelor of Public Administration degree from Texas State University-San Marcos. In December 2007, he received a Master of Arts Degree with a major in Legal Studies at the same university. He plans to attend law school at South Texas College of Law and hopes to become an asset to the legal community.*

ENDNOTES

1 29 U.S.C. §§ 1001-1461.
2 Cook Children's Med. Ctr. v. New Eng. PPO Plan of Gen. Consol. Mgmt., Inc., 491 F.3d 266 (5th Cir.2007).
3 *Id.* at 271.
4 *Id.* at 274.
5 261 F.2d 512 (5th Cir.2001).
6 *Cook Children's Med. Ctr.*, 491 F.3d at 274.
7 *Id.*
8 *Id.*
9 *Id.* at 275.
10 381 F.3d 444 (5th Cir.2004).
11 *Cook Children's Med. Ctr.,* 491 F.3d at 275.
12 482 U.S. 437 (1987).
13 *Cook Children's Med. Ctr.,* 491 F.3d at 275.
14 *Id.* at 276.
15 *Id.*
16 *Id.* (citing *Black's Law Dictionary* 1003 (8th ed.2004)).
17 *Id.* (citing Unif. Mediation Act § 2(1) (2001)).
18 *Id.* at 277.

AUSTIN APPEALS COURT DESCISION IMPLIES THAT MEDIATION AGREEMENT AFFECTING TERMINATION OF PARENTAL RIGHTS REQUIRES EXPRESS, COMPLETE COMPLIANCE
continued from page 12

8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* at *2.
13 *Bunton*, 2007 WL 1451757 at *2.
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.* at *3 (citing In the Interest of R.B., 200 S.W.3d 311,314 (Tex. App.--Dallas 2006, pet. denied); Garcia-Udall v. Udall, 141 S.W.3d 323, 332 (Tex. App.—Dallas 2004, no pet.).
20 *Bunton*, 2007 WL 1451757 at *3.
21 *Id.* (citing, In re D.H.L., No. 04-04-00876-CV, 2005 Tex. App. LEXIS 9288, at *6 (Tex. App.—San Antonio November 9, 2005, no pet.).
22 *Id.*
23 *Id.*
24 *Id.* (citing *In re D.H.L.*, 2005 Tex. App. LEXIS 9288, at *4).
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.* at *3-*4 (citing examples of non compliance, such as Bunton's failure to keep food or electricity in and for her rented apartment).
30 *Id.* at *4.
31 In re D.H.L., No. 04-04-00876-CV, 2005 Tex. App. LEXIS 9288, at *6 (Tex. App.—San Antonio November 9, 2005, no pet.).

BOOK REVIEW THE POWER OF A POSITIVE NO
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Many mediators will never utilize those principles so Ury has, in my opinion, done us all a favor by synthesizing the approach.

This book invites leisurely reading and integration. It encourages mediators and negotiators to look carefully at a three-step process, the last part dealing with the aftermath of saying No and not backing down. Some mediators will not find the book immediately useful, particularly those who have a style that is more directive or even evaluative. I believe, however, that there are useful tips for all of us.

** **Kay Elliott**, J.D., LL.M, has arbitrated and mediated over 1,800 cases since 1980. She has taught in and coordinated ADR graduate programs at Texas Woman's University and Texas Wesleyan School of Law since 1990, where she has coached championship negotiation and mediation advocacy teams. She is ACR Dallas President, Council Member of TMTR, Board Member of TMCA, and a frequent contributor to ADR publications and seminars. Kay co-edited the SBOT- ADR Handbook (2003) with Frank Elliott.*

IDAHO FEDERAL DISTRICT COURT HOLDS INFORMATION OBTAINED DURING STATE AGENCY'S CONCILIATION PROCESSIS PRIVILEGED AND PROTECTED FROM DISCLOSURE
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IHRC, and (2) I.C. § 67-5907(4) applies only to offers, counteroffers, and terms of agreement, none of which were made during IHRC's investigation.[24]

The court first looked to I.C. § 67-5907(4) and concluded that the statute, while unclear on its breadth of application, does evince "an intention by the Idaho Legislature to safeguard the conciliation process" and the need to ensure nondisclosure to the public.[25] The court also determined that I.C. § 9-203(5) likewise would protect these communications from disclosure in providing that a public officer "cannot be examined as to communications made to him in official confidence, when the public interests would suffer by disclosure."[26] Most of the public interests lie in nondisclosure of such communications between the IHRC and a party during the conciliation process.[27] The court further stated that disclosure of these communications, when parties are divulging information candidly, "could have a chilling effect on future conciliation communications and lead to a deterioration of the entire process."[28]

The court also found that IHRC's claim of "official information" under federal common law privilege was valid considering the potential disadvantages of disclosing the communications.[29] The court held that the disadvantages more than outweighed any benefit that could be obtained from such disclosure.[30] The court cited the Fifth Circuit Court of Appeals case of *Branch v. Phillips Petroleum Co.*, which discussed the common law privilege and upheld the EEOC's withholding of information related to proposals and counter-proposals made during the conciliation process.[31] Finally, the court found that although 42 U.S.C. § 2000e-5(b) is only binding on the EEOC, the Idaho Supreme Court has held that courts can look to federal law for guidance in interpreting the IHRA and, thus, the federal statute was further evidence of a policy against disclosure of conciliation matters in order to protect the delicate and candid conciliation process.[32] As a result, the Defendants' effort to enforce the subpoena as to the IHRC was denied.[33]

The court's decision found that the conciliation process is best served by protecting information derived during that process. Respecting the candid exchange of information between administrative agencies such as the IHRC and victims is crucial to maintaining confidence in the process as a whole for future conciliation and mediation efforts. Disclosing privileged information will unquestionably undermine the trust and confidentiality of conciliation communications and the integrity of the conciliation process as a whole. This ruling may be subject to appeal.

***Sarah Klebo** *is a Legal Assistant at Ashby Crinion LLP in Houston. She holds a M.A. in Industrial/ Organizational Psychology from the University of Houston Clear Lake and a B.A. in Psychology from Randolph-Macon Woman's College in Lynchburg, Virginia. Sarah will obtain her Mediation Certification in 2008.*

ENDNOTES

1 *Duarte v. City of Nampa,* No. CV 06-480-S-MHW, 2007 WL 1792325 (D. Idaho, June 20, 2007). (Williams, Mag.).
2 *Id.* at *1.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.* at *2.
8 IDAHO R. EVID. 408 (providing in relevant part: "…Evidence of conduct or statements made in compromise negotiations is likewise not admissible.")
9 IDAHO R. EVID. 507(2) (providing in relevant part: "A client has a privilege…to refuse to disclose and to prevent any other person from disclosing confidential communications made in the furtherance of the rendition of mediation services to the...persons who are participating in the mediation…")
10 *Duarte*, 2007 WL 1792325 at *2.*11 Id.*
12 *Id.* at *1-*2.
13 *Id.* at *2.
14 *Id.*
15 *Id.*
16 FED. R. CIV. P. 26(b)(1).
17 *Duarte*, 2007 WL 1792325 at *2.
18 *Id.*
19 *Id.*
20 *Id.*
21 *See,* I.C. § 67-5907(4) (the IHRC "shall endeavor to eliminate such discrimination by informal means such as conference, conciliation and persuasion.")
22 *Duarte*, 2007 WL 1792325 at *3.
23 42 U.S.C. § 2000e-5(b).
24 *Duarte*, 2007 WL 1792325 at *3.
25 *Id.* at *4.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.* (citing Branch v. Phillips Petroleum Co., 638 F.2d 873, 880 (5th Cir.1981)).
32 *Id.* at *5.
33 *Id.*

TO BE EFFECTIVE, THE PROVISIONS OF MEDIATED SETTLEMENT AGREEMENTS MUST BE INCORPORATED INTO THE ORIGINAL DIVORCE DECREE—THERE ARE LIMITS TO A COURT'S POWER TO "CLARIFY" A FINAL DECREE

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When the trial court entered Westbo's second clarification order, modeled on the mediated settlement agreement, it committed an abuse of discretion because, according to the court,

> What Westbo's clarification motion ultimately requested was (1) the naming of the two corporations to which the divorce decree's "[a]ll shares of stock personally owned" language referred and (2) the "defin [ing] of Westbo's and Metzger's 'respective rights in regard to the two corporations." The second request exceeded mere clarification because it sought a declaration of the parties' corporate rights, not merely the elucidation of any ambiguity inherent in the terms "[a]ll shares of stock personally owned." The trial court, therefore, had no continuing jurisdiction to grant Westbo's second request.[15]

In other words, the trial court's clarification order did more than provide a clarification by merely naming the corporations whose stock had been divided. The trial court went too far afield when it decreed that a trust held all the stock of Respiratory, Inc., decreed that Metzger would become beneficiary of the trust, awarded Metzger 1,000 shares of stock, and conveyed Westbo's interest and the interest of her children in the family trust. In the words of the court,

> It thus appears, even viewing the record in the light most favorable to the court's ruling, that the clarification order was used not to clarify the divorce decree, but judicially to enforce the parties' mediated settlement agreement to convey the stock in these two corporations. This is not mere clarification, and the trial court had no jurisdiction to do it.[16]

The court closed its discussion by addressing Metzger's assertion that the court's lack of subject matter jurisdiction made the mediated settlement agreement a nullity. The court wrote,

> Our holding is simply that this trial court, in the exercise of its limited post-decree jurisdiction to clarify, had no power to enter these specific portions of the appealed clarification order. Our holding does not, as Metzger also argues under issue one, have the effect of rendering the mediated settlement agreement itself void. Generally speaking, parties may contract as they wish concerning property awarded them in a divorce decree, and they may sue for breach of that contract. It is only the divorce court that has no power to modify the divorce decree's property division after the divorce decree has become final.[17]

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

ENDNOTES

1 Metzger v. Metzger, 2007 Tex. App. LEXIS 4487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).
2 *Id.* at *14-15.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.* at *1-2.
7 *Id.* at *2.
8 *Id.* at *7-8.
9 *Id.* at *8-9.
10 *Id.* at *9-11.
11 *Id.* at *13-14 (citing TEX. FAM. CODE ANN. §§ 9.002, 9.008 (Vernon 2006).
12 *Id.* at *14 (quoting TEX. FAM. CODE ANN. § 9.006(B) (Vernon 2006) (emphasis in original).
13 *Id.* (quoting TEX. FAM. CODE §§ 9.007(a) & (b) (Vernon 1998)).
14 Id. at *14-15 (quoting from In re Marriage of McDonald, "Clarifying orders may more precisely specify the manner of carrying out the property division previously ordered so long as the substrantive division of the property is not altered. In re Marriage of McDonald, 118 W.W.3d 829,832 (Tex. App.—Texarkana 2003, pet. Denied); *accord* McKnight v. Trogdon-McKnight, 132 S.W.3d 126, 130 (Tex. App.—Houston [14th Dist.] 2004, no pet.); In re Marriage of McDonald, 118 S.W.3d at 832; McKnight, 132 S.W.3d at 130 and 132.
15 *Id.* at *17.
16 *Id.* at *19-20.
17 *Id.* at *21.

THE PANAMA INITIATIVE: AN INTERDISCIPLINARY AND COLLABORATIVE APPROACH FOR THE SOLUTION OF EMERGING DEVELOPMENT ISSUES IN PANAMA, LATIN AMERICA, AND THE CARIBBEAN

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and students while positively impacting developing social, political, and economic issues in Latin America. For further information, please visit www.lacep.com or write to al@lacep.com.

* ***Al Amado*** *is the Executive and Founding Director of LACEP. He has over twenty years of diverse trial, appellate, and business management experience both in private practice and in-house as Director of Latin America for a global fitness company. He holds an LL.M. from The University of Texas School of Law, where his course of study focused on international law, conflict resolution, and interdisciplinary Latin American studies. He has served as a private mediator, arbitrator, and dispute resolution and trial consultant. He is bilingually fluent in Spanish and bi-cultural, having lived in Mexico for many years.*

** ***Judge Frank G. Evans (ret.)*** *is a Founding Director of LACEP. Recognized as the father of ADR in Texas, he is the founder of the Frank G. Evans Center for Conflict Resolution at South Texas College of Law. Judge Evans served nearly 20 years on the First Court of Appeals in Texas, serving as Chief Justice from 1981 until he retired in 1990. Judge Evans served on the original American Bar Association Committee on Alternative Dispute Resolution, and he was the founding chair of both the Houston Bar Association Committee on ADR and the State Bar of Texas ADR Committee. He received special commendation from the State Bar of Texas Board of Directors "for his indispensable work on the front lines of our legal system, providing improved access to justice for tens of thousands of people." Judge Evans continues his services to South Texas College of Law as the Founding Director of the Frank Evans Center for Conflict Resolution and periodically sits by assignment as a visiting judge and performs private ADR services as a mediator, arbitrator, conflict resolution consultant, and Special Judge.*

ARBITRATION IN SLOVAKIA

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[12] E.g., constitutional law of the National Council of Slovakia No.119/1995 Coll. on conflicts of interests of state functionaries during execution of their functions, Act No.385/2000 Coll. On judges, as amended by Act No. 185/2002 Coll., Art.14, par.1 of the Civil Procedure Code.

[13] Basically, arbitrators may be relieved from their duties to maintain confidentiality only with the consent of the party in interests of which this obligation has been imposed on the arbitrator. The arbitrator may be also relieved of the duty to maintain confidentiality in accordance with special provisions of the Slovak law.

[14] An arbitrator may also be replaced for bias. The arbitral panel is able to progress simultaneously with the arbitral proceedings while challenging the arbitrator. However, the panel won't be entitled to issue the final award before the challenge procedure has been concluded.

[15] Except for governing law, parties may also agree on the number of arbitrators, the place, the language and the form of arbitral proceedings. In case of absence of the parties' agreement, the necessary decision will be delivered by the arbitral panel (Sections 23 and 24 of the Act).

[16] See Kocher, D.: Arbitration in Finland. In: IDR, Journal of International Dispute Resolution, 1/2006. Frankfurt am Main: Verlag Recht und Wirtschaft. ISSN 1613-026X.

[17] Parties are also given the opportunity to ask the arbitral panel to record their settlement in the form of an award (in this case a so called "agreed award"), which is as effective and binding as the regular arbitral award on the merits.

[18] Act No.97/1963 Coll. On international private and procedural law, as amended later.

[19] Parties have to agree on such review in advance in their arbitration agreement; otherwise, the review is possible only if it is imposed by the Act.

[20] Section 274 letter h/ and Section 261 Subsection 2 of the Civil Procedure Code

[21] Slovak Code of Civil Procedure, section 274 letter h/.

[22] Arbitration Act , section 45, subsection 3.

[23] Arbitration Act, Section 50, subsection 4.

[24] Act No.97/1963 on Private International and Procedural Law, section 64, letter c/.

REFLECTIONS FROM THE EDGE: THE BOOKS THAT ARTICULATE THE MAGIC OF MEDIATION

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resolving conflict through nonviolent communication with everyone). These books teach the people skills that the earlier works on negotiation and mediation did not. If we must separate the people from the problem in order to be empathic with the people but assertive about the problem (the actual definition of collaboration), we must start with nonviolent communication. Although this is an approach that is powerful, simple in concept, and essential to moving away from competing and avoiding to collaborating, like *Getting to Yes*, it is very hard to do consistently and well. Without intentional, empathic and structured nonviolent or at least non-adversarial communication, resolution is very difficult. The best mediators communicate with empathy and assertiveness, but it is very powerful to understand the structure of nonviolent communication in order to use it deliberately and expertly.

Please let me know what your favorite books, authors, and techniques are, and I will incorporate that information into future articles for Texas mediators. For me, the best aspect of being a professional conflict resolution specialist is that we can continue to benefit from all of this knowledge and skill as we bring it into our professional and personal lives—as well as sharing it with others. Mediators care about the art and the science of their calling.

* ***Kay Elkins-Elliott****, J.D., LL.M, has arbitrated and mediated over 1,800 cases since 1980. She has taught in and coordinated ADR graduate programs at Texas Woman's University and Texas Wesleyan School of Law since 1990, where she has coached championship negotiation and mediation advocacy teams. She is ACR Dallas President, Council Member of TMTR, Board Member of TMCA, and a frequent contributor to ADR publications and seminars. Kay co-edited the SBOT- ADR Handbook (2003) with Frank Elliott.*

CHOOSING A PARTY-APPOINTED ARBITRATOR (WITHOUT BREACHING IMPARTIALITY AND INDEPENDENCE)
continued from page 5

7. "Subject always to the overriding provisions of Guidance 9, . ." three areas of investigation into the **prospective arbitrator's** "experience and expertise" are permitted. But these questions should not be used to elicit the **prospective arbitrator's** "views or opinions" on matters "which may form part of the case."

8. The **prospective arbitrator** should control the interview and should decline to answer questions that go beyond what is allowed in Guidance 10.

9. The appointing party should also be permitted to decline to answer any question from the **prospective arbitrator**.

10. If the **prospective arbitrator** concludes that the ap pointing party is seeking a partisan or non-neutral arbitrator, the **prospective arbitrator** should terminate the interview and decline to serve.[13]

11. The interview should be conducted "in a professional manner in a business location, and not over drinks or a meal."

12. There should be no billings for the **prospective arbitrator's** time or expense related to interviews by an appointing party prior to appointment of a **prospective arbitrator**.

These Guidelines are "recommendations" for good arbitration practice. They are not intended by the Chartered Institute to be "mandatory." They will serve as a good basis for discussion among thoughtful parties, arbitrators, and prospective arbitrators about appropriate interviews of **prospective arbitrators**.

* ***John Allen Chalk, Sr.*** *is a partner in Whitaker, Chalk, Swindle & Sawyer, L.L.P. of Fort Worth. He is a member of the ADR Section of the State Bar of Texas. Chalk has been a domestic commercial, healthcare, and employment arbitrator since 1992 and also acts an international commercial arbitrator. He is a panel member for several ADR administrators and publishes The Arbitration Newsletter.*

ENDNOTES

1 "In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator." Canon IX, A (March 1, 2004). *See also* Canon IX, C (3) (until the parties' intention regarding neutrality is determined by the arbitrators, "they should observe all of the obligations of neutral arbitrators set forth in this Code"). The American Arbitration Association had earlier made this same change by its July 1, 2003 *Commercial Arbitration Rules* which stated: "Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-17 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-17(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards." R-12 (b).

2. Canon III, B (1)-(6)(2004).

3. Canon III, B (1)(2004).

4. 9 U.S.C. §10(a)(2) ("evident partiality or corruption in the arbitrators, or either of them"); TEX. CIV. PRAC. & REM. CODE §171.088(a)(2)(A) ("evident partiality by an arbitrator appointed as a neutral arbitrator").

5. Canon III, B (1)(a)(2004).

6. Canon III, B (1)(b)(2004).

7. *Id.*

8. Canon III, B (2)(2004).

9. Canon III, B (3)(2004).

10. Canon III, B (4)(2004).

11. Canon III, B (5) ("logistical matters" discussed with appointing party "should be "promptly" reported to "each other party" to the arbitration).

12. http://www.arbitrators.org/Member/m1/Resources/PracGuides16.asp.

13. This Guidance 14 does not contemplate arbitration agreements where the parties have expressly agreed to non-neutral status of party-appointed arbitrators. *See Code* Canon IX, B (2004); AAA's *Commercial Arbitration Rules*, R-12(b) and R-17(a)(iii) (July 1, 2003; September 15, 2005).

When I was young, my ambition was to be one of the people who made a difference in this world. My hope still is to leave the world a little bit better for my having been here. It's a wonderful life and I love it.

Jim Henson, **It's Not Easy Being Green And Other Things to Consider**

2008 CALENDAR OF EVENTS

Family and Divorce Mediation Training * Houston * March 12-15, 2008 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com

40-Hour Basic Mediation * Houston * March 17-21, 2008 * (approved for 41.75 participatory hours and 4.5 ethics hours) * University of Houston— AA White Dispute Resolution Center For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

Workplace Transformative Mediation Training * Houston * April 3-5, 2008 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com

Graduate Portfolio Program in Dispute Resolution * Austin * April 4, 2008 * Eidman Courtroom and Jury Room—The Center for Public Policy Dispute Resolution; University of Texas School of Law * For more information call 512-471-3507 or www.utexas.edu/law/cppdr

Negotiation * Denton * Texas Woman's University * April 10 - 13, 2008 * Trainer: Kay Elliott & Co-Trainer Dr. Galindo * (approved for 29.25 participatory hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

Basic 40-Hour Mediation Training * Houston * April 17-19, continuing April 24-26, 2008* Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com

Basic 40-Hour Mediation Training * Houston * Texas Woman's University * May 14 - 18, 2008*Trainer: Kay Elliott * (approved for 38.5 participatory hours, 2.5 ethics hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

Organizational Conflict Resolution Programs * Houston * May 15-17, 2008 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com

Mediator Ethics * Houston * May 31, 2008 * 10:00 a.m. - 1:00 p.m.* Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com

40-Hour Basic Mediation * Houston * University of Houston AA White Dispute Resolution Center * May 30, 31, June 1 continuing June 6, 7, 8, 2008 *(approved for 41.75 participatory hours and 4.5 ethics hours) * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu * Website: www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation Training * Austin * June 2-6, 2008 *The Center for Public Policy Dispute Resolution; University of Texas School of Law * Kim Kovach, Trainer * For more information call 512-471-3507 or www.utexas.edu/law/cppdr

Managing the Difficult Conversation * Austin * July 16, 2008 *The Center for Public Policy Dispute Resolution; University of Texas School of Law * Mary Thompson, Trainer * For more information call 512-471-3507 or www.utexas.edu/law/cppdr

Basic 40-Hour Mediation Training * Denton * Texas Woman's University * June 18 - June 22, 2008 * Trainer: Kay Elliott * (approved for 38.5 participatory hours, 2.5 ethics hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

Family and Divorce Mediation Training * Houston * July 16-19, 2008 * Worklife Institute * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com

Negotiation Training * Austin * July 23-25, 2008 * The Center for Public Policy Dispute Resolution; University of Texas School of Law * John Fleming, Trainer * For more information call 512-471-3507 or www.utexas.edu/law/cppdr

Family Mediation Training * Denton * Texas Woman's University * August 21 - 24, 2008*Trainer: Kay Elliott * (approved for 28.5 participatory hours and 2.5 ethics hours) (3 ethics hours may be taken separately) For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu *Website: www.twu.edu/lifelong

Conflict Resolution * Denton * Texas Woman's University * October 16 - 19, 2008*Trainer: Kay Elliott & Co-Trainer Dr. Galindo (approved for 29.25 participatory hours) * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu *Website: www.twu.edu/lifelong

30-Hour Family Mediation Training * Houston * University of Houston AA White Dispute Resolution Center * October, 2008 * For more information contact Robyn Pietsch at 713.743.2066 or rpietsch@central.uh.edu *Website: www.law.uh.edu/blakely/aawhite

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.

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ALTERNATIVE DISPUTE RESOLUTION SECTION
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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2007 to June 2008. 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.

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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, 2008, 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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Cecilia H. Morgan, Chair
JAMS
8401 N. Central Expwy., Suite 610
Dallas, Texas 75225
Office (214) 739-1979 or
JAMS (214) 744-5267
FAX (214) 739-1981 or
JAMS (214) 720-6010
cmorgan@jamsadr.com

John K. Boyce, III, Chair Elect
Attorney and Arbitrator
Trinity Plaza II, Suite 460
745 E. Mulberry Avenue
San Antonio, Texas 78212-3166
Office: (210) 736-2224
FAX(210) 735-2921
jkbiii@boycelaw.net

John Allen Chalk, Sr., Treasurer
Whitaker, Chalk, Swindle & Sawyer, LLP
301 Commerce Street
3500 City Center II
Fort Worth, Texas 76102-4168
Office (817) 878-0575
(FAX) (817) 878-0501
jchalk@whitakerchalk.com

Susan B. Schultz, Secretary
The Center for Public Policy Dispute Resolution
The University of Texas School of Law
727 E. Dean Keeton
Austin, Texas 78705
Office (512) 471-3507
Cell (512) 751-9421
sschultz@law.utexas.edu

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

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

Council Members
Term Expires June 2008

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

Tad Fowler
P. O. Box 15447
Amarillo, Texas 79105
Office (806) 374-2767
FAX (806) 374-3980
tad@suddenlinkmail.com

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

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

Council Members
Term Expires June 2009

Kris Donley, Executive Director
Travis County Dispute Resolution Center
5407 IH 35, Suite 410
Austin, Texas 78723
Office (512) 371-0033
FAX (512) 371-7411
kris@austindrc.org

Regina Giovannini
1431 Wirt, Suite 155
Houston, Texas 77055
Office (713) 826-6539
FAX (877) 885-9756
giovannini@wt.net

Lynne M. Gomez
4521 Birch Street
Bellaire, Texas 77401
Office (713) 668-8566
FAX (713) 839-0644
lgomezarb@aol.com

Reed Leverton
W. Reed Leverton, P.C.
300 East Main Drive, Suite 1240
El Paso, Texas 79901
Office (915) 533-2377
FAX (915) 533-2376
reedleverton@hotmail.com
www.reedleverton.com

Jay C. Zeleskey
Zeleskey Mediations
8117 Preston Road, Suite 300
Dallas, Texas 75225
Office (214) 706-9080
FAX (214) 706-9082
jay@zeleskeymediations.com
www.reedleverton.com

Council Members
Terms Expire June 2010

Joe L. Cope
Center for Conflict Resolution
Abilene Christian University
809B North Judge Ely Blvd.
ACU Box 28070
Abilene, Texas 79699-8070
Office (325) 674-2015
copej@acu.edu

Hon. Camile G. DuBose
County Courthouse, Box 1
100 N. Getty, Room 305
Uvalde, Texas 78801
Office (830) 278-3533
FAX (830) 278-3017
camile@uvaldecounty.com

Alvin Zimmerman
Zimmerman, Axelrad, Meyer, Stern & Wise
3040 Post Oak Blvd., Suite 1300
Houston, Texas 77056-6511
Office (713) 552-1234
FAX (713) 963-0859
azimmer@zimmerlaw.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

Cecilia H. Morgan, Chair
JAMS
8401 N. Central Expressway, Suite 610
Dallas, Texas 75225
(JAMS) 214.744.5267
FAX 214.739.1981
cmorgan@jamsadr.com

John K. Boyce, III, Chair Elect
Attorney and Arbitrator
Trinity Plaza II, Suite 460
745 E. Mulberry Avenue
San Antonio, Texas 78212-3166
Office: (210) 736-2224
FAX (210) 735-2921
jkbiii@boycelaw.net

John Allen Chalk, Sr., Treasurer
Whitaker, Chalk, Swindle & Sawyer, LLP
301 Commerce Street
3500 City Center II
Fort Worth, Texas 76102-4168
Office (817) 878-0575
(FAX) (817) 878-0501
jchalk@whitakerchalk.com

Susan B. Schultz, Secretary
The Center for Public Policy Dispute Resolution
The University of Texas School of Law
727 E. Dean Keeton
Austin, Texas 78705
Office (512) 471-3507
Cell (512) 751-9421
sschultz@law.utexas.edu

Immediate Past Chair:
John Charles Fleming
Hays & Owens
807 Brazos, Suite 500
Austin, Texas 78701
(512) 472-3993
(512) 826-6855
john.fleming@haysowens.com

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