ALTERNATIVE RESOLUTIONS

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

As I settled into my study tonight, a quick glance at a scribbled "to-do" list reminded me that I needed to write this column. Also written down were several ideas that I was considering for the "Chair's Corner."

Yet, I couldn't move my thoughts past the ADR Section Council meeting I attended yesterday in Dallas. Over the course of a few hours, a talented group of dispute resolution professionals gathered to discuss the business of the Section, to explore current developments in the field, and to genuinely enjoy the company of each other. Put simply, I was proud. Lest you think me arrogant, let me explain.

The Council shared coffee and copies and conversation. Our agenda contained the standard fare of organizations – consideration of minutes and treasurer's reports and the like. But it also featured a number of items of tremendous importance to you as a member of the Section. Some of those things surfaced some diversity of thought and interesting exchange of point and counter-point. All delivered with respect and a spirit of camaraderie.

As our work unfolded, I watched busy individuals step forward to take responsibility for the myriad of tasks and assignments that flow from our Section life. And I remember the distinct feeling that things would be done and done well.

Driving westward toward Abilene yesterday afternoon I found myself feeling deep appreciation for the members of our Council. Each and every one of them has an impressive resume. Even though some of us have been in the field for a shorter time, there is no feeling of "junior" members. We were all accepted at the table.

Somewhere in a remote stretch of I-20, I realized how the Council, as a microcosm of our entire Section and our profession, projects a model of competence and collaboration. Many of the finer techniques of mediation were called on during that meeting and, where needed, the artistry of arbitration was engaged. It strikes me that each of you bring those same skills and talents to your arbitration rooms and mediation tables.

As a member of the ADR Section, you are an essential partner in moving our profession forward. Regardless of whether your tenure is one year or thirty, I am proud to be one of you. I am proud that dispute resolution professionals do more than just mediate and arbitrate. I am proud that you help people move toward understanding and resolution. I am proud that others recognize that what we do is changing the face of business, government, non-profit organizations, schools and communities. I am proud of you.

I do want to ask one favor.

Be proud, too.

Inside This Issue:

FROM THE EDITORS

By Stephen K. Huber and E. Wendy Trachte-Huber

NON-JUDICIAL DISPUTE RESOLUTION

America is in the midst of economic hard times, a situation that is unlikely to change in the near future. A central response must be a reduction in government expenditures – if not immediately, then in the near future. At the risk of noting the obvious, the judiciary is one of the three branches of government. The judiciary may be the Least Dangerous Branch, as Alexander Bickel argued, and certainly the least costly branch, but public dispute resolution if a form of government expenditure.

Budget discussions tend to focus on the federal government, because the amounts expended are so vast. Many federal government expenditures pay for activities that are national in scope, notably national defense, foreign affairs, regulatory affairs, and transfer payments. In this respect, judicial activity is atypical. The vast preponderance of disputes are heard by state rather than federal courts, and accordingly are paid for by state (or local) funds. [Of course, all government funds come from taxpayers, but our taxing system is a topic for another day.]

Major reductions in expenditures have already been made in such essential areas as national defense and education -- and more are coming. In this context, it is hardly surprising that judicial functions have seen major reductions in government funding – and more are coming. The implications for non-judicial dispute resolution are considerable, but in an essay directed at dispute resolution professionals these need not be spelled out at length. Rather than answers, we offer food for thought.

The consequences of reduced public funding are readily apparent: reduced services and increased delay in disposing of cases. There are, of course, numerous reform proposals, but these require substantive changes to the present system. For example, the jurisdiction of small claims courts might be expanded. Charges associated with the judicial process – "user fees," not taxes -- could be increased to make up for reduced government funding, but doing so would increase the price of access to the courts. In any event, the level of charges associated with court actions is the province of the legislative rather than the judicial branch of government.

The observations in the previous paragraphs are neither new nor controversial. The occasion for this essay is a recent article in The Economist, 10/1/11, at 31, that includes the specific factual data and quotations set out below.

The federal courts regularly receive a disproportionate amount of attention, and our focus is the state and local level of government, but a few words about federal courts are in order. The major pressure on federal courts in recent years has been increasing caseloads, accompanied by the slow pace of the appointment process for federal judges, rather than funding. Magistrate judges and bankruptcy judges do work at the trial level, but the work load pressure is unremitting. The salaries of federal district judges, measured in constant dollars, have been falling for years. In the face of deficits as far as the eye can see accompanied by high unemployment and stagnant middle class income, arguments by the Chief Justice to Congress for increasing judicial salaries will surely fail. The following quotation if from Wikipedia, "US federal judge".

> Chief Justice John Roberts has repeatedly pleaded for an increase in judicial pay, calling the situation a "constitutional crisis." The problem is that the most talented associates at the largest U.S. law firms with judicial clerkship experience (in other words, the attorneys most qualified to become the next generation of federal judges) already earn as much as a federal judge in their *first year* as full-time associates. Thus, when those attorneys eventually become experienced partners and reach the stage in life where one would normally consider switching to public service, their interest in joining the judiciary is tempered by the prospect of a giant pay cut back

to what they were making 10 to 20 years earlier (adjusted for inflation). One way for attorneys to soften the financial blow is to spend only a few years on the bench and then return to private practice or go into private arbitration, but such turnover creates a risk of a revolving door judiciary subject to regulatory capture.

Thus, Chief Justice Roberts has warned that "judges are no longer drawn primarily from among the best lawyers in the practicing bar" and "If judicial appointment ceases to be the capstone of a distinguished career and instead becomes a stepping stone to a lucrative position in private practice, the Framers' goal of a truly independent judiciary will be placed in serious jeopardy."

The organized bar has also argued for improved judicial compensation, at both the federal and state level. These efforts have failed, notwithstanding that the legal profession is far better represented than any other occupational group in legislative bodies at all levels of government.

Let us now turn out attention to state and local courts. An immediate difference is that salaries of judges and other court personnel are lower than those at the federal level. New York judges, whose pay has been frozen for over a decade (while caseloads increased 30%), have responded by bringing suit against the other two branches of government. As has been observed in New York, Texas and elsewhere, first year associates at major city law firms earn more than state judges.

In thinking about judicial proceedings, consideration needs to be given to the divide between criminal and civil proceedings. Many states have statutory (or even constitutional) provisions that parallel the federal Speedy Trial Act, 18 U.S.C. §§ 3161-3174, which means that criminal cases can crowd out civil trials. In one Georgia judicial district, civil adjudication has stopped entirely. Problems are serious, if less extreme, in many state court systems.

A report by the American Bar Association found that in the last three years, most states have cut court funding by around 10-15 percent. In the past tow years, 26 states have stopped filling judicial vacancies, 34 have stopped replacing clerks. 31 have frozen or cut the salaries of judges or staff, 16 have furloughed clerical staff, and nine have furloughed judges. Courts in 14 states have reduced their opening hours, and are closed on some working days.

As happens throughout government (and private industry) during tough times, maintenance on physical facilities such as court houses is deferred. Similarly, the acquisition of cost-saving 21st century technology gets postponed because funds are not available to pay the “up-front” capital costs.

As has so often been the case, California is a harbinger of things to come. For a very readable guided tour, see Michael Lewis, “California *and* Bust” (italics in original) in the November, 2011 issue of Vanity Fair magazine. Government services are degraded, and worse is soon to come. The current California budget cut funding for the court system by $350 million, and a trigger tied to decreasing state tax revenues will produce further reductions. With criminal cases receiving judicial priority, the impact on civil dockets is already serious. As for traffic infractions, the backlog “is already so daunting that it compromises enforcement (and the deterrence of bad driving).”

These limitations on judicial services have a real cost to society, as well as actual and potential participants in the judicial system.

In Florida in 2009, according to the Washington Economics Group, the backlog in civil courts is costing the state some $9.8 billion in gross domestic product a year, a staggering achievement for a court system that costs just $1.2 billion in its entirely.

Quite apart from dollar costs, justice delayed is justice denied – not only for the parties that obtain a judicial decision, but also for the parties who abandon the courts due to lengthening queues. [For much more about the topic of discouragement due to waiting periods, do a Google search for “Queueing Theory.”] Of course, many costs to individuals and society are not readily subject to economic valuation, such as those associated with delayed resolution of family disputes and the absence of social services for children. For the foreseeable future, expect more of the same – in Texas, and throughout America.

Justice Frank G. Evans Award
Selection Criteria Policies and Procedures for Selection of Recipients

- The Evans Award is created and dedicated as a living tribute to Justice Frank G. Evans who is considered the founder of the alternative dispute resolution movement in Texas.
- The award is awarded annually to persons **who have performed exceptional and outstanding efforts in promoting or furthering the use or research of alternative dispute resolution methods in Texas.** The recipients should be persons who are recognized leaders in the field of ADR. Although the award is presented by the ADR Section of the State Bar of Texas, the recipients do not have to be either a member of the State Bar, a member of the ADR Section, a lawyer, or a practicing third-party neutral.
- **Up to two awards may be awarded annually.**
- Each nomination submitted will be considered for two consecutive years but persons are encouraged to re-submit nominations yearly.
- Anyone may submit nominations provided the nominations are timely submitted on forms provided by the Awards Committee. The person making the nomination does not have to be a lawyer, a member of the ADR Section, or a third -party neutral.
- Nominations **must be received by March 1** of each year.
- Nomination forms may be obtained from any member of the ADR Section Directors Council or from the ADR Section Liaison at the State Bar of Texas.
- The nomination form will also be published at least once a year annually in the news bulletin of the ADR Section, preferably in the Fall edition. In addition, other non-State Bar ADR associations will be encouraged to publish or distribute the nomination form annually to their memberships.
- Selection of the recipients will be made by an Awards Committee of the ADR Section with approval of the Council. **Awards Committee voting membership will be comprised of five members of the Council.** The Chair and the voting members of the Awards Committee will be appointed by the Chair of the ADR Section. The Chair of the Section will not serve as the Chair of the Awards Committee. If an Awards Committee member is nominated, consideration of that nomination shall be delayed to the first subsequent year when the nominee is no longer a member of the Awards Committee.
- Persons who are members of the council as of March 1 are ineligible for consideration for the Evans Award for that calendar year. Ex-officio members are eligible.
- Although duration of involvement is not a requirement for selection of a recipient, special consideration will be given to nominees who have devoted themselves to alternative dispute resolution over an extended period of time.
- Presentation of the Award will be made at an appropriate ceremony at the annual State Bar Convention with a report of the presentation submitted for subsequent publication in the State Journal and the ADR Section bulletin.

Recipients

2011 Josephina Rendon
2010 Cecilia H. Morgan
2009 Michael J. Kopp
2008 Robyn G. Pietsch & Walter Wright
2007 Cynthia Taylor Krier
2007 Charles R. "Bob" Dunn
2006 Michael J. Schless
2005 Maxel "Bud" Silverberg & Rena Silverberg
2004 Professor Brian D. Shannon
2003 Honorable John Coselli
2002 Gary Condra
2001 John Palmer
2000 Suzanne Mann Duvall
1999 C. Bruce Stratton
1998 Professor Edward F. Sherman
1997 The Honorable Nancy Atlas, Judge, Southern District of Texas
1996 Bill Low, First Non-Attorney Recipient
1995 Professor Kimberlee Kovach

NOMINATION FORM
JUSTICE FRANK G. EVANS AWARD

Presented by the
Alternative Dispute Resolution Section - State Bar of Texas

I hereby nominate the following person for the Justice Frank G. Evans Award in recognition of the nominee's outstanding contributions toward, and achievements in, furthering the use or research of alternative dispute resolution in Texas [Attach additional pages as necessary]:

Nominee (Print)_____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ FAX: _____ E-Mail: _____

1. Is the nominee an attorney licensed to practice law in Texas? (Y) (N) (Circle one)

2. What is the nominee's occupation and business address:

_____

_____

3. List ADR methods in which the nominee has received training (e.g., mediation, arbitration) and, if possible, identify the training organization, length of training, and training year:

_____

_____

4. List ADR methods in which the nominee has conducted training (e.g., mediation, arbitration) and the number of courses and the organizations:

_____

_____

5. List the number of years that the nominee has been a member of the ADR Section of the State Bar. Describe in detail the extent of involvement:

_____

_____

_____

6. List the areas in which the nominee serves as a third-party neutral (e.g., family law, government, environmental):

_____

_____

_____

_____

7. List honors, awards, and recognitions received by the nominee in the field of ADR:

_____

_____

8. List the ADR organizations (national, state, and local) to which this nominee belongs or has belonged. Describe the extent of involvement, including offices (with dates) held by the nominee in the organizations:

_____

_____

9. List articles on ADR written by the nominee. Include the names of the publications in which the articles were published and the dates of publication:

_____

_____

_____

_____

10. On additional pages, please explain in detail what acts of outstanding achievement the nominee has performed in furthering alternative dispute resolution in Texas that qualifies the nominee for consideration for this award. Attach all documentation necessary, including letters of recommendation, to support the nomination and submit this completed form and all attached documentation as a single nomination packet.

(Please Print)

Nominated by: _____

Signature: _____ Date: _____

Address: _____

City: _____ State: _____ ZIP: _____

Phone: _____ FAX: _____ E-Mail: _____

Note: Nominations must be received by March 1, 2012. Submit nomination packet: electronically to hca-drc@ktc.com or mail to Ed Reaves, Hill Country DRC, 327 Earl Garrett # 108, Kerrville, TX 78028-4500.

Mediation as Terror Management: Implications for Mediation Training and Practice

By Kenneth M. Jackson

Introduction

The counseling role of mediators is explicitly disclaimed in mediation ethics rules such as Tennessee Supreme Court Rule 31, App. A, § 6 (b) (4), and the giving of "other professional advice" is discouraged in the Texas Supreme Court's Ethical Guidelines for Mediators, ¶ 11. Though mediators are not counselors when acting as mediators, and mediation is not therapy, this article contends that mediators need skills that are part of a counselor's repertoire. Mediators need to grasp and apply a theoretical base that grounds mediators in an understanding of human nature. I will denominate and explain a theoretical base called Terror Management Theory that can be helpful to mediators. I will also briefly discuss other useful theories. Throughout I will draw implications for mediation training and practice, and conclude with a counseling model of mediation.

Terror Management Theory

"Terror management" is the term used by several principal researchers (Drs. Sheldon Solomon, Tom Pyszczynski, and Jeff Greenberg, among others) to describe the fear of literal and symbolic death that is the mainspring of human activities, Threats to order, predictability, meaning, permanence, prosperity, and self-esteem engender this fear. Conflicts between persons and positions exacerbate the fear to the extent that interests are sacrificed to worldview defense. My thesis basically is that mediation can respond to this human condition by understanding Terror Management Theory, applying it in case-specific contexts, and acting to minimize its impact.

Terror Management Theory suggests the need for greater psychological and counseling training for mediators, as well as revisions in mediation practices and training generally. This does not, of course, mean that non-attorney mediators do not need more legal and paralegal training. Terror Management Theory proposes that, because humans are presumptively unique in their self-consciousness of their mortality, the instinct for self-preservation responds to reminders of mortality (mortality salience) with fears of death, decay, and worthlessness. This bundle of fears, which is universal, is managed by adopting and maintaining a personal cultural worldview, and by creating ways to maintain the *status quo* and to enhance one's self-esteem. A "world-view" is the collection of beliefs and attitudes about life held by a person or a group, a set of assumptions about physical and social reality, the "most basic and comprehensive concepts, values, and unstated assumptions about the nature of reality."

Fear management is achieved largely through extrinsic signs such as wealth, power, and fame, but also through identification with others like ourselves. Self-esteem serves to buffer to our anxieties associated with awareness of mortality, and it is made possible by the development of cultural worldviews "which provide a stable and meaningful conception of the universe, social roles with specific prescriptions for behaviors that are deemed valuable, and the promise of safety and immortality to those who satisfy those prescriptions."

In a conflict when one's self-esteem is challenged by another person, one will create a variety of worldview defensive strategies to minimize, counteract, or compensate for the perceived threat. Worldview defense is experiential, not rational. Individuals criticize, disaffiliate from, and even become aggressive towards those whose worldviews

differ, while valuing those who support their worldviews.

There are well over 200 articles reporting on experiments in Terror Management Theory, and some are cited in the bibliography below. Detailed citations of quoted material derived from the bibliography are available upon request. The work of Drs. Solomon, Pyszczynski, Greenberg and others is based on Ernest Becker's *Denial of Death*, and his *Escape from Evil*. Becker's basic idea is that awareness of death is a uniquely human phenomena and the mainspring of human activities – activities largely designed to avoid or deny death, literally and symbolically. Over time humans created cultural worldviews that offered order, predictability, meaning, and permanence. The thrust of *Escape from Evil* is the principle of prosperity: anything that threatens our access to what we need, from food and water to material and emotional goods, is bad.

What Terror Management Theory is telling mediators is that more fundamental processes are involved in conflict resolution than needs and interests, monetary or otherwise. It provides us with a way to understand the fear of conflict, and the inappropriate responses to conflict that are endemic in society.

Proximal and Distal Defenses

In mediation we see both proximal and distal defenses. Although cast in polar terms, there may be a degree of each in defensiveness. Death-related thought first activates direct defenses (proximal defenses) to minimize the threat and then later triggers symbolic worldview defenses (distal defenses). Proximal or direct defenses include: separating from threatening persons, stereotyping the other person, using derogatory terms, exaggerating differences, stigmatizing the other, displaying disapproval, making self-serving projections, and creating social distance. In mediation, we see problem-avoidance, altered perceptions of the severity of problems, distractions, and denial of vulnerability to problems. Sometimes we see actions to delay or defer paying attention to, or taking action on critical problems in situations where early resolution would be beneficial.

Distal defenses (worldview defenses) include increasing self-esteem by winning, by material acquisitions, and by lifestyle. These more abstract intellectual defenses "provide security by making one's life seem meaningful, valuable, and enduring. Positive reactions are given to those who support one's worldview, negative to those who do not. In mediation, when worldviews collide, the mediator must not only maintain neutrality between them, but also must help to translate apparent differences into superordinate commonalities. Mediators do this by demonstrating that they have listened to each participant through such techniques as active listening, summarizing, reframing, and appropriate questioning. Commonalities perceived by the mediator can be tested. (For a good exploration of appropriate communication techniques, see Chapter 5, "Assisting the Communication Process," in Laurence J. Boulle, Michael T. Colatrella, Jr., and Anthony P. Picchioni, *Mediation Skills and Techniques*, (Lexis Nexis, 2008), pp. 115-140.

Both types of defenses are fragile. We have daily reminders of mortality in the normal flow of life, and in profound tragedies such as the recent 9.0 earthquake, the ensuing tsunami, and the nuclear threat in Japan. "To the extent that people need to believe that one and only one conception of reality is ultimately correct, the existence of conceptions at variance with their own implies that someone must be mistaken; . . . the existence of others with different worldviews therefore increases the individual's need for validation of his or her own worldview."

Inducing mortality reminders "increases the positivity of evaluations of those who bolster the cultural worldview and the negativity of evaluations of those who threaten it."

Received Wisdom About Mediation

Acknowledging differences in practice among mediators, there remains a body of received wisdom that is commonly utilized in the training and practice of mediation. Textbooks and training manuals, for the most part, present conformed models of mediation practice. Variations are co-opted – facilitative, evaluative, and transformative styles of mediation, sole mediators or co-mediators, family or business cases,

separate or joint sessions, and ways of facilitating communication – all different approaches that are described for use in appropriate cases. The question I am raising is whether or not our broad assumptions about sound mediation techniques need re-examination. I conclude that they do with regard to the existential psychological dynamics we can now, because of Terror Management Theory, understand to be present and active, if unconsciously, in conflict communications, and end with a recommended model for a mediator who can employ counseling skills and theory.

Why We Need What We Need

Getting to the real needs and interests of parties is the seam of gold the mediator prospects for, because it offers multiple, often elegant, possible solutions. When mediators understand why parties have the needs they do, mediators can devise new, or employ familiar mediation techniques to respond to those needs and interests. The better mediators can understand the psychological underpinnings, or lack thereof, of the wide variety of received principles and techniques in which they are trained, and which they perpetuate by applying them in particular cases, the better they can improve the way they conduct, and influence the outcomes of, their mediations. As their skills are developed in practice, mediators have the potential for greater creative use of those abilities. But they also may become rote and stagnant. Understanding human motivation in mediation situations provides an opportunity to infuse meaning into their mediation practice.

The Need for Self-Esteem

It is important for mediators to recognize the dynamic role self-esteem plays in any mediation or negotiation. The human need for self-esteem has two threat dimensions: public and private. We privately defend our self-esteem when it is privately threatened. "When publicly threatened, individuals are particularly likely to engage in private self-esteem maintenance strategies." For example, failures may be attributed to external factors, an individual's own capabilities are over-valued, and one's performance over-estimated in comparison to that of others.

Self-esteem serves as a buffer to the deep feelings of anxiety over death (literal or symbolic), decay (as in aging), and worthlessness (as in losing in a conflict). We minimize our terror of death, decay and worthlessness by denying our impotence, vulnerability, and mortality, and by seeing ourselves as significant and our worldview as valid. Anything that suggests that our worldview is wrong – the opposing position in a conflict, for example – threatens our self-esteem and raises our fear and anxiety levels.

In an employment conflict, for example, in-group members such as management may engage in negative behaviors toward out-group members such as employees to defuse the threat to their worldview – that power should reside in management. Thus we often see a claim of retaliation by an employee in employment mediation. Negative reactions on either side are more likely, and are stronger. when the alternative conception of reality is compelling and attracts a strong commitment from the out-group.

One thinks of the recent demonstrations in Wisconsin and elsewhere related to government action to eliminate collective bargaining for teachers, though they are part of ages of labor-management strife. Conflict is primarily ideological. One person's worldview is pitted against the worldview of another. This diminishes the self-esteem of parties on both sides by raising the possibility that their personal value is no different from, and no better than the other party's. The parties instinctively understand that their assumptions and presumptions, and their positions in a conflict are not unquestionably valid. This apparent equality of values and worldviews is unsettling and threatening. Often both parties deny this potential path toward mutual respect and instead convince themselves that their position is the superior one, the only right one.

A noteworthy corollary of this dynamic is that the more dissimilar the worldviews, attitudes, beliefs, and values of the parties in mediation, the less likely they will be willing to work together toward a resolution of their problems. Dissimilar worldviews often require that the mediator can best serve the process by discovering commonalities and by normaliz-

ing differences. For example, in employment mediation one might reverse roles by evoking a manager's past experience as a non-managerial worker. Or the mediator might aid in the search for common values and worldviews that overarch the dissimilar worldviews by exploring why each came to work at their company.

Self-Esteem and Social Behaviors

Many social behaviors are influenced by our need to protect self-esteem. We tend to like and trust the similar and familiar, and dislike and distrust the dissimilar and unfamiliar. The similar and familiar validate our beliefs and attitudes, thereby affirming our self-esteem. We react negatively to deviance and perceived deviance from norms that we and those in our in-group maintain. Research has shown that attitudes of in-group members toward out-group members are influenced by the positions they take on issues, while counter-attitudinal positions taken by in-group members are viewed less critically. Mediators, too, "build and maintain self-esteem by being helpful to others, particularly others who have been deemed by the culture to be particularly worthy of help. Helping imparts a sense of value both because of the approval it generates from others and because of one's private sense of living up to cultural standards of goodness."

As a mediator practicing in, among other areas, faith community disputes, I see a common source of disputes to be the prejudice and hostility that can come from different religious views, even within a single, denominational church. Reminders of mortality have been shown experimentally to increase liking for a member of one's own religious group and decrease liking for a member of a religious out-group. For example, a study by Drs. Naomi Struch and Shalom H. Swartz found that aggression toward ultra-orthodox Jews by other Israeli Jews was correlated with perceived conflicts of interest and differences in basic values between the groups. Similar perceptions and differences arise in other intra-religion and intra-denominational as well.

A second experiment showed that awareness of mortality encourages those with high authoritarian personalities (individuals with a high level of respect for authority, rigid and dogmatic views, and negative attitudes toward those who are different) to increase their tendency to reject dissimilar others. In mediation it may frequently be the case that one party is an authoritarian personality who is seeking to impose controls on the process, to over-emphasize standards they perceive to be unmet by the other party, and otherwise to dominate the other party. In that event, mediators employ a number of techniques to address the authoritarian personality, particularly if that personality is representing a power imbalance. These mediation techniques may include empowering the weaker party, creating doubt and reality testing for the stronger party, neutrally introducing counter-balancing standards, and urging tolerance of differences. Another experiment indicated that "those with worldviews that encourage tolerance of differences may actually respond to fears of mortality by reacting less negatively to those who are different."

A third experiment indicated that terror management plays a role in the censorship and persecution of those courageous or foolhardy enough to challenge central aspects of a popular worldview. The trial of Socrates provides a classical example. The authors of this third experiment used the then-current example of the Ayatollah Khomeini's call for the death of an author critical of Islam, Salmon Rushdie, to demonstrate that terror management can call forth potentially lethal consequences. More prosaically, mediators in disputes involving professional firms may see an individual practitioner being rejected because he or she raises questions about, or points to faults in established practices in the firm, or is overbearing in dealing with others. The one who is perceived as being out-of-bounds threatens the in-group's faith in the validity of their worldview. The mediator may help by challenging the in-group to be open to dissenting opinions.

When viewed as an intervention, mediation is effective when it facilitates the acquisition and maintenance of meaning and value for all parties. The mediator promotes values, roles, and behaviors that will provide compelling, consistent social validation of the parties' self-worth. This means that mediators must be careful when they challenge one of the parties to reconsider their perceived reality. Reality

testing, if carelessly done, can undermine efforts to help a party envision a meaningful post-dispute view of reality from which a sense of personal value can be derived. Terror management research suggests that reality testing is best done in private sessions, because public evaluation settings create more anxiety than private evaluation settings, and because public awareness of a failure, *i.e.*, a challenge to one's understanding of reality, increases insecurity and defensiveness. This brings into question the model of mediation that attempts to keep the parties together in joint session all of the time.

In domestic violence cases, where a victim often is more concerned about hiding the physical or emotional abuse than with seeking relief from the abuse, we see the extent to which one reacts to threats to self-esteem and the emphasis placed on what other people think, despite pain and degradation. When the mediator attempts to help the abuse victim test reality, the victim may view the mediator's attempt as an attack on the victim's worldview that it is her or his duty to keep the abuse secret. In such cases, the mediator must be both skillful and careful.

Otto Rank, a psychotherapist and existential philosopher who broke away from Freud, and influenced Ernest Becker, contended that fear is not the only human motivation as Freud had suggested. He argues that people are also motivated to grow and develop their strengths, character, and skills. Terror Management theorists have followed Rank's lead, and have also explored the role of growth and enrichment motives in human behavior as well as defensive concerns. For example, promoting the conflict management skills of mediation participants in an intra-office conflict between administrative and technical staff members after resolution of the presenting issues can lead to enhanced self-esteem on both sides, and higher levels of collaboration, creativity, and self-actualization.

While we want the parties to seek creative solutions in mediation, Maslow reminds us that deficiencies in basic needs must be satisfied before the individual will pursue self-actualization. When defensive motives can be satisfied, it is possible for people to cope with mortality awareness in a positive way – a change in values, an expansion of the self, a clarification of one's priorities, and bring a more authentic meaning to life.

Helpful Strategies

Positive, intrinsic motivations are integrated within Self-Determination Theory, such as Dr. Barbara L. Fredrickson's interest-based theory. While not as urgent or fundamental as negative motivations, intrinsic positive motivators help people create physical, intellectual, social, and psychological resources. "Interest," in her usage, is akin to curiosity, and the mediator can help to generate engaged involvement in the mediation process by offering possibilities. By inducing positive emotions, the thought-action repertoire of mediation participants can be increased and stimulate growth, integration, and positive motivation. Goal-setting and goal-pursuit in a meditation can instigate activities that produce feelings of competence, and create a future-oriented perspective that avoids blaming and promotes reciprocity.

Cognitive Dissonance Theory offers another helpful direction for mediators. It asserts that a person attempting to hold two mutually exclusive cognitions "produces an aversive tension state that people are motivated to reduce." Mortality reminders intensify dissonance reduction efforts. The way this works is that information inconsistent with one's worldview is avoided or explained away, because "inconsistency undermines the very foundation of the individual's potentially fragile psychological equanimity." Therefore, when the mediator challenges one party's worldview, she must be ready to offer another worldview that will both serve the party's self-esteem needs and help buffer the party's fears. This other worldview may be the third position discussed below. Also, a mediator might suggest that the parties agree to a trial period for a proposed solution to their conflict to verify that it is not opposed to their worldview, but consistent with it. I have found this to be particularly helpful in developing parenting plans and in juvenile dependent/ neglect cases.

Just World Theory is another theory that can offer guidance to mediators. It is based on the fact that people attempt to provide a sense of security in a world in which bad things happen to good people. They are "motivated to believe that the world is a fair and just place where people deserve what they get and get what they deserve." Encounters with injustice motivate people to do something to restore

justice. While this speaks to likely motivation for mediators to engage in the profession, the point here is that a cognitive dissonance arises when one's view of justice in a particular case cannot be achieved. A party's belief that the good will be rewarded must mean that the other party's "unjust" position is evil. We see this effect in quantitative disputes in mediation when parties insist on larger rewards for themselves (the good) and harsher monetary punishment for the other party (the evil). We also see cases where parties "will incur considerable costs in terms of generally desired resources to maintain their claims to being virtuous."

While acknowledging that people have other motives along with terror management needs, such as experiencing pleasure, avoiding pain, desiring consistency, justice, and social approval, and achieving growth, these needs are derived in significant part from the need to address the problem of mortality symbolically. "The core need to control this deeply rooted anxiety that results from our awareness of our ultimate vulnerability and mortality in turn gives rise to other more specific needs and psychological mechanisms (*e.g.*, self-esteem, social approval, and justice)." Terror Management Theory asserts that "to control our fear of insignificance, we invest in social roles and relationships that give our lives meaning and value. To control our fear of not being able to fulfill the requirements of these roles or losing these relationships, we distort our perceptions and attempt to undermine anything that stands between us and these life-sustaining commitments."

Further Lessons from Terror Management Theory

Terror Management Theory is particularly relevant in multi-cultural mediation settings, because prejudice against, intolerance of, and maladaptive responses to those outside one's own culture is a buffer against anxiety about the validity of one's own culture and worldview. Xenophobia is evident in the responses to immigrants in state legislation. In an experiment, under conditions of mortality reminders, American subjects assessed greater attributions of responsibility and larger damage awards when the cars in a described automobile accident were Japanese than when they were American. In a German experiment, mortality salience led subjects to sit closer to a German confederate and further away from a Turkish confederate, and to report less favorable general attitudes toward foreigners. It appears that it is not differences per se that matter, but differences that implicitly or explicitly challenge the individual's worldview. The fear of mortality is more or less salient in cultures depending on whether or not it is an individualistic culture or a collectivist culture. These differences create a built-in in-group/out-group conflict.

Relevant to criminal misdemeanor mediations, Terror Management Theory has shown that harsher penalties would be insisted upon for transgressors who violate one's standard of value. In an experiment, municipal judges in mortality salient conditions would set higher bonds for violations than would municipal judges in a control group.

Terror Management Theory provides helpful strategies in mediating divorce or other conflicts involving older persons. Some have argued that attachments -- close personal relationships -- serve an important terror management function in addition to worldview and self-esteem. Divorce and family mediation obviously involves threats to personal attachments, worldview (*e.g.*, marriage as normative), and self-esteem, and so our mediation protocols should be reviewed to assure that, as mediators, we are attending to those threats.

Sometimes mediators hear one party challenge the ethics of the other party. This is a direct affront to a person's sense of self-worth. Sometimes a party will persist in its views to the point that the other party will attempt to assimilate or accommodate those views to its own. While the mediator should be alert to those signals, because they may offer a way to settlement, caution should be used when such signals occur in domestic abuse cases. They may indicate an attempt to romance the victim.

Terror Management Theory posits that people are highly sensitive to environmental cues associated with threats to continued existence, which should emphasize to mediators the importance of a welcoming, comfortable setting for the mediation settings, and maintenance of ground rules.

Uncertainty manipulation is a standard tool for the mediator; however, uncertainty may engender negative attitudes toward others at the very time when the aim is to bring parties to agreement. Uncertainty tends to raise fear. People are likely to be less open in the midst of uncertainty. Often, uncertainty encourages rigid conformity. In conditions of uncertainty, conforming to others relieves anxiety. We see this in employment mediations, for example, when a group of employees have conformed their narratives in complaints against management, or *vice versa*.

Threats to the person, (*i.e.*, economic, existential, personal character threats) push people away from intrinsic goals they generally endorse toward materialistic defenses (*i.e.*, money, appearance, popularity), whether or not such materialistic goals nurture their well being. Mediators can nurture and protect the mediation process by reassuring the parties that the mediators are searching for solutions that will honor and strengthen all parties, and that the parties retain control of their agreement.

Implications for Mediation Training and Practice

The view that mediation is simply assisted negotiation is problematic in light of Terror Management Theory. Without engaging in the practice of formal therapeutic counseling, mediators need to understand and manage the psychological challenges their clients face. In light of these findings, more emphasis in training should be placed on the transformative mediation model than is currently done. Transformative mediation theory posits that parties in conflict are in a 'vicious circle of disempowerment, disconnection, and demonization. These characteristics are present in worldview defense and are best approached by engaging the parties in creative building of a working relationship in mediation.

Materials on the nature of conflict and strategies for resolving conflict should be expanded in light of Terror Management Theory. Methods for reducing defensiveness should be emphasized. Repetitive practice in facilitating communication between persons with different worldviews would enable better situational responses by mediators to blocked understandings. Given the tenacity of worldview defense, mediation trainers are right to insist on not rushing to solutions. Mediators also are well advised to acknowledge elements of likeness between the parties, and to reframe issues in a manner that neither side is disadvantaged. Mediators should be aware of cultural differences, even if the differences appear to be minimal.

In addition to communication with each party during intake, a preliminary conference, "convening," may be helpful in acculturating the parties and their counsel to each other. Gathering information about the dispute is secondary to gathering information about the parties. Getting to know them on a personal level humanizes both the process and the mediator. It helps the mediator to gauge the emotional states of the parties, and to assess the possible effects of differences. The mediator can promote his or her trustworthiness, as well as that of the process, while managing expectations. Concerns can be acknowledged and normalized and even explained how they might be mutual. Proximal direct defenses often are asserted early in mediation and, if the proximal defense is not in the form of withdrawal, strong emotions are often expressed.

I have also suggested the use of more private sessions to avoid public threats to one's self-esteem and worldview, particularly in reality testing. Evoking commonalities was another suggestion. Counseling training should include practice in dealing with various types of personalities such as authoritarian and idiosyncratic personalities. Helping the parties to envision a good post-mediation reality – getting the dispute behind them – can complement their distal defenses. We need to watch for either party's efforts to assimilate or accommodate the views of the other party in their worldview. If time and circumstance permit, teaching conflict management skills is an important service mediators can provide for cases in which there will be a continuing relationship between the parties. Inducing positive emotions and engaging in joint activities such as brainstorming can stimulate feelings of competence and mutuality. Using care in manipulating uncertainty can avoid adverse reactions.

A Counseling Model of Mediation

Drs. J. R. Newbrough and David McMillan's concept of mediating from the third position, in effect, provides a mediator's proposal at early stages in the process. The third position begins with two guidelines in addition to the usual rules of communication: (1) the promise to be curious, and (2) respect for a worthy opponent. The promise to be curious entails a commitment to the idea that there may be options for a solution that the parties have not considered, and a promise to be open to the possibility that there are such options. Respect for a worthy opponent is based on the democratic idea of checks and balances and on the fact that when our ideas are opposed, we can develop better ideas and more creative interest-inclusive solutions. With tentative buy-in to these guidelines, the mediator listens to the parties and positively frames each party's position outside the party's personal interest and inside a good moral value that serves the community or system. The mediator then frames the debate as a conflict of values, not of persons. Traditional training regimens in my experience do not engage value-based issues, but instead either advise avoidance by attending to interest-based bargaining or assert that they are not amenable to solution. In the interest-based model of mediation, a party may be asked to prioritize his or her values. Or the parties' disputed values are split such that each can exercise their value in their personal spheres of influence. Any of these may exacerbate the effects of worldview defense. Newbrough and McMillan contend that using values offers mediators another opportunity to honor the parties and ennoble the discourse.

For example, the traditional interest-based approach in a dispute over the religious upbringing of a child might resolve the dispute by using time to separate the parents' interests. A parenting plan might allow the child to be raised in one faith tradition when with the father, and another when with the mother. Each parent then has a personal sphere of influence over the child. Their interests have been served, but that may have no relation to the child's interests, particularly because the parents may become more encapsulated in their personal worldviews and disdainful of that of the other parent, which, of course, the child perceives. This puts the child in the center of a potentially nasty, confusing, and long-lasting conflict.

Continuing with the Newbrough-McMillan approach, the parties are honored for taking on the role of advocate for their respective "good," and it is expected that by being so appreciated and honored that the parties' anger and fears they had at the outset will begin to recede. They will begin to use more of their brains as they consider options. Their self-esteem will be enhanced. Then the mediator, in order to open the neo-cortex further, engages the parties as well as himself or herself in a playful manner to nominate values to serve as a third voting value that might break the impasse.

After each party agrees to serve a third value as well as their original value, the mediator allows time for the parties on their own to generate new solutions that will serve their original value and the third value. Initially, because of the new common third position, common elements in the parties' proposed solutions emerge. The mediator notes these new common elements and a momentum of shared problem-solving emerges, leading to solutions that had never before been considered. This process creates no losers and no compromises. It generates new solutions that are potentially useful to all parties.

While this is a straightforward process, it does require adaptation for conventionally trained mediators to use it productively. This is one of those "try it, you'll like it" things. It embodies some important psychological principles. Coupled with an understanding of Terror Management Theory and how it plays out in conflicts and mediation, a mediator can recognize the psychological interests underlying both substantive and procedural interests.

Conclusion

The psychodynamics of the fear of death are brought into every mediation in various forms. Defensive responses, direct and indirect, have been illustrated. Traditional mediation methods are shown as not always meeting unconscious psychological needs. Suggestions have been offered for the implications of Terror Management Theory for mediators and the mediation process. The third position ap-

proach has been offered as a way to developing a mutually agreeable worldview, while promoting the self-esteem of the participants. Concerns about some accepted practices and training methods have been expressed.

Nevertheless, it is clear to me that further work needs to be done to explore the dimensions of Terror Management Theory as an intellectually sound and practical bedrock of mediation practice and conflict resolution. For example, I have not thoroughly explored the effects of Terror Management Theory on the mediator as a person, or on his or her performance as a mediator. To the extent it would be useful, the integration of relevant insights from cognitive and other theories would help to complement the unconscious processes of terror management with conscious processes.

Ken Jackson of Nashville, Tennessee received his B. A. and J. D. degrees from Southern Methodist University, and M. Div. from Vanderbilt University. He is a member of the Tennessee Bar and an inactive member of the Texas Bar. He is a Tennessee Supreme Court Listed Rule 31 General Civil and Family Mediator, and is certified for domestic violence cases. He arbitrates and mediates for AAA, FINRA, BBB, the Mediation Group of Tennessee, and the Nashville Conflict Resolution Center. He is a member of the Tennessee Association of Professional Mediators, the Executive Council of the Tennessee Bar's ADR Section, and the ADR Section of the State Bar of Texas.

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Opportunities for Peace Making in Pakistan

"You never really understand a person until you consider things from his point of view –until you climb into his skin and walk around in it."
–Atticus Finch in To Kill a Mocking bird

By Sherrie Abney*

The American View

Everyone was a little apprehensive. It was May 7, 2011, and we were preparing to meet ten visitors from Pakistan that the U.S. State Department had brought to Dallas, Texas, to learn about peace keeping and conflict resolution. Five days earlier the United States Navy Seals had killed Osama Bin Laden in Abbottabad, Pakistan. We were wondering how our visitors felt about the circumstances leading to Bin Laden's death, and how they would feel about *us* telling *them* how to resolve conflict?

Several weeks earlier we had received information regarding the individuals that were coming. They were all Muslims, and they were involved in various occupations in different areas of their country. Among our guests were chiefs of police and other peace keeping officials, lawyers, several heads of NGOs (non-government organizations), a social worker, and a professor. The information revealed that several of them had expressed hostile attitudes about the United States and the American people in the past. This information had been delivered prior to May 2nd, so we wondered if their opinions about the United States might have changed for the worse since the report was compiled. We had no idea of what to expect from them.

A conference room at the Dallas Bar Association Headquarters had been reserved. Our moderator was a retired judge and three attorneys trained and experienced in Collaborative Law, were ready to present a relatively new form of dispute resolution that employs interest-based negotiation to our visitors.

The group arrived and quietly filed into the room holding out their hands in greeting. We all shook hands and seated ourselves around the conference table. One of the men had purchased a "cowboy outfit" consisting of boots, levis, a belt with trophy buckle, a hat, and western shirt. (That was encouraging — maybe they all did not hate us.) After introductions, we began explaining the collaborative process with PowerPoint slides and materials that we had prepared. Our visitors had an interpreter with them, but they all spoke English and very few translations or explanations of terms were needed. They were extremely attentive and polite, and they had many questions for us.

Disputes in Pakistan often involve religious differences and quarrels between tribes over land. Some of our visitors had witnessed bloodshed between religious groups and had risked their own lives to stop more killing. They were very serious about any new ideas we could give them that would help them resolve conflict. Few mediators in the United States put their lives on the line when attempting to settle a dispute, but some of these people were and are doing it on a regular basis. In Pakistan, people doing this sort of work are killed, kidnapped, tortured, and their homes are burnt.

What We Told Them

Many cultures operate on the premise that "might makes right," or they rely on the law which may or may not be appropriate for the issues in question. The collaborative process is based on a very simple five step procedure that examines the issues in dispute through the eyes of the parties. The process begins by discovering the interests, concerns, and goals

of each of the parties to the dispute. Once the issues are identified and the parties have explained their concerns, information is gathered so that the facts surrounding the dispute may be examined. When each of the parties has all of the facts in his or her possession and each person has heard and understands the concerns of the other parties, the participants are ready to develop options. Developing options consists of brainstorming and sharing ideas regarding courses of action for consideration by the parties. Enough time should be taken in this step to be certain that every possible option is listed. Next, participants evaluate each option, and those that are impossible or unnecessarily detrimental to one of the parties are discarded. The remaining options form the basis of negotiations which eventually lead to resolution.

Most dispute resolution procedures focus on who is to blame. The collaborative process takes the focus away from the past and blame and looks to the future and how responsibilities will be shared between the parties to resolve the conflict.

Our visitors were not familiar with this approach to dispute resolution, but they immediately responded that they could see how the process could change the attitude of the parties. Instead of being blamed and told what they had to do, the parties would be listening to each other and sharing information. They would become a part of the solution instead of the answers being imposed on them by a third party. They would have ownership in the result.

At the end of the day, we all wondered just how much we had been able to impart to our visitors that they would be able to actually put to good use. After taking a few photos, they went on to their next stop which was Fort Worth and more ideas on dispute resolution.

The Pakistan View

June 6, 2011, I received an e-mail entitled "My New Friends from America." It was from the executive director of an NGO in Pakistan. I opened it and discovered that this was one of the people who had visited us in May. He is stationed at a post near the Afghanistan border in the northern part of the country. His post includes 3.5 million people spread over six regions in one of the most dangerous and war torn areas in Pakistan. His job is human rights protection, and reforms in the governance system of the tribal areas. His organization is struggling to eradicate the menaces of militancy, terrorism, drugs, and to bring positive changes and sustainable development through building programs for the tribal people. (I expect there are not many people who are standing in line hoping for his position or one like it.)

He explained the governing system as follows:

> The federally administered Tribal Area is governed by the British era old black and draconian law known as Frontier Crimes Regulation (FCR1901) where the people's fundamental rights are not protected and there is no concept of the separation of power, and all the powers whether legislative, executive or judicial are vested in a single person known as Political Agent.
>
> Neither the superior courts have the jurisdiction in the area nor the elected representatives of the area can legislate for their own area and the area is totally on the mercy of the presidential and governor executive orders which are implemented by the Political Administration.

As I continued to read the e-mail, I began to see that they had also been apprehensive about visiting us. Under the Heading, "What We Observed" he wrote:

> The Americans people hate war and they are peace loving people and respect humanity regardless of race, religion, color and caste.
>
> Another astonishing thing was that on the 2nd May 2011 the incident of Osama took Place in Abbottabad and on the 7th May we came to America and we had apprehended that we will face a very harsh and hostile attitude

> of the Americans but to our great surprise that we experienced 100% opposite and friendly behavior from the people.

Every where we were cordially received, they shake hands, and had a very positive and loving behavior with us.

Not only was the attitude of our hosts but also the common people on the roads, markets and bazaars quite outstanding.

> On our return to Pakistan the people use to ask us about the culture, religion, and different ways of life and the perception about the Islam, Muslims, and particularly of the tribal people. We continuously tell them about the reality and of our previous misguided perception about the Americans which make them surprised and [they] want to learn more and more.

All of this was extremely gratifying, but the best surprise came toward the end of the e-mail:

> On my return I practically implemented the learnt lessons about the peaceful settlements of the local disputes and settled the longstanding property disputes between two warring tribes. I settled that through the process of mediation and both the parties were surprised to see that I did not impose my decision on them rather than I was only a facilitator and they were able to decide their disputes themselves in a friendly environment.

Our visitors had taken back the peaceful ideas that we had shared with them and put them to good use. The e-mail concluded with expressions of thanks for the "very good time and respect" that changed their perception of America. Who would have believed that people in Dallas could influence the resolution of a dispute between warring tribes and improve the image of America in Pakistan?

* Sherrie R. Abney is a sole practitioner in Carrollton, Texas and adjunct professor at Southern Methodist University Dedman School of Law. Her practice consists of real estate transactions, mediations, arbitrations, and collaborative cases. A significant amount of her time is spent developing materials and training the collaborative process. In addition to numerous articles, she is the author of *Avoiding Litigation: A Guide to Civil Collaborative Law,* and *Civil Collaborative Law: The Road Less Traveled*.

USING THE FEDERAL RULES OF CIVIL PROCEDURE IN EMPLOYMENT ARBITRATIONS: THE LAW OF UNINTENDED CONSEQUENCES?

*By Lionel M. Schooler**

In the employment context, many employers have adopted dispute resolution programs that feature, as one means of alternative dispute resolution, a resort to binding arbitration if internal investigative procedures and informal resolution mechanisms do not resolve the workplace problem at hand. In such situations, employers sometimes implement this program by incorporating the rules and processes of an ADR provider, such as the American Arbitration Association (AAA). It should not be overlooked that to avoid court scrutiny for unconscionability[1], most employer-drafted dispute resolution policies require that the employer is to bear the up-front costs of arbitration.

However, possibly wanting to narrow the bases upon which an arbitrator can exercise the discretion that AAA Rules provide while at the same time expanding the available avenue for discovery and pre-trial disposition of claims, some employers have specifically incorporated the requirement that the Federal Rules of Civil Procedure shall apply to any company-sponsored arbitration.[2] This Article discusses the consequences, both intended and unintended, of that decision.[3]

I. INTRODUCTION

A. THE APPROACH IN THE ARBITRATION RULES

Using as an example the AAA Employment Arbitration Rules, those Rules contemplate: a short statement of the Claim and the Response; an Initial Management Conference to establish dates for the Hearing and various pre-hearing deadlines on a streamlined basis; and the conducting of Pre-Hearing discovery between the Initial Conference and the Hearing in the most efficient and least intrusive manner possible.

This approach is designed to emphasize the importance of the parties' collaboration rather than the Tribunal's frequent oversight of, and/or involvement in, the proceeding. Because of existing AAA policies, for example, an Arbitrator usually does not charge "study time" for conducting the Initial Management Conference and, if no other matter is presented for consideration to the Tribunal between then and the Hearing, the Tribunal has no occasion to charge the parties for any time expended until the date of the Hearing. Indeed, it is not unusual for the Tribunal not to review detailed information about the case, whether in the form of a pre-hearing brief, exhibits of the parties, or other such materials, until commencement of the Hearing itself.

B. THE APPROACH IN THE FEDERAL RULES

The Federal Rules seek to promote efficiency in many respects. However, as written and as interpreted by the courts, the Rules hover over every aspect of a lawsuit -- commencing with the filing of the lawsuit and advancing through the pre-trial joinder phase, the discovery phase, the potential sum-

mary disposition phase (of some or all claims), and culminating in the trial itself.

Invocation of the Federal Rules as the governing rules of the arbitration proceeding dictates that an Arbitration Tribunal must behave as a federal judge would in managing the proceeding; as a result, if arbitrator involvement is required at any particular pre-hearing phase, then expense to the parties follows in the form of increased study time by the Tribunal.

It can be fairly stated that every stop at which a Tribunal must devote attention to a matter governed by the Federal Rules along the way, from the Initial Management Conference to the Hearing, amounts to "mini-litigation" of issues potentially arising under the Rules. Such mini-litigation necessarily brings with it corresponding expense to the parties for the Tribunal time involved.

II. THE FIRST STOP: SUFFICIENCY OF THE PLEADINGS

The impact of the Federal Rules occurs at the very onset of the proceeding.

In the Initial Management Conference, because of the invocation of the Federal Rules, the Tribunal is obligated to inquire about whether the parties will rely upon such Rules in connection with the issue of the sufficiency of the pleadings.

Given the party-driven nature of arbitration proceedings, a Tribunal can always afford the parties the opportunity to agree upon some modified use of the Federal Rules, or some "picking and choosing" as to which rules the parties wish to apply. As a result, Arbitrators should try to determine from the parties whether they can agree on ground rules for the amount of detail that must be included in the Statement of Claim and the Response.

However, if the parties do not agree to waive the applicability of Federal Rules 8 through 15, the Tribunal is squarely presented with the first potential issue: does the Statement of the Claim (and/or any Counterclaim or Cross-Claim) comport with FED.R.CIV.P. 12(b)?[4]

That is, because of the U.S. Supreme Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 7 (2008), the first scheduling decision confronting the Tribunal, and therefore the parties, will be the deadline by which a Rule 12(b)(6) motion and response shall be filed, if any, addressing the sufficiency of the Statement of the Claim, the Response or any Counterclaim (as the case may be).

The companion decision to be made at that time is the handling of the cost of Tribunal time to review and rule upon such a motion, *i.e.*, the deposit amount the employer shall be required to make to cover the Tribunal's anticipated study time pertaining to the motion.

At first glance, an advocate might assume that the Tribunal's time to address this matter could be limited, because of the focused nature of an inquiry about the sufficiency of a pleading. Such an assumption is belied by the fact that parties to an arbitration are paying for the process, and are "entitled to get their money's worth." This overriding fact thrusts the importance of the transparency of the process to the fore. As a result, whether the Tribunal is going to grant or deny such a motion (in whole or in part), the parties are entitled to know the basis for such a ruling. Specifying the basis for a ruling translates into increased Tribunal involvement because of the need to issue a detailed written ruling.

III. THE SECOND STOP: DISCLOSURES AND PRE-HEARING DISCOVERY

Federal Rule 16 contemplates the use of a process much like what is accomplished in the Initial Management Conference, such that it does not necessitate additional Tribunal time or cost to the parties.

However, the "discovery rules," Federal Rules 26 through 37, impose special requirements upon parties that can contribute to significant inefficiencies and expense. This is not to say that parties in a proceeding governed by the Rules cannot agree on topics such as the types of discovery to be used, the limits for using any particular form of discovery,

and the relaxation of deadlines for responding to discovery requests. However, a proceeding under AAA Rules does not envisage the use of requests for admissions or interrogatories, or providing specific details in expert reports, and the AAA Rules usually empower the Tribunal with discretion on limiting the number of depositions while relaxing the standard for the scope of document requests.

In Federal Rules litigation, by contrast, it is a fact of life that the more discovery mechanisms there are available, the more expense to the parties, in terms of lawyer time, to draft and/or respond to discovery. It is also a fact of life that the more discovery issued, the more likely that a discovery dispute can arise.

IV. THE THIRD STOP: DISCOVERY DISPUTES; SANCTIONS

A. DISCOVERY DISPUTES

In an arbitration proceeding, discovery disputes raise the spectre of the need for the Tribunal to conduct a conference to resolve such disputes, because FED.R.CIV.P. 26 clearly provides for discovery boundaries that are often constricting[5], and FED.R.CIV.P. 37 clearly provides consequences for not responding to discovery requests properly.[6] Conferences with the Tribunal increase the cost to the parties because of the need for compensated "study time" and the corresponding obligation upon the Tribunal to issue a written ruling resolving such disputes.

Practitioners are often cautioned about how much judges dislike having to rule upon discovery disputes and about how important it is for practitioners to attempt to resolve such disputes without the need for formal intervention.

For a Tribunal, the challenge to resolving a discovery dispute is first, allocating time to consider the dispute so as to keep the Proceeding on schedule; and second, having the time before any such conference to wade into the interstices of a dispute to understand its background and context so as to appreciate the *bona fides* of the specific dispute. The Federal Rules have guidelines as to what is and is not discoverable, but the only meaningful way for a Tribunal to assess "relevancy" (for example) is to be briefed adequately by the parties as to the nature and background of the dispute.

Tribunal time translates into an additional cost to the parties.

B. SANCTIONS

Federal Rule 37 comes with an extra set of baggage, the authorization to impose sanctions upon the non-compliant party.[7] Sanctions are ordinarily anathema to the usual party-driven proceeding, which is designed to emphasize collaboration and cooperation. But the availability of sanctions is a fact of life under the Federal Rules. Obviously, any time a party makes a legitimate request for Rule 37 sanctions in a pre-hearing dispute, the Tribunal is obliged to give such a request fair consideration and, correspondingly, to ensure that any written ruling adequately explains why such sanctions are or are not being awarded.

V. THE FOURTH STOP: PRE-TRIAL DISPOSITION

AAA Employment Rule 27 states as follows on the subject of pre-trial dispositions: "The arbitrator **may** allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."

That is the entire wording of the Rule. It does not provide any guidelines at all for the time-frame for presenting or considering such a dispositive motion, the rules of evidence that apply[8], or the standard upon which such a motion should be granted. Given the discretion afforded to the Tribunal as to whether to "allow" the filing of such a motion, the Tribunal has to balance whatever benefit may or may not be achieved by a theoretically possible narrowing of the issues with the potential detriment to curtailing one of the hallmarks of the arbitration process: providing each side its "day in court."

FED.R.CIV.P. 56 is, of course, quite different from AAA Rule 27. It comes loaded with deadlines, specific evidentiary rules, and the standard to be applied in deciding whether a summary judgment motion should be granted. Thanks to the U.S. Supreme Court's Rule 56 "trilogy" of decisions[9], Rule 56 is also overlaid with a presumption that (as with other pre-trial rules), the arbiter is going to use this Rule aggressively to ferret out non-meritorious claims and streamline the matters at issue, if any, for trial.

One tribunal's efficiency can be another tribunal's cost.

In a federal court lawsuit, in response to a summary judgment motion, a federal judge can certainly serve the interests of the parties by utilizing the regime established by Rule 56 to narrow the amount of court time that may have to be devoted to a trial on the merits, an important factor given the typical demands upon a judge's time and his or her limited available trial days for a civil case.

On the other hand, in an arbitration proceeding, a Tribunal's involvement in a pre-hearing conference focusing upon potential disposition of some or all of the claims (usually some) dictates that a significant amount of study time, and therefore expense to the parties, will have to be incurred. This is so for the same reason that a Tribunal's involvement in adjudicating a discovery dispute will be expensive -- to give the matter proper consideration, the Tribunal will be obliged to delve into the background facts of the case to become sufficiently aware of the context of the facts so as to determine for which facts, if any, there is a genuinely material issue.

While Rule 56 permits a court to issue a perfunctory ruling when denying a non-meritorious motion, in an arbitration proceeding the Tribunal usually has the task of providing a reasoned opinion for the parties (as part of both the agreement to arbitrate and, if not, as part of the applicable AAA Employment Rules)[10] to explain the basis for its ruling on a Rule 56 motion for summary judgment, including (where appropriate) the extent to which, and reasons for which, claims are to be narrowed or eliminated from the Hearing.

Of course, it should not be overlooked that if the issues to be adjudicated at the Hearing are not all resolved by a summary disposition, then the parties likely will not be spared the cost of the Tribunal's time for the Hearing.

VI. THE FIFTH STOP: THE HEARING

The second to last stop is the Hearing. This is where the Federal Rules of Evidence come into play.

Rule 30 of the AAA's Employment Rules provides in pertinent part as follows:

> "The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute.
>
> The arbitrator shall be the judge of the relevance and materiality of the evidence offered, ***and conformity to legal rules of evidence shall not be necessary***."

In most arbitration proceedings conducted pursuant to AAA Rule 30, therefore, a Tribunal is permitted to "receive" all of the evidence and then determine for itself the extent to which the evidence is worthy of acceptance. This expedites the process of receiving into evidence *en masse* the parties' exhibits at the outset of the Hearing, as well as the process of taking live testimony generally unimpeded by repetitive objections.[11]

Not so with the Federal Rules of Evidence. Because of the expense to the parties for a separate pre-hearing conference, a Tribunal usually does not convene a "pre-trial conference" in advance of the commencement of the Hearing for the purpose of considering admissibility of evidence. Therefore, the commencement of the Hearing usually marks the first time the Tribunal is exposed to the parties' documentary evidentiary submissions and, correspondingly, their respective objections to admissibility of the opposing party's exhibits.

Ruling upon admissibility typically results in a lengthy consideration of many objections and, correspondingly, a deferral of a decision on admissibility as to some exhibits whose admissibility cannot be determined outside the context of live testimony. Additionally, once live testimony commences, the overlay of the Federal Rules of Evidence requires that its standards be applied, with the result that there can be frequent objections to the admissibility of certain kinds of live testimony.[12]

VII. THE LAST STOP: POST-HEARING ISSUES

Finally, there is the interplay between the Federal Rules and the rules of a Tribunal ordinarily operating under the auspices of a provider such as the AAA. The AAA's Employment Rules provide for a reasoned award (as indicated above), whereas in a "bench" trial, FED.R.CIV.P. 52 contemplates that the District Court will issue findings of fact and conclusions of law. The AAA's Employment Rules also provide a deadline of thirty (30) days for issuance of the "award," while the Federal Rules do not prescribe any such deadline. The AAA's Employment Rules further contemplate that all matters to be adjudicated by the Tribunal, including an award of attorney's fees[13], are to be included within its award. By contrast, FED.R.CIV.P. 54(d) now specifically provides that a District Court is authorized to take up the subject of attorney's fees within a prescribed time ***after*** the entry of a final judgment.

Given the party-driven nature of an arbitration proceeding, a Tribunal is best advised to comport with the requirements of the party's arbitration agreement and the applicable provider's rules in issuing an award, an event that occurs outside the framework of the Federal Rules.

VIII. AFTER THE LAST STOP

Finally, there is the matter of an arbitrator's authority once an award has been issued. A Tribunal is not appointed to hear a case in the same way as a judge is appointed to serve as a judicial officer, and therefore a Tribunal is *nunctas officio*, losing its authority to act at the time of the issuance of the award, subject to the very limited exception set forth in (for example) AAA Employment Rule 40, which states as follows:

> "Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, technical, or computational errors in the award. ***The arbitrator is not empowered to redetermine the merits of any claim already decided***. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto. If applicable law requires a different procedural time frame, that procedure shall be followed."

Litigants are often surprised to discover that a Tribunal is not authorized to adjudicate, for example, a motion to reconsider or a motion for new trial.[14] However, given the source of the Tribunal's authority, without an agreement of the parties to expand the Tribunal's authority beyond the bounds of what exists in the provider's Rules[15], the Tribunal is usually powerless to act following issuance of the award.

CONCLUSION

The arbitration process can achieve significant savings to litigants in time and money through the streamlining of processes and procedures. Such savings can be unintentionally forfeited, however, by an uncritical inclusion of court-designed rules superimposed upon the arbitral process. Drafters should therefore weigh the benefits of predictability and expanded pre-hearing involvement against the burdens of increased cost and potential delays in the arbitral process when adopting the rules governing an arbitration proceeding.

* **Lionel Schooler** is an equity partner in the Houston office of Jackson Walker L.L.P. He has practiced employment law and federal court civil litigation since 1976, following completion of a clerkship with the Hon. Carl O. Bue, Jr. of the United States District Court for the Southern District of Texas in Houston (retired). Mr. Schooler has also served as a member of the Arbitration Panels on Commercial and Employment Law of the American Arbitration Association since 1992, and was recently certified by the Chartered Institute of Arbitrators as a Fellow in International Arbitration.

Footnotes

[1] *See Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 763 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000) (an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims).

[2] Typically, employers also incorporate the Federal Rules of Evidence when doing so.

[3] In this article, "the Hearing" describes the arbitration equivalent of a court trial on the merits; the "Tribunal" refers to the neutral or neutrals appointed to adjudicate the dispute.

[4] Since the parties are usually appearing voluntarily in an arbitration proceeding, or have been ordered to participate by a court in advance of commencement of the proceeding, it is assumed that the Tribunal usually will not have to address Rule 12(b) issues pertaining to subject matter jurisdiction, personal jurisdiction, venue, insufficient process or service of process, or failure to join a party.

[5] For example, FED.R.CIV.P. 26(a)(1)(A)(iii) requires "a computation of each category of damages claimed by the disclosing party," and also requires the disclosing party to make available for inspection any documents or other evidentiary material on which the calculations are based.

[6] For example, FED.R.CIV.P. 37(c)(1) provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

[7] Of course, the Federal Rules also contain a second mechanism for imposing sanctions in FED.R.CIV.P. 11. A consideration of the possible role of Rule 11 in an arbitration proceeding is beyond the scope of this Article.

[8] The impact of the Federal Rules upon the Hearing itself, particularly as to the admissibility of evidence, is discussed below.

[9] Rule 39(c) of the AAA's Employment Rules states: "The award shall be in writing and shall be signed by a majority of the arbitrators and ***shall provide the written reasons for the award*** unless the parties agree otherwise. It shall be executed in the manner required by law."

[10] *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

[11] A Tribunal is usually selected because of its having a specified level of experience with the substantive area of the law involved and with trials. Therefore, in most arbitration proceedings, the parties rely upon the Tribunal to flush inadmissible or irrelevant information at the "decision stage" of the proceedings, not the "Hearing stage."

[12] While the Federal Rules do prescribe guidelines for such matters as the manner in which testimony is to be taken, *see* FED.R.CIV.P. 43, it is a hallmark of the arbitration process that a Tribunal is not inflexibly precluded from adopting streamlined methods by which to accommodate scheduling needs and scheduling challenges that inevitably arise in any arbitration. For example, the undersigned usually encourages the parties to agree upon such matters as scheduling witness testimony "out of order" or from a remote location by telephone or video conference, to enhance the flow of testimony and streamline the process as much as possible.

[13] This restriction stands in sharp contrast to what Federal Rules 59 and 60 provide. They establish a regime in which a District Court is authorized to continue to have "jurisdiction" over a case after final judgment for up to one year.

[14] This restriction stands in sharp contrast to what Federal Rules 59 and 60 provide. They establish a regime in which a District Court is authorized to continue to have "jurisdiction" over a case after final judgment for up to one year.

[15] As the U.S. Supreme Court recently emphasized, while arbitration is a creature of contract, and while the intent of the parties should be given latitude in the type of proceeding upon which they have agreed to adjudicate their dispute, the parties' contracting power is not unfettered. *See Hall St. Associates L.L.C. v. Mattel*, 552 U.S. 576 (2008).

MICRO-INTERVENTIONS IN MONEY MATTERS

MEDIATOR FACILITATIONS

By Kay Elkins Elliott**

In recent weeks, preparing two teams for two competitions on two coasts, in entirely different subject matter areas, the basic techniques of distributive bargaining have been highlighted for me. Many situations are mostly about money. Yes, there may be integrative potential, but in integrative and distributive conflict, value must be claimed and closure must be reached to seal the deal. As mentioned in earlier columns, our colleague Jeff Abrams from Houston has concerns that mediators need more focused instruction and coaching on *facilitative* mediation of money matters – when relationships are of minor importance and the case will go to court or to arbitration if the mediation does not result in a settlement. His concerns led me on a journey – to find books, articles, guides for being excellent in bargaining, whether we are the mediator or the negotiator. Notice that the goal is to be facilitative – not evaluative, directive or adversarial.

In the midst of this journey, my role as a coach for ADR law school teams taught me more. On October 1, 2011, my team of two competed in the Southwestern Law School (Los Angeles) Entertainment Law Negotiation Competition for the first time. We didn't know what the culture of the competition would be so we prepared on the law, the facts, the issues, and developed a somewhat integrative (interest-based) strategy. We quickly learned in the first round that the judges were all savvy, street-smart entertainment lawyers who were experts in negotiating money matters. With laser focus they zeroed in on our weaknesses. Why didn't we ask more questions at the beginning to learn what information was missing? Why did we make the first offer, thereby leaving money on the table? Why did we waste time talking about a creative option but miss the fact that for the other side one issue was a deal-breaker – dooming us to not getting a deal? Why didn't we listen more and talk less? Why didn't we serve our client's interests by closing a deal he really needed? By the afternoon we had shored up some of those weaknesses and learned our lessons: some bargaining realities don't change that much. Learn the best techniques and use them well or fail your client was the take-away from that experience.

A few days later in a class I teach, Advanced ADR Advocacy, the twelve top students from the Texas Wesleyan intramural negotiation competition were assigned a negotiation roleplay to do outside of class. The facts are deceptively simple: a young, aspiring, poor artist inherits two paintings from the attic of his demented aunt. To his 21st century artistic eye the paintings are horrible and even the art appraiser tells him one is practically worthless and the other is maybe worth $12,000 on the open market. It was painted by a dead artist, Travis Bonham, with a respectable reputation. Our seller wants to go to Europe and study Modern Art with a guru. He needs only about $16,000 more to finance the trip. He advertises information about the art he is offering for sale and a lawyer, acting as the agent for a gallery, calls him and sets up an appointment.

All of my students reported their outcomes, and had to designate for me their reservation point, aspiration point, best alternative to a negotiated agreement, first and second offers -- with a rationale to support them. The sellers who received anything more than $12,000 thought they had been very successful. What they failed to find out by asking pointed questions at the beginning was the following: the gallery owner already had a wealthy buyer who was salivating over getting the Travis Bonham painting, which represented the last one in existence and completed his unique collection of all of this painter's work. The buyer's wife was the last remaining relative of the painter! To get his prize the

real buyer had told the gallery to spend up to $150,000! Any seller who puts out the first offer leaves huge dollars on the table – much wiser to ask questions, try to guess the secrets behind this lawyer -agent (that should have been a clue!) and force the gallery to make the first offer.

One student did this and the gallery agent said $40,000. What would you do? He accepted but of course now realizes that when the first offer from the buyer is triple what the appraised value of the item is, something is amiss. He should have gone much higher, say $100,000 and watched the reaction of the buyer. It is hard to fake body language. Unless the other negotiator is very skilled, the lack of outrage will be apparent, and the counter offer from the buyer has to be higher than $40,000. Now the seller knows the true bargaining zone is very different than what was expected. He has cleverly anchored the buyer in the upper range of the true bargaining zone – where he will get much more money to finance his artistic education. Notice that even when the seller anchors high, he still leaves money on the table!

There are some inescapable realities of distributive negotiation in mediation and it might be helpful to review some of them before we look at two common settlement problems that mediators must manage.

- Disputants and their legal representatives are the mediator's client *teams*.

- Information will be withheld from the other side, but sometimes one side will share those secrets with the mediator because of confidentiality.

- The paramount objective for the lawyers, and usually the clients, is to get a bigger, or at least a *fair share of the pie.*

- The bias of the mediator, usually, is to close the deal, whether it is fair or not.

- Proposals will be mostly about money or some other type of value.

- Feelings, while important in decision-making, may overwhelm rational thinking, so the mediator must be canny in timing her interventions and in asking for monetary proposals.

- Most of the time will be spent exchanging offers and counter offers.

- Parties will experience anger, tension, anxiety, frustration, and dismay as monetary offers are exchanged and the climate heats up.

- The human brain is flawed. Many cognitive, emotional, and cultural barriers impede the journey to the parties' best numbers.

- Mediators help in this journey by employing many, tiny, incremental interventions or techniques to steer around barriers.

- Even when the parties reach their best numbers, mediators must help them close any gap that still exists – closure skills are distinct from negotiation skills.

Now let's consider a typical, rear-ender case, or any case, in which the mediator has to facilitate, not evaluate nor direct, the parties to their best numbers and then to closure. In a great book, also mentioned in recent columns, Mediating Money Matters, by J. Anderson Little, published by the American Bar Association, some settlement conference clichés are highlighted with suggested interventions by a mediator. At a recent Association of Attorney Mediators symposium, the participants brainstormed additional micro-interventions for familiar road blocks. See if any of their answers or answers from Andy Little's book will help you. Adapted excerpts from the Little book are first, then the suggestions from the group at the symposium in September.

SETTLEMENT PROBLEM #1:

"We are not going to make the first offer!" What if both sides say this in mediation? What should the mediator do to start the negotiation dance? Here is an early caucus script with defense counsel:

D: "You've been with them for 30 minutes and we want to hear what their first offer is. Do you finally have a number for us?"

M: "No. They say they want you to make the first offer because their offer is already in their pleadings and the settlement brochure. They also say you have never made any offers during the last 8 months of this case and they are not going to bid against themselves."

D: "We haven't given them a number because they've never actually made a demand –everyone knows the amount in the pleadings is at least twice as high as the settlement value. Tradition says the plaintiff has to make the first demand!"

Answers: Here are the possible interventions generated by the book and at the symposium:

(1) Since both parties realize any offer thrown out anchors the bargaining zone, they are reluctant to go too low (as the seller/plaintiff) or too high as the defendant.

> All research shows first offers exert pressure on the settlement figure. As in the gallery case above, seller will anchor much too low if he makes the first offer,
> potentially leaving more than $100,000 on the table.
>
> Mediator: "This is a common problem. In almost every case making the first offer is risky unless each party has correctly evaluated his own case and estimated the value of the other party's case – sometimes that is impossible because information comes out at mediation that is useful in doing those difficult tasks. The normal way of proceeding is for the party with the burden of proof to make the first offer. But they are resisting that tradition.
>
> May I suggest this: give them the lowest number you really believe a jury might give them if they win, based on the weaknesses of their case, discounted by the risks and costs of trying the case, unless you plan to offer them nothing today. If that number is actually at the bottom of your bargaining zone, you anchor them low –where you want them to be. You leave yourself plenty of room to bargain aggressively and rationally. And you send a message to them that you have correctly evaluated the strengths of your case but are here in good faith to try to settle. You are educating them by your offer – because, as you know, what negotiators do with their numbers is tell the other side where they need to be to get the case settled. If you start educating them right from the beginning with the proposal you send over it could have a beneficial effect on his first offer. Are you willing to consider this?"

A.A.M. Answers:

(2) "What do you think the reaction in the other room will be when I go back without an offer from you? Is that the best way for us to educate them?"

(3) "Unfortunately, this may be a dangerous bargaining strategy. You will never find out how low they might go, unless you test the waters. Are you willing to use their stubbornness to gain an advantage here by anchoring them low, where you want them to be anyway?"

(4) "How does this adherence to tradition benefit you and your client? Are you not here to let me help you find out if a zone of possible agreement actually exists? What if any proposals you authorize me to make are framed as options, not offers, and cannot bind you? Until you actually sign a mediated settlement agreement you are not irrevocably committed – as you know."

(5) "How would you react if you were sitting in the other room? Even though you don't like them, it might be useful to stand in their shoes, for the sake of your client, and use the best tactics to get them to disclose more about their case and whether they really want to settle in a range you could be comfortable with."

(6) On a facetious note: "I am declaring an impasse and need to collect my mediation fee before you leave!" Obviously, none of the readers would do this, so maybe the other suggestions can be stored in your mediator arsenal for the next time.

SETTLEMENT PROBLEM #2:

After the first proposal from the claimant, defendant reacts strongly to a perceived outlandishly high settlement proposal. "The claimant has asked me to convey their first proposal -- $100,000."

Defendant: "Ok, that's it! I'm out of here! What a joke! This is a waste of my time. That's an insulting offer! Do they think I'm stupid? I'll give them as ridiculous an offer as they just sent me! Or, on second thought, I'm not even going to dignify that ridiculous number with a response. This mediation is over!" This talk is accompanied by action: Counsel starts packing up his briefcase and tells client to get up.

All of these remarks have something in common: they are based on the perception that the first proposal conveyed by the mediator from the other side is out of the ballpark and indicates that the case won't settle today. Underneath the statements is dismay, frustration and anger – similar to emotions felt in the first situation above. When these hostile reactions to proposals occur, it is the mediator's job to help the parties and their counselors go from negative, emotional reactivity to rational decision-making.

Mediator: "You want to hear if they are on your planet or even in your universe – is that right? Well they are on the $100,000 planet and I can see that is not even in your solar system. Since this is a typical soft tissue injury, low impact case and the plaintiff was out of work for a month, this looks like a $15,000 case to you – is that correct? So, you're discouraged to hear this high number. I take it you think he needs to be educated about a realistic range of settlement in this case? Here's my difficulty. If I go back in and ask him for another number without any proposal from you he's going to say what you did – that nobody wants to bid against himself. Perhaps we have another option at this point. Let me ask you a question: if he had been more realistic – what would your proposal have been?"

"I see you packing up your briefcase and beginning to leave the mediation. You have done your homework about jury verdicts in this county and you also are a more experienced negotiator than the other attorney. You probably believe that the other attorney isn't prepared to negotiate in the settlement range today so why prolong the mediation. Is that accurate? But you really came here today to settle – this is not a zero case to you? What if I share with him our conversation and tell him that you are now willing to offer $5,000 even though you are very dismayed by what he has done so far? And do you also want me to get him to justify why he thinks this is really a $100,000 case? So, you want to learn what you can today about his case evaluation? Good!"

AAM Answers:

(2) Explain you can't get a ping without a pong – one of the most powerful weapons of influence -the reciprocity principle.

(3) Explain mediation is a process and a range must be established. Plaintiff has started at an extreme end of that range – now Defendant can set the lower end of the range.

(4) Work to simplify the issues and keep probing to uncover what the strengths of each side are and of course their weaknesses.

(5) Find out the least plaintiff will take, even if you don't have permission to share that. If you realize there is an overlap or a settlement point, keep the parties negotiating until they close the gap.

(6) Tell the parties during the mediator's opening statement that they will probably each receive offers they do not like and cannot understand.

(7) Remind them that no one has to accept an offer but they should keep negotiating.

In future columns more settlement clichés will be explored. There is a wealth of information available for mediators who want to become experts in facilitating money mediations!

**** Kay Elkins Elliott*** maintains a private practice, Elliott Mediations, serves as ADR coordinator and adjunct professor at Texas Wesleyan University School of Law, and is a founding member of the Texas Mediation Trainers Roundtable. Ms. Elliott is a board member of the Texas Mediator Credentialing Association, the only organization in Texas that offers credentialing to mediators. She served on the State Bar of Texas ADR Council, is co-editor of the Texas ADR Handbook, 3rd edition and writes a mediation column in the Texas Association of Mediators Newsletter and the TCAM Newsletter.

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

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Winter	December 15, 2011	January 15, 2012
Spring	March 15, 2012	April 15, 2012
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SEND ARTICLES TO:

Prof. Stephen K. Huber
University of Houston Law Center
Houston, Texas 77204-6060
shuber@uh.edu

ETHICAL PUZZLER

By Suzanne M. Duvall

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to214-368-7528.

The Fall issue of the Ethical Puzzler is special in that I ask some of the leading ADR Practitioners in Texas to share their own experiences that presented them with their own "ethical puzzler" and, as well, to share how they handled the situation or, in hindsight, how they wished they had handled the situation.

Here's what they had to say —

****

Steve A. Bavousett (Houston). Fortunately I have not had many ethical dilemmas this past year. I did receive a call from a fellow mediator here in Houston, however, with an ethical issue that was troubling to him. After successfully mediating a grandparent custody case, the biological mother, who was pro se, made a comment to him that she should "just take her child and run." The concern, of course, was how serious she was, and whether he had a duty to report the threat either to the grandparents, their attorney, or the authorities. I think the ethical obligation in maintaining confidentiality is very clear, absent a clear belief that she is likely to follow through with her threat and commit a crime based upon the information that she had conveyed to him. I think the mediator faces a difficult decision of weighing the credibility of the commission of a crime against the sour grapes of a disappointed litigant.

Kris Donley (Austin). Several years ago, I mediated with a divorced couple (7 years) who were requesting a modification to the previous visitation and support agreement. Dad felt that their daughter, age 13, was spending too little time with him, and Mom wanted an increase in child support. Both parents had since remarried, and all four were present for the mediation.

The mediation begins in joint session, and the usual introductory remarks are made including the question to the group *does anyone feel that I might not be neutral in the situation,* and no one does.

After some time in joint session, I decide to the utilize individual sessions following a short break for clarity on Mom's resistance to include Dad in some requested activities. As I am entering the room with the Mom (whose new husband is coming down the hall), she exclaims enthusiastically, *"Now I know where I have seen you!!..You were my intake counselor at The People's Free Drug Clinic in the 70's!! I was really strung out on those days!"* (and to my blank expression) *I met with you several times—do you remember me?"*

True, I worked in the mental health and substance abuse field for twenty yeas, working with hundreds prior to my shift to mediation—although never at The People's Free Drug Clinic and, also true, the name I have now is the name that I had then, but I had no recollection of either her name or face and had to, regretfully acknowledge that I did not remember her.

About that time, her current husband appears, And now the dilemma…

1) Is this information relevant to the current situation? I don't think so—but what are my ethical obligations here?

2) Does it affect Mom's perception of my neutrality? Is the new husband privy to this history that precedes his relationship with her—in order to explore the issue? Will excusing the husband to discuss it more bring even more attention than necessary? What is my disclosure obligations to the other side? If they become aware of the former path crossing after the session, will it taint perceptions of the session or me in any way? ***How do we balance the confidentiality of the topic with the need to be neutral?***

Here's what I did:

Once the new husband entered the room and closed the door, I spoke directly but with vagueness to her stating, So—how would you like to handle that information?...to which she turned to her new husband and explained, *"I was just telling Kris that I remembered her from a long time ago in a medical clinic, but she doesn't remember me."* To which the husband shrugged and we proceeded.

I chose not to reveal anything further to the other side. While this did not come up again, I found myself wondering what if it had and whether I should have insisted on revealing this information to the other side as some vague path crossing decades ago that only Mom remembers anyway. Frankly, the words never came to me as to how to do that without raising suspicions. Considering the length of time (decades) and the sensitive nature of the information (drug abuse), I wondered if the disclosure would do more harm than the perception of lost neutrality—if I took the chance that it would not come up. Nevertheless, there was some risk associated with either options and while, I believe that I chose the less riskier, it certainly could have gone another direction.

William (Bill) H. Lemons (San Antonio). Lonnie Lawyer is representing his client (Joe) in a personal injury matter—a serious glazing accident involving a now-insolvent major automobile manufacturer. The initial demand was $26 million, and the mediation is moving painfully slow. While in caucus with me as Mediator, (shortly after selecting what he wanted for lunch), the plaintiff's lawyer excitedly tells me that the demand is now $1 million. Stunned at this, plaintiff Joe immediately jumps up and begins to argue with me, urging me not to take that offer back. It is obvious there was no real agreement between the lawyer and his client. The disagreement begins to escalate. A good deal of time goes by, and lawyer and client are still in a heated discussion.

Does the Mediator now "mediate" the dispute between lawyer and client? What does the Mediator tell the other side (if anything) as the other side now has asked if there is any response to their latest offer? Or more often, "what was the reaction in the other room?" or "what is the mood in there?"

Later, in a "hallway conversation," Lonnie tells me that actually, he had not remembered to file a Proof of Claim in the auto manufacturer's Chapter 7 case, and that might be a problem. But do not tell the other side. Particularly don't tell Joe.

What ethical obligations does the Mediator have, if any, in assisting a party in collecting money for a claim that is barred as a matter of law?

Unfortunately, I sometimes find myself "mediating" disputes between counsel and client in one of the rooms. That is the nature of the process, particularly when one of the sides is "under-represented." Sometimes, it is necessary that counsel reduce fees in order to get the deal done.

Using open-ended questions and being careful not to step on any toes, I was able to facilitate Joe and Lonnie coming to agreement as to their approach and ultimate end game. Had things not progressed to where client and lawyer were working together, under Ethical Guideline No. 13, I would have felt comfortable postponing, recessing or terminating the mediation process until Joe and Lonnie could meaningfully participate.

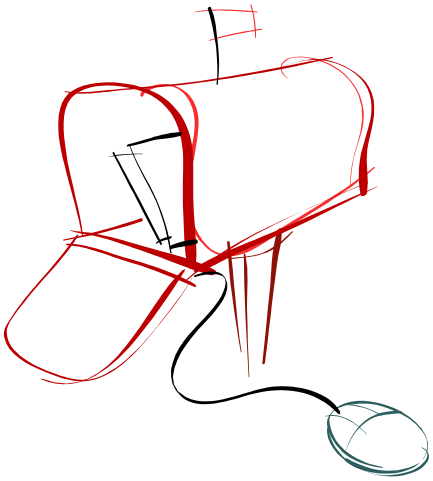
Remember I am not at liberty to disclose in the other room mood, attitude or the existence of hostility in the room I have just left. Such is every bit as confidential as speech.

I was able to dance around the issue of there not having been a Proof of Claim on file. Nobody ever asked, Perhaps the Trustee knew. Sometimes a party (or counsel) recognizes that limitations has passed

and bars a claim or all claims. As Mediator, it is not my job to provide defenses for one side or the other, or to rule on the ultimate merits of the dispute.

****

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



ADR ON THE WEB

By Mary Thompson*

Idealawg

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

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

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

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

Mediation includes information on

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

Elder Mediation/Generation Mediation provides links to the following content

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

Conflict Resolution includes

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

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

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

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

CALENDAR OF EVENTS 2011—2012

Family and Divorce Mediation Training * Houston * November 2-5, 2011 * *Worklife Institute* * For more information contact Diana C. Dale or Elizabeth F. Burleigh * Phone: 713.266.2456 * Website: http://www.worklifeinstitute.com

Family Mediation Training * Denton * November 17-20, 2011 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: http://www.twu.edu/ce/Mediation.asp

Expert Mediation Training * Denton * December 2-3, 2011 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: http://www.twu.edu/ce/Mediation.asp

40-Hour Basic Mediation Training * Houston *January 9-13, 2012 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

Commercial Arbitration (Domestic and International) * Houston *January 11-14, 2012 ** *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

40-Hour Basic Mediation Training * Ruidoso, New Mexico * February 27-March 2, 2012 * *Office of Dispute Resolution of Lubbock County* * For more information Harrison W. Hill at (806)775.1720 * HHill@co.lubbock.tx.us * Website:http://www.co.lubbock.tx.us/egov/docs/1291311234620.htm

40-Hour Basic Mediation Training * Salado, Texas * March 26-March 30, 2012 * *Office of Dispute Resolution of Lubbock County* * For more information Harrison W. Hill at (806)775.1720 * or by E-Mail: HHill@co.lubbock.tx.us *Website: http://www.co.lubbock.tx.us/egov/docs/1291311234620.htm

Basic Mediation Training * Denton * April 11-15, 2012 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: http://www.twu.edu/ce/Mediation.asp

Basic Mediation Training * Denton * July 11-15, 2012 * *Texas Woman's University* * For more information contact Christianne Kellett-Price * E-Mail: ckellett@twu.edu * Phone: 940.898.3466 * Website: http://www.twu.edu/ce/Mediation.asp

2011-2012 Officers and Council Members

Officers

Joe L. "Joey" Cope, Chair
Duncum Center for Conflict Resolution
1541 N. Judge Ely Blvd.
ACU Box 27770
Abilene, Texas 79699-7770
Office: 325-674-2015
Fax: 325-674-2427
Email: copej@acu.edu

Hon. Alvin Zimmerman, Chair-Elect
Zimmerman, Axelrad, Meyer,
Stern & Wise, P.C.
3040 Post Oak Blvd., Suite 1300
Houston, Texas 77056-6560
Office: (713) 552-1234
Fax: (713) 963-0859
Email: azimmerman@zimmerlaw.com

Susan G. Perin, Treasurer
Attorney * Mediator *Arbitrator
3207 Mercer Street
Houston, Texas 77027
Office: 713-572-5000
Fax: 713-551-9301
Email: susan@susanperin.com

Ronald L. Hornberger, Secretary
Plunkett & Gibson, Inc.
70 NE Loop 410, Suite 1100
San Antonio, Texas 78216
Office: 210-734-7092
Fax: 210-734-0379
Email: hornbergerr@plunkett-gibson.com

Susan B. Schultz, Past Chair
The Center for Public Policy
Dispute Resolution
727 E. Dean Keeton
Austin, Texas 78705
Office: 512-471-3507
Fax: 512-232-1191
Email: sschultz@law.texas.edu

Consultants

Stephen K. Huber, Co-Chair
Newsletter Editorial Board
Post Office Box 867
Bellville, Texas 77418
(979) 865-0020
shuber@uh.edu

E. Wendy Trachte-Huber, Co-Chair
Newsletter Editorial Board
Post Office Box 867
Bellville, Texas 77418
(979) 865-0020
countrymediator@aol.com

Robyn G. Pietsch,
Newsletter Editor
1109 Ridgevalley Dr.
La Porte, Texas 77571-2895
(281) 638-4042
robynpietsch@att.net

Special Representatives

Cecilia Morgan
TMCA Liaison
JAMS
8401 N. Central Expressway
Suite 610
Dallas, Texas 75225
Office (214) 744-5267
FAX (214) 720-6010
Email: chm320@sbcglobal.net

Daren Brown, TYLA
701 S. Taylor, Suite 500
Amarillo, Texas 79101
Office: 806-468-3329
Email: daren.brown@sprouselaw.com

Council Members
Terms Expire June 2012

Hon. Anne Ashby
PMB 152
11700 Preston Road, Suite 660
Dallas, TX 75230
Office: 214-269-7634
Mobile: 214-384-0674
Fax: 214-889-9999
Email: aashby@anneashbylaw.com

Hon. Dwight E. Jefferson
Dwight E. Jefferson,
Attorney at Law, P.L.L.C.
405 Main Street, Suite 950
Houston, TX 77002
Office: 713-222-1222
Fax: 713-993-0533
Email: dj@jeffersonlawfirm.com

Donald R. Philbin, Jr.
P.O. Box 12286
San Antonio, Texas 78212
Office: 210-212-7100
Fax: 210-212-7118
Email: don.philbin@adrtoolbox.com

James Edward "Ed" Reaves, Jr.
Hill Country Dispute Resolution Center
327 Earl Garret, Suite 108
Kerrville, TX 78028
Office: 830-792-5000
Email: hcadrc@ktc.com

Council Members
Terms Expire June 2013

Hon. Robert A. "Bob" Gammage
P.O. Box 400
Llano, Texas 78643
Office: 512-657-3575
Email: bgllano@yahoo.com

Hon. Donna S. Rayes
81st Judicial District Court
P.O. Box 161
Jourdanton, Texas 78026
Office: 830-769-3572
Email: dcourt81_218@yahoo.com

William B. "Bill" Short
Coats Rose, P.C.
5420 LBJ Freeway, Suite 1300
Dallas, Texas 75240
Office: 972-982-8458
Email: wshort@CoatsRose.com

Patty Wenetschlaeger
Brewer Jackson, P.C.
5201 N. O'Connor Blvd., Fifth Floor
Irving, Texas 75039
Office: 972-870-9898
Email: pwenetschlae-ger@brewerjackson.com

Term Expires 2014

Guy L. Hawkins
P.O. Box 2664
Lubbock, Texas 79408-2664
Office: 806-762-5289
Email: sofgl@yahoo.com

Robert C. Prather, Sr.
Snell Wylie & Tibbals
8150 N. Central Expressway, Suite 1800
Dallas, Texas 75206
Office: 214-691-2500
Fax: 214-691-2501
Email: rprather@snellwylie.com

Hon. Susan S. Soussan
1330 Post Oak Blvd., Suite 2880
Houston, Texas 77056
Office: 713-961-2880
Fax: 713-961-2886
Email: susan@soussan-adr.com

Hon. John J. Specia, Jr.
Plunkett & Gibson, Inc.
70 NE Loop 410, Suite 1100
San Antonio, Texas 78216
Office: 210-734-7092
Fax: 210-734-0379
Email: speciaj@plunkett-gibson.com

ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

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

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2011 to June 2012. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

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ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. Names, dates, quotations, and citations should be double-checked for accuracy.
5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. Check your mailing information, and change as appropriate.
8. The author should provide a brief professional biography and a photo (in jpeg format).
9. The article may have been published previously, provided that the author has the right to submit the article to Alternative Resolutions for publication.

Selection of Article

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

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

Preparation for Publishing

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

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

Future Publishing Right

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

ALTERNATIVE RESOLUTIONS
POLICY FOR LISTING OF TRAINING PROGRAMS

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

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

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

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

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

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

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

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

SAMPLE TRAINING LISTING:

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

ALTERNATIVE DISPUTE RESOLUTION SECTION

State Bar of Texas
P.O. Box 12487
Capitol Station
Austin, Texas 78711

http://www.texasadr.org