Alternative Resolutions

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The Newsletter of the State Bar of Texas
Alternative Dispute Resolution Section

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CHAIR'S CORNER

by William H. Lemons, III, Chair, ADR Section

"NOW WHAT HAVE YOU GOTTEN INTO?"

I'm married to the most wonderful person. Always have been. Or so it seems, after 34 years. She knows me pretty well. We met in Tyler while taking ballroom-dancing lessons in the fifth grade. Oh, I still don't know how to dance, but she has pretty much learned to read me like a book.

And so, at the end of the *Breakfast with the Texians* we did last year for the ABA Dispute Resolution Section mid-year meeting in San Antonio, she spotted me with a sheepish grin on my face (kinda like when your pet knows it is in trouble). I had just spoken with Wayne Fagan and Mike Schless, and they had asked me if I would consider being Chair of this section. I said that I would. So when I walked up to Pam to tell her, she immediately knew something was up and asked, "Now what have you gotten into?"

Well, I actually did take over as Chair of this wonderful group. The point of this story is that the ADR Section, as you might expect and certainly would hope, is *very very inclusive.* I am pretty new at all this. I have not done thousands of mediations or hundreds of arbitrations. I'm still a recovering former big-firm trial attorney. I only started my dispute resolution career in 1998. So if this section can elect me as Chair, it is very inclusive and there is a place here for everyone.

Yet the structure of our leadership is intended to keep me from running our train off the track too badly. Mike Schless, our wonderful and so very knowledgeable past-Chair, remains on the Executive Committee, as does Danielle Hargrove, who returns as Secretary. Mike Wilk, our Chair-elect, is also on the Executive Committee. The Executive Committee is joined this year by our new Treasurer, Cecilia Morgan, of Dallas.

Please take an active role in the Section. We have many exciting things going. For just one example, note in this Newsletter the preliminary brochure for our October CLE program. It takes place over a two-day period at South Texas College of Law in Houston. The roster of participants is stunning, and each topic is cutting-edge. It is going to become the preeminent ADR program in the nation. We are also finally going to give meaningful tribute to Frank Evans by dedicating his *Center for Conflict Resolution* that Thursday evening, October 14, 2004. You will each receive the actual program brochure shortly. Sign up early. Tell your friends to sign up early. We think the program will be full. We're going to run out of space.

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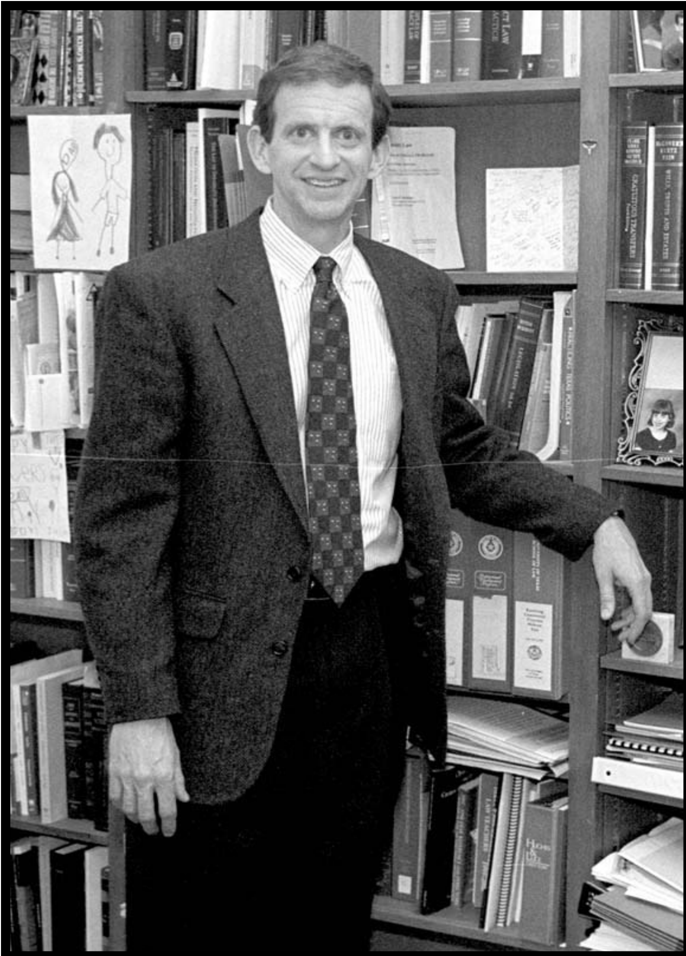
BRIAN D. SHANNON IS THIS YEAR'S RECIPIENT OF THE JUSTICE FRANK G. EVANS AWARD

By Michael J. Schless and Walter A. Wright



At the section's annual meeting in San Antonio on June 25, 2004, Brian D. Shannon became the eleventh recipient of the Justice Frank G. Evans Award, which is presented annually to recognize a person's exceptional and outstanding efforts in furthering the use or research of alternative dispute resolution methods in Texas.

Shannon, who is the Associate Dean for Academic Affairs and Charles B. Thornton Professor of Law at Texas Tech University School of Law (Texas Tech), spearheaded Texas mediators' opposition to the Uniform Mediation Act (UMA) by writing several articles pointing out the UMA's weaknesses, including <u>Dancing with the One that "Brung Us"-Why the Texas ADR Community Has Declined to Embrace the UMA</u>, 2003 Disp. Resol. J. 197 (2003). Shannon also is a co-author, with Alan Rau and Edward Sherman, of <u>Texas ADR and Arbitration: Statutes and Commentary</u> (2000), a comprehensive treatise on Texas ADR procedures. He is collaborating with John Fleming and the other authors, along with the ADR Section, to produce a new edition in the near future. He teaches courses in Alternative Dispute Resolution at Texas Tech, and he is an ADR practitioner.

In addition to his ADR work, Shannon writes about, teaches, and advocates fair treatment of people with disabilities. In recognition of his outstanding service to the disabled and organizations representing the disabled, he received the Mary Holdsworth Butt Award from the Texas Department of Mental Health and Mental Retardation in April 2002.

Shannon and his wife Jean are the proud parents of Julia Corinne, age 12.

Previous recipients of the Evans Award are as follows:

1994 Honorable Frank G. Evans
1995 Kim Kovach
1996 Bill Low
1997 Honorable Nancy Atlas
1998 Professor Edward F. Sherman
1999 C. Bruce Stratton
2000 Suzanne Mann Duvall
2001 John Palmer
2002 Gary Condra
2003 Honorable John Coselli

ADR Section Calendar

2004-2005

As a member of the ADR Section, you are always cordially invited to attend any of the quarterly Council meetings. We ask that as many members as can try to attend the annual meeting each year that is held in conjunction with the State Bar Annual Meeting. Next year, it will be in Dallas. Please note our calendar:

Council Meetings

October 13, 2004
4:00—6:30 p.m. Prior to Annual CLE – South Texas College of Law, Houston

January 15, 2005
10:00—3:00 p.m. Texas Law Center – Austin

April 9, 2005
10:00—3:00 p.m. Location to be Determined – San Antonio

June 24, 2005
2:30—4:30 p.m. State Bar Annual Meeting, Dallas

General ADR Section Meeting

June 24, 2005
2:30—4:30 p.m. State Bar Annual Meeting, Dallas

CHAIR'S CORNER
NOW WHAT HAVE YOU GOTTEN INTO?
Continued from front page

After conferring, section leadership decided to forego having another retreat this year, and determined to continue carrying out the goals that we set at last year's retreat, including:

Goal A: To advance the field of arbitration by insuring fairness and educating consumers and practitioners in the use of the process. The Section adopted the revised AAA/ABA *Code of Ethics for Arbitrators in Commercial Disputes* at the last annual meeting. Mike Schless described the ongoing "Arbitration Roundtables" in his Chair's Corner. The Section is planning more of these very helpful and informative meetings for this fall and winter. Lastly, we anticipate serving as a resource for the Legislature in the next session, even if we have to travel to Oklahoma.

Goal B: Increase the use of ADR for conflict management outside the courtroom. We continue to receive input from the Section's committee that studied cross-cultural dispute resolution/conflict management needs and potential solutions. Under Judge Coselli's tutelage, we will continue to look into this important but amorphous topic. We also continue to explore what the DRCs are up to and what support the Section might provide them.

Goal C: Increase membership diversity, input, and benefits. It is no secret that some sections of the State Bar are struggling to retain membership and will only be able to do that if they remain *relevant*. We intend to stay ahead of this curve. We have attempted to survey the membership to determine needs and preferences. We shall constantly strive to enhance the *diversity* of the Council and the Section's membership in meaningful ways. We invite any ideas that you may have.

One of our projects this year also will be to increase the use of electronic marvels to better serve the membership. Through the State Bar, we have established a listserv for our members, and we will explore how to maximize it without becoming intrusive. We spend thousands of dues dollars each year printing and mailing this Newsletter. Imagine how easy and inexpensive it might be—for those who so elect—simply to email them each issue.

So note the names on the roster of officers and Council members (including our new ones) in the Newsletter. Get hold of one of them in your area and speak with him or her about what you think of what we're doing, what you think we should be doing, and what you might be able to do to help. This is a wonderful group, and what is before us is so timely and important. ***See what you can get into.***

MALPRACTICE INSURANCE WON'T COVER ALL THAT SOME MEDIATORS DO

By Jeff Kichaven*

We mediators need help from our colleagues who practice insurance-coverage law. We need to know what our malpractice policies cover and do not cover. We need this help because the nature of our malpractice policies has changed.

In past years, most mediators practiced law and mediated part-time, on the side. In those past years, we had legal malpractice policies with riders that covered our work as mediators. Carriers typically did not charge an additional premium for this low-risk rider.

Now, more of us call mediation our day job, and we tend not to have traditional law practices at all. Today, though, our malpractice policies cover us only for mediation work and specifically exclude—or at least do not state that they cover—liability arising from law practice. We pay dramatically lower premiums as a result.

There's just one little problem. Many mediators may still be performing tasks that constitute "law practice" in the guise of the practice of mediation. These tasks may create risks of exposure that our underwriters no longer intend to cover when we tell them that we no longer practice law but instead practice mediation, and they lower our premiums.

So if we find ourselves in the unhappy position of defendants in malpractice suits arising out of alleged negligent performance of tasks that are traditionally considered part of "law practice," our unhappiness may mount when our malpractice carriers deny coverage and refuse to defend us.

Hence the mediation community's need for help. Mediators need to know what our malpractice carriers consider to be covered and not covered under so-called "mediation-only" malpractice policies, so that we can govern ourselves accordingly in our practices.

This problem is neither academic nor hypothetical. Consider the plight of the unfortunate George Golvan, an Australian mediator whose conduct is the subject of malpractice litigation in the Supreme Court of Victoria in the case styled Tapoohi v. Lewenberg (2003) VSC 410 (21 October 2003). Tapoohi started as a dispute between two sisters over their late mother's estate, and it evolved into a legal-malpractice claim by one of the sisters against her lawyers, who in turn have claimed over for contribution against Golvan. Mediation of the dispute over the mother's estate took place in Australia on September 20, 2001. The estate included several parcels of real property. Ownership involved complex "company structures."

The court observed, "At approximately 8:00 p.m. the parties reached agreement in principle concerning the commercial settlement proposal, which provided that the properties would be transferred to Mrs. Tapoohi in return for the payment of $1.4 million, and that Mrs. Tapoohi would relinquish her interest in the family companies." Mrs. Tapoohi's lead counsel, Geoffrey Shiff, declared that "(w)hen agreement in principle had been reached . . . he thought they had done enough for the day . . . . (He) was hungry, tired and worn out and did not think that he could deal constructively with the many outstanding issues." But mediator Golvan would hear nothing of it. The court reports that he said such things as, "You have got to stay, you have got to do the terms of the settlement tonight." "No, we are doing it now. We're signing up tonight as that is the way I do it, that's how I conduct mediations." Counsel allowed the bullying to continue and, according to the court, "Mr. Golvan then proceeded to dictate the proposed terms of the settlement."

Sure enough, "Following the receipt of taxation advice, it was considered that the figure of $1.00 for the price of the shares in [the family companies] would have undesirable taxation consequences for Mrs. Tapoohi. Attempts by her lawyers to have the price varied failed. The commencement of this proceeding followed." Golvan moved for summary judgment in his favor on the contribution claims that Tapoohi's lawyers brought against him. In this opinion, among other things, the court denied Golvan's motion. Golvan will have to stand trial.

Perhaps the most provocative question Golvan will have to confront is whether his malpractice carrier is obligated to provide him with a defense. His engagement in this matter was expressly "as a mediator." But dictating detailed contract terms is not part of the practice of mediation. At least in California, it is the essence of the practice of law. People v. Merchants' Protective Corp, 189 Cal. 531, 535 (1922). See generally, 1 The Rutter Group California Practice Guide, Professional Responsibility 45-51 (2003).

If mediation is to develop as a profession separate from the practice of law, and non-lawyers are to be allowed to mediate without being guilty of the unauthorized practice of law (a crime in most places), then mediators must stay away from those tasks that are at the heart of law practice. Mediators must not be allowed to draft contracts that affect the legal rights of others, as Golvan did in the Tapoohi case.

Formal ethical standards for mediators have not evolved to the point I am advocating. That's because too many mediators, like Golvan, are inappropriately attached to "settlement for settlement's sake" as their goal. In fact, so many mediators are driven by settlement considerations, I doubt that mediation organizations, if left to their own devices, will take that step any time soon.

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MALPRACTICE INSURANCE WON'T COVER ALL THAT SOME MEDIATORS DO

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If we mediators do not move to more appropriate ethical standards voluntarily, some carrier's coverage lawyer is going to push us there. Because a strong case can be made that Golvan's malpractice policy does not provide coverage in the Tapoohi case. If, indeed, the act of drafting contract terms is the exclusive domain of law practice, then Golvan's malpractice carrier might be justified in denying him coverage for this claim if his policy covers mediation services only, and not the practice of law.

In the civil lawsuit, Golvan may be subject to a direct claim by Mrs. Tapoohi for legal malpractice. When Golvan started dictating the settlement agreement, his sins went beyond the ethical lapse of undertaking the legal representation of clients who had not waived a conflict of interest. He may also have acted incompetently toward Tapoohi, one of his "clients," if his legal work exposed her to adverse tax consequences. His personal silver lining may be that, if he still carries legal malpractice insurance, that carrier may still be obligated to cover this claim.

We mediators have an important role to play in maintaining the boundary between the mediation services litigators hire us to render and the law practice in which the litigators are engaged. I make the following practical observations and suggestions:

- If we set "settlement for settlement's sake" as mediation's goal, we risk becoming Jekyll-and-Hyde characters capable of turning into monstrous bullies at the drop of a hat. And we may drop the hat when the parties and their attorneys are least able to protect themselves from our mindless pursuit of settlement.
- We should not draft settlement agreements—that's the lawyers' job. We should not even offer settlement forms—the lawyers should bring their own. Lawyers' forms are designed to protect their clients' interests; mediators' forms are not. The lawyers' job is to create a settlement agreement that protects their clients' rights and promotes their clients' interests. Whatever the mediator's job, it's not the same as the lawyers'.
- We should limit any help we provide in drafting settlement agreements. Better mediators use better mediation techniques, asking questions rather than making statements. Of course, mediators must pose any questions in a spirit of honest curiosity. The lawyers must be free to answer the questions in any way that is consistent with the discharge of their fiduciary obligations to their clients. If the lawyers don't know the answer to the questions and need time to find them, the mediator might just have to accept a delay in settlement. And if the deal becomes undone after the delay? Well, as mediate.com's Jim Melamed sagely said in one of the first mediation trainings I ever attended, "If the deal isn't right on Tuesday, it probably wasn't really right on Monday, either." What kind of mediator would bully lawyers into a deal that that isn't really right for their clients?

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Association for Conflict Resolution - Houston
HBA ADR Section
HBA Litigation Section
Houston Volunteer Lawyers Association
State Bar of Texas ADR Section
State Bar of Texas Labor Employment Section
State Bar of Texas Litigation Section
Texas Association of Mediators
Association of Attorney – Mediators
Collaborative Law Institute
HBA Family Law Section
HBA Appellate Section
Institute for the Study of Conflict Transformation
State Bar Board Certified Family Law Section
Texas Mediators Trainers Roundtable

BRINGING GANDHI TO NORTH TEXAS

By Jay A. Cantrell

An article entitled "Once More With Healing" by Steven Keeva caught my eye as I was paging through the May 2004 issue of the American Bar Journal. One of the quotes in the article was from Mahatma Gandhi[1] on the subject of practicing law: "I understood that the true function of a lawyer was to unite parties riven asunder." The article also cited a speech by former U.S. Supreme Court Chief Justice Warren Burger, who encouraged lawyers to accept one of their earliest roles: to heal social conflict.

The philosophies of Mahatma Gandhi and Supreme Court Justices seemed a long way from my office on Scott Street in Wichita Falls, Texas. Perhaps I noticed the article because I had spent the morning serving as a neutral in a rather typical divorce mediation, one in which the dashed marital expectations of the parties lead to an unbroken series of actions by each party to strike out at the other party, both in and outside litigation. The parties, armed with the righteousness of their positions and unburdened by any significant degree of objectivity about the shortcomings of their cases, had prepared for battle. Where, I thought, was the opportunity for healing in the ongoing legal struggle between these parties?

As I reflected on the morning's activities, it occurred to me that perhaps mediation had provided an opportunity for healing. Mediation provides an opportunity for the parties to: (1) understand their legal circumstances, (2) clearly communicate, and (3) seek innovative and, in many cases, unique solutions. One or more of these three elements is essential to a fair and reasoned resolution of a dispute or litigation, and a fair and reasoned resolution of a dispute or litigation is essential to the healing process.

In most cases, parties to litigation are thrust into a brave new world. The way they do business, conduct their personal affairs, and resolve disputes is different in litigation. There are rules of evidence making some documents admissible and others not. Facts relevant to a party may not be relevant in court. Facts a party does not regard as relevant may be pivotal in litigation because of some legal rule previously unknown to the party. Discovery rules require disclosure of information or documents that the party never imagined would be shown to a judge or jury. In short, parties are suddenly forced to deal with emotional, financial, and legal issues that likely were foreign to their daily existence prior to the litigation. The benchmarks for daily life are radically changed for these folks, and many (I would say most) typically are hit with an intimidating storm of fear and anxiety as they grapple for their bearings in this brave new world.

I am not a psychologist (I haven't even played one on TV), but I believe Gandhi was correct in his assessment of human nature when he said, "The weak can never forgive. Forgiveness is the attribute of the strong." This observation applies to dispute resolution in the following sense: The weak—those who are fearful, anxious, and do not understand their new circumstances in the context of litigation—find it almost impossible to give any ground to reach a resolution. On the other hand, the ability to compromise and settle a dispute is the attribute of the strong—those who understand their positions and the risks involved.

In the case I mediated earlier today, the parties were well represented. Their lawyers explained to them the intricacies of community property law, conservatorship, and support. During the mediation session, their attorneys also applied these intricate rules to their children, house, retirement plans, automobiles, and other property. Suddenly the parties had benchmarks. The law provided them with a means of evaluating their and each other's positions. They were no longer left solely to their own devices in analyzing themselves and each other. More importantly, the mediation session allowed them the opportunity to understand their circumstances in the context of societal norms (i.e., marital property law and the laws relating to conservatorship and support). The norms were objective, not something the other side had created to get an advantage in the dispute. When both parties applied the norms to their case, the chances of resolution increased dramatically. The mediation process offered a unique opportunity for the parties to engage simultaneously in this exercise of understanding and analyzing their case in light of the societal norms or laws.

Mediation also provides an opportunity for clear communication. As therapists (and almost anyone else who regularly deals with people in conflict) know, it is difficult for parties to a dispute to understand clearly the interests (or even the positions) of the other party. A neutral third party in a mediation has a unique opportunity to bring about healing by fostering clear communication.

Consider a recent mediation between family members involved in a business enterprise. One family member was very angry and defensive due, in part, to her assumption that a second family member believed she performed

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BRINGING GANDHI TO NORTH TEXAS

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poorly in the business and was incapable of handling business matters. The assumption was untrue and, in fact, the second family member was quite complimentary of the first family member's business acumen, but the latter had not been able to hear or understand this fact prior to the mediation. The mediator's clarification of perceptions placed the dispute in an entirely different light and removed one of the significant barriers to a resolution of the lawsuit and a mending of the family rift.

Mediation also is well suited to the implementation of unique or innovative solutions. I recall reading an exchange between individuals who were debating whether medicine or law had contributed more to the development of society. The advocate for law quipped that during the early post-colonial period of American history, when physicians were bleeding their patients to cure them of various ailments, lawyers were drafting the United States Constitution. Although I do not see the utility of such a debate, the statement about post-colonial medical practice may be analogous to present-day litigation, which has the capacity to bleed participants emotionally and financially. "Modern medicine" (i.e., mediation) offers the prospect of a better result and healing when the participants are informed about it and are willing to participate in it.

A simple breach-of-contract case between businesses illustrates the benefits of the "modern medicine" of mediation. An Original Petition is filed seeking a money judgment for failure to pay amounts due on a contract. If the court grants the judgment, the plaintiff can ask the clerk to issue a writ of execution and have the sheriff or constable seize any non-exempt property and sell it to satisfy the judgment. That is the standard remedy offered by the law. Let's assume, however, that the parties agree to mediate. At mediation, the parties discover they were once friends. The defendant is having hard times; his widget sales are way down. The plaintiff cannot understand why his old friend, the defendant, is not paying his bill. The plaintiff does not know that the defendant is suffering hard times because the defendant is reluctant to admit it. If these facts are discussed openly, however, the mediation offers an opportunity for a unique solution: the defendant sells widgets to the plaintiff at a reduced price (thus offsetting the debt owed), the plaintiff's debt is satisfied, the defendant gets much-needed sales, and the parties renew their friendship.

In North Texas, where I practice law and mediation, subjects such as Gandhi's philosophy of the practice of law are not included in the bench and bar's normal daily discussions. I am certain there are still holdouts in our local bar associations who are very leery of this "newfangled" mediation stuff. However, I would like to believe that the idea of the law as a vehicle for healing social conflict is not so new.

In November 1963, the Texas Bar Journal published an article entitled "How to Be A Successful Lawyer."[2] The piece was actually a letter written by Roland Boyd, a lawyer from McKinney, Texas, to his son. Among the advice he gave was the following:

> Remember, the rule of nine: It works this way - nine people out of ten are good, honest, intelligent, decent, and fair-minded people. Therefore, if you want to have the odds, nine to one, in your favor, get on the right side of the issue. In the legal profession the right side of the issue is **the side that helps society**. In other words, **don't injure your fellow man** [emphasis added].

I don't believe Mahatma Gandhi ever went to McKinney—and I am certain he never came to Wichita Falls—but I do believe that he would have agreed with Roland Boyd's comments. I also believe that he would be pleased with the use of mediation to resolve litigation because it can provide the parties with benchmarks, clearer communication, and innovative remedies, all of which increase the potential for healing conflict. So perhaps those of us who are involved in the mediation process have the opportunity to bring more of Gandhi's healing philosophy of the law to our locales than we might first believe. I would certainly like to think so.

[1]In 1888, Gandhi left India to study law in London. In 1891, he was admitted to the bar as a barrister.
[2]This article can be viewed at: http://www.texasbar.com/Content/ContentGroups/Other_content/How_to_Succeed_as_a_Lawyer/How_to_Succeed_as_a_Lawyer.htm

__Jay A. Cantrell__ is an attorney who has practiced law in Wichita Falls, Texas since 1978. He has earned the Credentialed Advanced Mediator designation from the Texas Mediator Credentialing Association and is a member of the Texas Association of Mediators, the Wichita County Bar Association, the Alternative Dispute Resolution Section of the State Bar of Texas, and the Dispute Resolution Section of the American Bar Association. He has conducted over 400 mediations since

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5th Annual Institute of Responsible Dispute Resolution — ADVOCACY SKILLS FOR RESOLVING DISPUTES

Thursday and Friday, October 14-15, 2004

THE SECOND ICEBERG COULD SINK YOU

Beware of Nonverbal Communication Cues

By Barbara G. Madonik

Just after America's first manned lunar landing mediators loved to tell a story. It centered around an inexperienced neutral who wanted desperately to ease party tension. She asked counsel and clients in turn, "What is the greatest scientific breakthrough?" As the novice moved from person to person she kept hearing the wee echo of an elderly and slightly tipsy party. "Ask me, ask me," the party mumbled. When the woman's turn came she slurred indignantly, "Simple, the thermos bottle. You pour hot water in; it stays hot. You pour cold water in; it stays cold. And it doesn't even know how it does it!"

HOW DOES IT KNOW?

In fact, the thermos doesn't know how it does it. It doesn't have to know. The process happens automatically. And just as automatically the major part of communication takes place without most communicators knowing how they do it either. As far back as 1970, a study conducted by the University of Pennsylvania[1] determined that only seven percent of what was being communicated was the result of the words or content of what was said. In that study, thirty-eight percent of communication resulted from verbal behavior, which included tone of voice, timbre, tempo and volume. Fifty-five percent of communication derived from nonverbal communication, including body posture, breathing, skin color and movement

About the same time, eager graduate students in California decided to document and create models of communication excellence. They wanted to do this by locating and modeling language patterns of effective communicators who consistently elicited the results they sought. The assignment seemed straightforward. The students would videotape high caliber professionals like Virginia Satir[2] and Milton Erickson[3]. They would analyze their words, break down linguistic components, create finite language models, and reduce the patterns to compact communication packages that linguists could replicate. At the end of the testing, however, the results stunned these researchers. Like their Pennsylvania counterparts, they discovered that the words of the communication masters formed only a minimal part of their messages.

The two independent studies arrived at the same major conclusion: people made sense of communication automatically and in specific ways that often had little to do with word content. The California students continued further. The results were used later to form the basis of a system[4] that identified and codified how people processed information and demonstrated identifiable preferences for sending and receiving it.

DOING YOUR OWN EXPERIMENT

Care to conduct your own experiment? Go back in time. Examine past mediations or arbitrations. Was there one in which you explained something brilliantly – or so you thought until you realized no one else understood it? Are you curious how anyone could have missed your point? Then investigate a bit. Did you present your idea using their communication preferences? Did you know how to recognize their preferences? Actually, did you even know they had preferences at all?

If you answered no to any of these questions your message may have been lost. It probably resembled signals broadcast on frequencies into which audiences are not tuned. Your brilliant communication may have literally missed its mark. You can, however, learn how to invite people to tune into your communication. You just need to explore a simple communication system. Knowing about it can help you to develop more flexibility to reach every member of that conflict resolution audience.

A SIMPLE COMMUNICATION SYSTEM

Information is gathered by people through their five senses: sight, sound, touch, taste, and smell. The raw data is then sent for interpretation to the brain. There the information is filtered, analyzed, and presented – or really *re*-presented – through one of three *channels*. These channels are called visual, auditory, and kinesthetic representational systems. You can understand this concept most easily by imagining the brain as a mental file cabinet. In it are three drawers respectively labeled visual, auditory and kinesthetic (later abbreviated as *V, A* and *K*). The visual drawer contains sight-related material, the auditory holds sound and reading information, and the kinesthetic drawer retains data tied to feeling, feelings, taste and smell. People understand information in all three representational systems. However, by the age of seven they have randomly begun to favor one representational system. From then onward they have this arbitrary preference although they are not aware of it. They tend to open and dip into that mental file drawer most of the time. They may rarely visit the remaining two. They demonstrate the preference when they send and receive information during mediation and arbitration.

HOW DOES THIS AFFECT YOUR MEDIATION & ARBITRATION?

Parties at mediation and arbitration must first make sense of communication. They have to do this before they can begin to evaluate the point being made. This means that they must first process the message by relating it to their particular model of the world. To do this they

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use their preferred representational system. Theirs may or may not be your preferred system. If you send your communication using their system they process information and understand quickly. If you transmit information in another representational system parties may fail to understand you easily. They must first spend time and energy *translating* your message into a representational system they understand before they can consider its merits. If you continue to force them to translate every message you risk fatiguing them. As a result, irritation and stress levels often rise to the point where communication shuts down.

Once you are able to recognize representational system preferences you can accomplish a great deal. You can facilitate communication between neutrals and parties at the table, clients and their counsel, disputing parties, and even opposing counsel. For example, people with a visual preference see the world by constructing (that is, imagining) or remembering mental images. In their model of the world a picture really is worth a thousand words. Allow them to create pictures or diagrams to process communication. Others with an auditory preference prize sound. They often take copious notes or ask to have something repeated word for word. They understand things they hear or read. Make sure you send your messages to them that way. Yet another group, who have a kinesthetic preference tend to deal with the world through body sensations. For them terms like "gut feeling" and “walks all over me” have literal connotations. You can make headway when you respect their need to understand the world through physical contact as well as taste, smell and feelings.

Knowing that representational systems exist is the first step toward fluid communication. Learning to recognize the clues to people’s preferences is the next. You can do this by becoming a keen observer and astute listener. Get a real feel for the environment around you. Because the mind and body are part of the same cybernetic system[5] you will be able to track communication through interconnected clues. Start with neurological clues demonstrated by specific eye patterns[6] and then listen for language that indicates preferred systems[7]. Both kinds of clues will be clear and repeated. Parties will cycle through them again and again because that is how they communicate. When you take time to notice you might be surprised at how the signals begin to jump out at you.

THE EYES HAVE IT

Romantics have long advanced the theory that the eyes are the windows of the soul. But no one can yet dissect the soul. Nonetheless researchers have made progress in the world of neurology. Ironically, there may be scientific vindication for those romantics. Specific eye positions (called eye accessing cues) appear to correlate with positions to which the eyes travel when the brain looks for information. Using the file cabinet analogy once again, this means that eyes automatically seek the visual, auditory or kinesthetic file drawer in which information resides. When you know how to spot eye accessing cues you enhance your ability to communicate. You can respond directly to the representational system parties show you. The chart below illustrates typical eye accessing patterns.

Ready for your next experiment? Have some fun as you begin to identify these cues by observing your colleagues, people around you, family and live television interviews. Notice their eye movement patterns. If you miss quick eye movements, relax. You will get many investigative opportunities: communication patterns are repeated continually. Use the accompanying chart to assist you. Notice that eyes looking upward or that are defocused typically indicate people accessing a visual system. Eyes moving side to side or down to their left are usually seen when people are seeking auditory data. Eyes traveling downward and to their right side tend to indicate people going for kinesthetic information[8].

WHAT THE WORDS TELL

Language also presents you with valuable clues to preferences. Even though people use all three representational systems their `word choices indicate their partiality for one system. Examples of clues to preferences are shown on the chart below:

continued on page 10

Examples of Language Cues to Communication Preferences

VISUAL	AUDITORY	KINESTHETIC
Mental picture	Idle chatter	Start from scratch
Dim view	Manner of speaking	Heated argument
Sight for sore eyes	Tuned in	Gut reaction
Named eye	Rings a bell	Not following you
Short sighted	I said to myself	Slipped my mind
Looks like	To tell the truth	All washed up
Mind’s eye	Outspoken	Hang tough
Tunnel vision	Call on	Hot headed
Horse of a different color	Utterly	Stiff upper lip
In light of	Word for work	Sharp as a tack
Eye to eye	Earful	Come to grips
Make a scene	Loud and clear	Hardhearted
Paint a picture	Give an account of	In touch with
Gain perspective	Voice your opinion	Smooth operator
See to it	Resounding success	Stuffed shirt
Seeing is believing	I hear you	Hopping mad

THE SECOND ICEBERG COULD SINK YOU

continued from page 9

Are you ready for your final challenge? Then take this test now. Reread each column in the chart on the previous page. Afterward, take as much time as you need and add ten words or expressions to each column. After you have finished, continue reading this article.

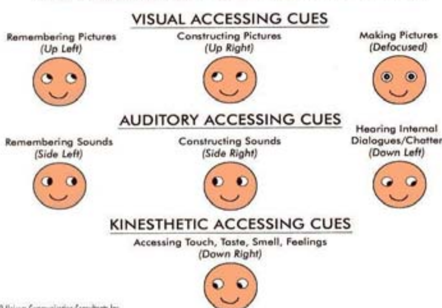
People who take the test are often surprised with their results. They usually do not experience equal ease completing all three columns. Sometimes they have great difficulty coming up with even one expression in one or two columns. Facility to complete one column and not another may indicate they favor one representational system so strongly they do not use the others very often. As a result they may find it quite difficult to think in terms of those unused representational systems. If you took the test and found this result you too may be using only your preferred system. If this is the case, consider the degree of discomfort you experienced finding terms outside your favored system. Appreciate how that might equal the same degree of difficulty others experience when they prefer a system different to yours. Now imagine the impact on results at the table. With this in mind, you might begin to see the advantage of flexibility to glide from system to system. Without it you might be creating communication obstacles unrelated to issues and jeopardizing attention spans.

PRACTICALLY SPEAKING

Consider how to use this information respectfully and to everyone's benefit. For example, most mediations and arbitrations are gatherings of parties with different communication preferences. One strategy for delivering message effectively to everyone involves ensuring availability of materials that people can see (e.g., pictures, charts), read (e.g., reports, testimonials) and touch (e.g., handouts, models). Another way to improve results occurs when opposing counsel negotiate. Often conflict results from misunderstanding information rather than disagreeing with it. Many times just sketching a picture (*V*), asking for feedback (*A*) about a suggestion, or providing miniatures (*K*) is very useful. At times when communication is limited to words (e.g., in correspondence or on the telephone) cycle through all three systems. For example, "I look forward *(V)* to our next telephone conversation *(A)* in which we can dig into *(K)* more case detail."

DANGER OF ICEBERGS

THE EYES HAVE IT



Mediators, arbitrators and counsel who rely solely on word content put their results at risk because they are dealing with only the tip of one communication iceberg. These folks might want to go back to remembering why the Titanic sank -- the captain stubbornly refused to factor in all information. He would only deal with limited information, acknowledged the presence of just one iceberg, and maintained a collision course. Notwithstanding the captain's denial of a second deadly ice floe, it still existed. The second sank the ship.

Paying attention to all communication at the table or in caucus is much the same. Nonverbal communication exists and conveys powerful messages whether neutrals or counsel choose to deal with it or ignore it. However, if they choose to deal with it, they usually discover that their communication is working for them instead of against them.

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Barbara Madonik *is an international communication consultant and trainer, mediator and dispute investigator. She is also the trial strategist and jury consultant who pioneered the practical use of nonverbal communication in Canada's legal system and organizations. President of Unicom Communication Consultants Inc., Barbara is retained on high profile civil and criminal cases, has been invited to the United Nations, and is the author of I Hear What You Say, But What Are You Telling Me? The Strategic Use of Nonverbal Communication in Mediation. She is a guest lecturer at law schools, bar associations, universities and dispute resolution programs. She keynotes and presents CLE and CEU programs throughout Canada and USA . Barbara invites readers to contact her at (416) 652-1867,* ***madonik@unicomcommunication.com****, or website* ***www.unicomcommunication.com****.*

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[1] *Kinesics and Communication*, Birdwhistle, R., University of Pennsylvania, 1970.

[2] Innovator of Family Therapy in the seventies.

[3] Psychiatrist, Founder of The American Society For Clinical Hypnosis, creator of innovative approaches to hypnosis later called "Ericksonian Hypnosis".

[4] Neuro-Linguistic Programming, Vol. I, Dilts, R.B., Grinder, J., Bandler, R., DeLozier, J., and Cameron-Bandler, L., Meta Publications, 1979.

[5] *NLP Through Time*, NLP Connection, Vol. IV., No., 3., p. 20, Gordon, D., July-September, 1989.

[6] *Magic Demystified*, Lewis, B.A., Pucelik, R.F., Metamorphous Press, Lake Oswego, Oregon, 1982.

[7] *Sensory Based Language in Legal Communication*, The Practical Lawyer, Vol. 27 - No. 1, p. 45, Barkai, J.L., January 15, 1981.

[8] *I Hear What You Say, But What Are You Telling Me? The Strategic Use of Nonverbal Communication in Mediation*, Madonik, B.G. , Jossey-Bass, San Francisco, CA 2001

ADR on the Web

Narrative Mediation

By Mary Thompson

Conflict Resolution Information Source,
University of Colorado
http://www.crinfo.org/narrative_mediation/

The Conflict Resolution Information Source website (CRInfo) contains a variety of interesting sections, many of them with relevance to mediators and collaborative-law practitioners. One of the most interesting focuses on narrative mediation.

Anyone going to national mediation conferences in the past few years has run into this relatively new kid on the mediation block. Narrative mediation is based on the social-constructionist theory that all truths or realities (including conflict) are created through social discourse. Therefore, to resolve a conflict requires that the disputants and the mediator develop (or "co-author) a new story about their relationship. The web page "Narrative Mediation: What is It?" provides an overview of the basic principles and techniques.

"Comparisons Between Narrative Mediation and Other Mediation Models" displays a useful chart contrasting Interest-Based, Narrative and Transformative Mediation in terms of goals, underlying values, and key strategies.

One area where narrative mediation is making an especially significant contribution to our field is in the focus on questioning. "Stages in a Narrative Mediation Process" not only shows how a typical family mediation would be structured, but provides over 50 examples of questions for the mediator to ask. This list offers some truly creative approaches to encouraging dialogue. Note the following examples, designed to help the parties construct a more cooperative version of their relationship:

I was wondering about how you have handled these issues in your best moments?
If friends of yours were struggling with this sort of problem, what advice would you give then about how to resolve it?
If you could, what would you rescue that has been damaged by the conflict?

Obviously, this approach may not work with all disputes (or with all clients). Currently, it is used largely in family, employment, and restorative justice cases. Regardless of your current approach to dispute resolution, CRInfo's Narrative Mediation website offers tools to increase the repertoire and creativity of any mediator or collaborative law practitioner.

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

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

5th Annual Institute of Responsible Dispute Resolution
ADVOCACY SKILLS FOR RESOLVING DISPUTES
Thursday and Friday, October 14-15, 2004

DON'T MISS OUT! BE A PART OF ADR HISTORY!

You will want to be a part of the dedication on Thursday evening of the Frank Evans Center for Conflict Resolution. A unique and memorable ceremony is planned to honor the vital founding role played by Judge Evans, acknowledged by all as the father of alternative dispute resolution in Texas. Mark your calendar now and make reservations early because we anticipate a full house for this extraordinary program. See pages 12-14 for information and registration form!

ADVOCACY SKILLS FOR RESOLVING DISPUTES

ADVOCACY SKILLS FOR RESOLVING DISPUTES
5TH ANNUAL INSTITUTE FOR RESPONSIBLE DISPUTE RESOLUTION

SOUTH TEXAS COLLEGE OF LAW – GARRETT TOWNES HALL

October 14-15, 2004

Y**ou** are familiar with the high quality of the annual Institutes for Responsible Dispute Resolution under the leadership of the founding director of the South Texas College of Law's Center for Legal Responsibility, **Hon. Frank G. Evans**. And you may have experienced that same caliber of educational experience at any of the annual conferences of the ADR Section of the State Bar of Texas. This year, these two respected organizations have joined forces to bring you what promises to be both an extraordinary learning opportunity and an important milestone in the evolution of dispute resolution in Texas. On October 14-15, 2004, the South Texas College of Law and the State Bar of Texas ADR Section invite you to an historic two-day seminar ***and*** dedication of the **Frank Evans Center for Conflict Resolution** to commemorate the tremendous contributions by Judge Evans to ADR in Texas.

The focus of this Fifth Annual Institute for Responsible Dispute Resolution, *Advocacy Skills for Resolving Disputes,* will be on mediation and arbitration from the advocate's perspective. Judge Evans will lead a distinguished panel of jurists in a discussion of the changing landscape of litigation and the relationship between ADR and litigation, and **Judge John Coselli** will lead another discussion regarding the vanishing trial and its causes and effects. ADR Section Chair **Bill Lemons** will lead a panel of practitioners in a discussion of the nuts and bolts of arbitration. Yet another panel moderated by ADR Section Past Chair **Mike Schless** will discuss effective mediation strategies, and **Trey Bergman's** panel will focus on mediation ethics. **Professor Hanson Lawton** and **Judge Bruce Wettman** will educate us on the new Online Parent Coaching Program at STCL, and **Harry Tindall** will lead a group discussion on the increased use of collaborative law in family law cases and beyond. Many other topics and speakers will be presented, and you will be given the opportunity to participate and ask questions in the interactive sessions throughout the two days. We are especially pleased to announce that **Chief Justice Thomas R. Phillips**, who will be joining the faculty at South Texas College of Law, will honor us as a luncheon speaker to give us his perspectives on *"American Courts in the 21st Century."*

You will also want to be a part of the dedication, on Thursday evening, of the Frank Evans Center for Conflict Resolution. A unique and memorable ceremony is planned to honor the vital founding role played by Judge Evans, acknowledged by all as the father of alternative dispute resolution in Texas. Mark your calendar now and make reservations early because we anticipate a full house for this extraordinary program.

Registration Information

Registration Fee: $365 The registration fee includes continental breakfast and lunch for both days, and a reception for the dedication of the Frank Evans Center for Dispute Resolution on Thursday, October 15, 2004.

To register: See the registration form in this brochure. You can confirm your registration at www.stcl.edu/cle.html. Please allow one week to process registration. Registrants will be accepted at the door on a space-available basis.

CLE Credit: Accredited by the State Bar of Texas MCLE Department for 13.5 MCLE hours, of participatory credit, and1 hour of legal ethics credit.

Refund Policy: Refunds, less a $45.00 processing fee, are given to those who cancel in writing by October 11, 2004. Substitutes are accepted.
Location: SOUTH TEXAS COLLEGE OF LAW, 1303 San Jacinto, Houston, Texas 77002, Tel: (713) 646-2998
Fax: (713) 646-2996 E-mail: jhaikin@stcl.edu

Hotel Accommodations: Crowne Plaza Houston-Downtown,1700 Smith Street,(713)739-8800 ext. 44, $119.00 per night, guaranteed until September 22, 2004. Please indicate you are attending the *5th Annual Institute for Responsible Dispute Resolution.* The hotel is located 6 blocks from the law school.

Parking: Fannin Garage, 1112 Clay Street (between Fannin and San Jacinto), $5.00 per day, no in-an-out privileges. Reserved parking for the disabled on floors 5,7, 9 and 11 near the elevator. Allright Parking (surface lots), 1200 San Jacinto (between Dallas and Polk), $5.00 per day. Main Street Garage, 1301 Main Street, $9.00 per day. Parking is available in garages and on surface lots near the law school.
Special Accommodations: For any special needs as addressed in the Americans with Disabilities Act, Call **Jennifer Haikin** at **(713) 646-2991** by September 17, 2004 or as soon after as possible.

Registration Form

5th Annual Institute of Responsible Dispute Resolution **ADVOCACY SKILLS FOR RESOLVING DISPUTES**
Thursday and Friday, October 14-15, 2004 **Registration Fee: $365**
The registration fee includes the symposium , continental breakfast and lunch for both days, and the reception on October 15, 2004 in honor of the dedication of the Frank Evans Center for Dispute Resolution
Accredited by the State Bar of Texas/MCLE for 13.5 hours of participatory credit and one hour of ethics credit.
Return completed registration form with payment to **South Texas College of Law Center for Legal Responsibility, 1303 San Jacinto, Houston, Texas 77002-7000, Attn: Jennifer Haikin,** or log on to **www.stcl.edu /cle/html**.

Name ______________________________ Bar Card # ______________________

Business phone ________________________ Cell Phone ____________________

E-mail ____

Firm Name ____

Address ____

Street ____

City ____________________ State ________________ Zip Code ______________

Please make check payable to South Texas College of Law or
Charge to : VISA MASTERCARD Credit card number ____________________________

Expiration date ___________________

Name on credit card ___________________________________

Signature ____

ADVOCACY SKILLS FOR RESOLVING DISPUTES

5TH ANNUAL INSTITUTE FOR RESPONSIBLE DISPUTE RESOLUTION

SOUTH TEXAS COLLEGE OF LAW – GARRETT TOWNES HALL

October 14-15, 2004

Agenda

Please join us for an extraordinary learning opportunity and an important milestone in the evolution of dispute resolution in Texas. On October 14-15, 2004, the South Texas College of Law and the State Bar of Texas ADR Section invite you to an historic two day seminar ***and*** *dedication of the* ***Frank Evans Center for Conflict Resolution*** *to commemorate the tremendous contributions by Judge Evans to ADR in Texas.*

Thursday, October 14:

7:45 a.m. Registration and Continental Breakfast (Atrium)

8:45 a.m. **Welcome: James Alfini,** President and Dean, South Texas College of Law, Houston
Kelly Frels, President State Bar of Texas, Bracewell & Patterson, L.L.P, Houston

9:00 a.m. **Overview: William H. Lemons III,** Chair, State Bar of Texas ADR Section
Law Offices of William H. Lemons, San Antonio

9:15 a.m. **Panel Discussion:** ***Perspective on Litigation and Texas ADR***
Hon. Frank G. Evans, Moderator Ret. Chief Judge
& Founding Director of the Center for Legal Responsibility, Houston
Dean James J. Alfini, South Texas College of Law, Houston
Richard Naimark, AAA, New York, New York
Hon. David B. West, Cox & Smith Incorporated, San Antonio
Hon. Nancy Atlas, U.S. District Judge Southern District of Texas, Houston

10:15 a.m. Break

10:30 a.m. **Panel Discussion:** ***Nuts & Bolts of Arbitration for Lawyers***
William H. Lemons III, Moderator, Law Offices of William H. Lemons, San Antonio
Raymond Kerr, Pope, Kerr & Hendershot, P.C., Houston
Regina Giovannini, Attorney at Law, Houston
Hon.Cecilia Morgan, Attorney and Counselor at Law, Dallas

11:30 a.m. **Review:** Q&A with panel of all morning presenters

12:00 noon Lunch Break: Please pick up your lunch in the Atrium and return to Garrett-Townes Auditorium

12:15 p.m. **Lunch and guest speaker: Malcolm Skolnick, Ph. D., J.D.** Cytogenix, Houston
Cross-Border Legal Conflict Resolution Planning: The Design and Development of Conflict Resolution Plans for the Cost-effective Resolution of International Business Disputes

1:15 p.m. Break

1:30 p.m. **Panel Discussion:** ***Effective Mediation Strategies for Attorney Mediators***
Hon. Michael Schless, Moderator; Attorney and Counselor at Law, Austin
Ross Stoddard, Attorney and Mediator, Irving
Tom Watkins, Brown McCarroll, L.L.P., Austin
John Simpson, Splawn & Simpson, Lubbock

2:30 p.m. Break

2:45 p.m. **Presentation:** ***The State of the Law***

Arbitration: John Charles Fleming, GCB Mediators, P.L.L.C., Austin
Mediation: Talmage Boston, Winstead, Sechrest & Minick, Dallas

continued on page 15

5TH ANNUAL INSTITUTE FOR RESPONSIBLE DISPUTE RESOLUTION
continued from page 14

3:45 p.m. **Presentation: *The Online Parent Coaching Program in the Family Courts***
Professor R. Hanson Lawton, Moderator, Professor of Law and Director of the Center for Legal Responsibility, South Texas College of Law, Houston
Hon. Bruce Wettman, Moderator, Ret. Judge and Mediator, Houston
Hon. Georgia Dempster, 308th Family District Court Judge, Houston
Dr. Lewis Shadoff, Technical Advisor, Center for Legal Responsibility, South Texas College of Law, Houston

4:45 p.m. Adjourn Seminar for the day.

5:15 p.m. **Dedication of the Frank Evans Center for Conflict Resolution** (Garrett-Townes Hall)

6:00 p.m. **Reception** (Atrium)

Friday, October 15

8:00 a.m. Continental Breakfast (Atrium)

9:00 a.m. **Panel Discussion: *Introduction to Collaborative Law***
Harry L. Tindall, Moderator, Tindall & Foster, P.C., Houston
Gay Cox, Attorney and Counselor at Law, Dallas
Lawrence R. Maxwell, Jr., Attorney, Mediator, Arbitrator, Dallas
Jennifer Tull, Law Offices of Jennifer Tull, Austin

9:45 a.m. Break

10:00 a.m. **Panel Discussion: *Ethical ADR Strategies for Attorney Advocates: Winning With Integrity***
Trey Bergman, Moderator, The Selig & Bergman ADR Group, Houston
Jay Madrid, Winstead, Sechrest & Minick, Dallas
Mike Hebert, Professor of Law, The University of Texas School of Law, Austin
Maxel B. (Bud) Silverberg, Attorney-Mediator, Dallas
John L. Estes, Locke Lidell & Sapp, Dallas

11:00 a.m. **Panel Discussion: *The Vanishing Trial: Cause, Effect, and Solution***
Hon. John Coselli, Moderator, 125th District Court Judge, Houston
Scott Atlas, Vinson & Elkins, L.L.P, Houston
Charles R. (Bob) Dunn, Godwin Gruber, Houston
Richard Mithoff, Mithoff & Jacks, L.L.P., Houston
Harry Reasoner, Vinson & Elkins L.L.P., Houston

12:30 noon Please pick up your lunch in the Emilie Slohm Dining Room on the 6th Floor of the Fred Parks Law Library

12:45 p.m. Lunch and guest speaker: **Chief Justice Thomas R. Phillips** (Emilie Slohn Dining Room)
American Courts in the 21st Century

1:35 p.m. Break

1:45 p.m. **Panel Discussion : *Preparing for Mediation of Legal Conflicts***

1:45 p.m. **Kimberly Kovach, Co-Mediator,** University of Texas School of Law, Austin
Friday Eric Galton, Co-Mediator, GCB Mediators P.L.L.C. , Austin
(Continued) **Talmage Boston, Advocate,** Winstead, Sechrest & Minick, Dallas
Tom Woodrow Advocate, Holland & Knight L.L.C., Chicago, Illinois

2:45 p.m. Break

3:00 p.m. **Panel Discussion: *Effective Attorney Advocacy in Arbitration***
Rob Kelly, Arbitrator, Kelly & Nevins, L.L.P., Kerrville
Mikal Watts, Advocate for the Claimant, Watts Law Firm, Houston
Jeff Londa, Advocate for the Respondent, Ogletree & Deakins, Houston

4:15 p.m. **Q&A regarding issues raised by all presentation**
The Big Epilogue – Anticipating the Future of ADR and the Law
Michael Wilk, Moderator, Hirsch & Westheimer, Houston
William Lemons, Moderator, Law Offices of William H. Lemons, San Antonio
Dean James J. Alfini, South Texas College of Law, Houston
Hon. Michael Schless, Attorney and Counselor at Law, Austin
Deborah Heaton McElvaney, Dillard, McElvaney & Kovach, L.L.P., Houston
Hon. John Coselli, 125th District Court Judge, Houston

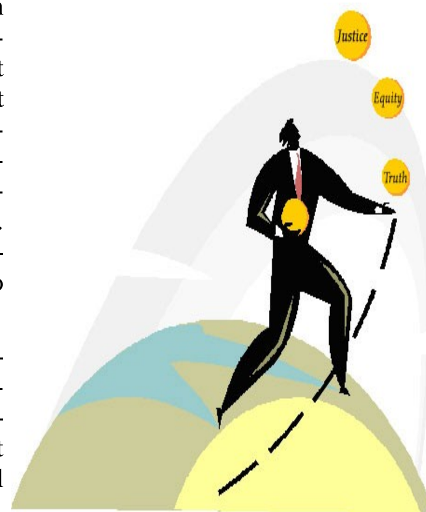
5:00 p.m. Adjourn

THE BETTER BUSINESS BUREAU:
ADR's "JOHNNY APPLESEED" HIGHLIGHTS ITS ARBITRATION PROGRAM

*By Kim Lawrence**

Whether they are members of the Alternative Dispute Resolution (ADR) Section of the State Bar of Texas, the Association for Conflict Resolution, or the Texas Association of Mediators, ADR professionals' common goal is to educate the public about the benefits of using procedures such as mediation and arbitration. To that end, the Better Business Bureau (BBB) plays an important role by providing a forum that places ADR in the forefront of consumer/business dispute resolution.

The BBB has been involved in ADR since its inception. Originally founded by a group of business people who wanted to regulate companies' false and misleading advertising practices, the BBB quickly became involved in reporting consumer complaints against companies. A standard for membership that continues today is that a company cannot have any unresolved complaints on its record. Whether through mediation or arbitration, member companies are ethically committed to resolve their disputes amicably. Consumers with complaints against non-member companies also are encouraged to use the BBB's ADR program.



The BBB provides its mediation and arbitration services at little or no cost to the general public. Over the past year, the Houston-area BBB has expanded its ADR department and is fortunate to have an impressive pool of volunteer mediators and arbitrators. These talented individuals bring the advantages of ADR to both business owners and consumers almost daily, and they help the BBB spread the word about ADR. The Better Business Bureau of Metropolitan Houston, Inc. conducts approximately 230 ADR procedures a year, thus reaching over 400 individuals directly.

In addition to providing these services, the BBB speaks to its member companies and others on the benefits of mediation and arbitration, and encourages them to use the BBB as their ADR provider. The speaking engagements and the BBB newsletter are two of the many ways the BBB reaches thousands of citizens and educates them on the benefits of different ADR processes. A topic of particular interest at many of the speaking engagements is the difference between the BBB's arbitration process and rules and those of other arbitration providers.

While some other arbitration providers may have a history of providing first-rate arbitration services and offer large pools of distinguished arbitrators, the costs associated with their services often are prohibitive, especially for small businesses and consumers of modest means. In addition, the arbitrator pools of other providers may consist largely of attorney-arbitrators who may or may not be the best people for the job. While attorney-arbitrators may be preferable when there are issues of statutory interpretation, arbitrators with knowledge and experience in a particular industry may be preferable when the issues are factual in nature.

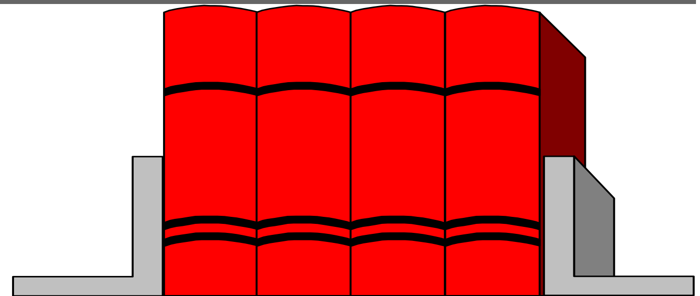
Because the standards for an arbitrator's award are fairness and equity, it makes sense that an arbitrator who understands an industry and its customary business practices may be the better choice to make an award involving disputed facts. For example, if a dispute concerns plaster discoloration in a newly built swimming pool, and the fact to be decided is whether chemicals were used correctly or whether the plaster was defective, is an attorney's perspective on the issue better than a business person's perspective? An attorney-arbitrator could interpret the contract, but the contract would not yield the answer to the factual question. What, then, would be the basis for the attorney's award? The attorney-arbitrator probably would need to call upon an industry expert to provide the information necessary to render a decision.

The BBB asks, why not provide the industry expert from the beginning? Because the rules of procedure and evidence used in jury trials do not apply in arbitrations, the weight of specific evidence can best be determined when the arbitrator hearing the case understands the factual evidence. In the swimming-pool example, an arbitrator with a background in pool building would be more likely to understand the testimony, weigh the evidence accurately, and make an award based on fairness and equity. The chemical composition of the chlorine used for the first filling may be the key fact and deserve much more weight than the weather conditions the day the plaster was poured. An

continued on page 18

BOOK REVIEW

Nickel and Dimed



Barbara Ehrenreich
Metropolitan Books, Henry Holt and Company,
New York, 2001
221 pages
Reviewed by Mike Amis*

This is an important book. Have you read it? Many have. I think it's an important book for mediators who mediate cases involving low-income people as parties. Are you like me as some sessions unfold? You start to learn about the folks sitting across from you, get their information about their day-to-day lives, the impact of the dispute on them, and suddenly at about 2:00 P.M. a question appears in your brain: "How in the world are they makin' it?"

One day, the author, in between writing projects, sat at a nice lunch with her Harper's editor and asked him exactly that question: "How does anyone live on the wages available to the unskilled?" How can the people that we don't want on welfare survive on $6 or $7 per hour? Or $9, for that matter? The result is this book.

Maybe this book is not a must for you, but the information contained in it is certainly of value to any mediator. Exhibit A: I'm in a mediation on a person al injury case brought by an ordinary person, a single working woman, let's say Betty. Armed with my Covey mantra of "Seek to understand, then (and only then) seek to be understood," I was clicking along, when Betty's counsel finally interjected to straighten me out on a few things: first, Betty, like 50% of this population, had zero health insurance, and the physical-therapy wing of the hospital where she went to the ER would not take her; her option would be to get herself—by public transportation—some 25 miles to the public hospital, where she would sit for hours, if not days, and where she would be protected by armed police officers on the lookout for funny business, not her own. She chose to do what her family members told her: get medical care by looking in the yellow pages for a decent-looking lawyer, who would then send her to a chiropractor, who would get paid out of the settlement. Now, all this became Betty's reality as a result of walking along minding her business when Rollo jumped the sidewalk to hit her with his (fortunately) insured vehicle. Betty, in short, was an expert in getting "nickel and dimed."

Back to the book. At her fancy lunch with her editor, Ehrenreich said that someone ought to check out how low-wage folks were able to get by, to which he compassionately replied, "*You.*" And so began her travels into the world of the minimum-wage worker. Over the following months, she lived the life of the low-paid worker in three jobs which are self-explained by the index: "serving in Florida" (waitpersoning); "scrubbing in Maine" (cleaning up houses); and "selling in Minnesota" (big retail store). As she shows up unannounced in her pre-selected experimental cities and hits the streets for a job in each, Ehrenreich introduces us to living in cars, living in motel rooms, living in trailers, double jobs, not much sleep, and a diet that would make Dr. Atkins do a double-take. Of course, unlike her co-workers, the author has a safety net, her *real* real job.

As mediators, we often know very little about our clients. Indeed, many of them are understandably private regarding their personal circumstances. And yet in many of our cases we sense we are dealing with people who are living very close to the edge. Ehrenreich's experiences give us the insight to listen with more sensitivity, ask the right questions, and appreciate the challenges faced by these clients, both in and outside of the mediation.

Here are a few samples of information and insight which make me think you should read this book.

- "I rush home to the Blue Haven at the end of the day, pull down the blinds for privacy, strip off my uniform in the kitchen – the bathroom being too small for both a person and her discarded clothes – and stand in the shower for a good ten minutes, thinking all this water is *mine.* I have paid for it, in fact, I have earned it. I have gotten through a week at The Maids without mishap, injury, or insurrection (p. 85)."
- "Today, she (Melissa) looks embarrassed when she sees me: 'I probably shouldn't have done this, and you're going to think it's really silly . . .' but she's brought me a sandwich for lunch. This is because I'd told her I was living in a motel almost entirely on fast food, and she felt sorry for me (p. 163)."
- "Then there's the question of how to make the best use of a fifteen-minute break when you have three or more urgent, simultaneous needs – to pee, to drink something, to get outside the neon and into the natural light, and most of all, to sit down (p. 164)."

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HIGHLIGHTS OF THE ADR SECTION'S ANNUAL MEETING IN SAN ANTONIO

By Walter A. Wright

The ADR Section's annual meeting took place on June 25, 2004 at the Henry B. Gonzales Convention Center in San Antonio. Mike Schless, outgoing section President, began the meeting by reviewing the section's accomplishments during the past year, including hosting a series of arbitration roundtables that addressed consumer and legislative concerns, publishing the third edition of the ADR Handbook, sponsoring an excellent CLE program in Dallas in October 2003, studying cross-cultural issues through the Cross-Cultural ADR Task Force, and supporting the Texas Mediator Credentialing Association, which began issuing credentials this year. Schless thanked five outgoing council members for their years of service to the section: Deborah McElvaney (Immediate Past Chair), Hon. Romeo Flores, Ann MacNaughton, Rena Silverberg, and Joe Nagy.

The section elected five new directors: Gene Valentini (Lubbock), Jeff Kilgore (Galveston), Leo Salzman (Harlingen), Robert Kelly (Kerrville), and Robert Wachsmuth (San Antonio). The section also elected a new slate of officers: Michael Wilk (Houston, Chair Elect), Danielle Hargrove (San Antonio, Secretary), and Cecilia Morgan (Dallas, Treasurer). After supervising the section's approval of a revised set of bylaws, Schless turned over the section's presidency to William Lemons, III (San Antonio).

Following a luncheon, John Fleming, Suzanne Duvall, and John Coselli presented a brief CLE program. Fleming presented a legislative and judicial update. Duvall and Coselli spoke about the past, present, and future of the Texas Mediator Credentialing Association. Schless and Lemons presented the 2004 Justice Frank G. Evans Award to Professor Brian Shannon of Texas Tech University School of Law (see related article in this newsletter). Following the meeting, the section's council met to plan the section's activities for the 2004-2005 bar year.

THE BETTER BUSINESS BUREAU

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arbitrator with expertise in the industry would be more likely to know which factors deserve the greater weight.

The Council of Better Business Bureaus (CBBB) has studied the impact of arbitration on businesses and consumers, the costs associated with the process, and the types of arbitrators available to the public. The pool of affordable public arbitrators is shallow. Accompanying the increasing popularity of arbitration clauses in credit card, cell phone, on-line and other consumer-based transactions is the need for a deeper pool of trained, community-based arbitrators. To this end, the CBBB has developed a comprehensive Binding Arbitration Training Program.

Although the CBBB training uses the BBB Rules of Binding Arbitration as its model, it provides a generalist approach that teaches trainees how to apply all arbitration rules, not just the BBB's. Specifically, the role of the arbitrator and the scope of arbitration are discussed, and the participants are trained to understand the scope of their authority through the specific rules to be applied and the arbitration agreement. The training also teaches how to conduct a hearing, maintain control of the parties, gather facts, weigh the evidence, and write a well-reasoned decision.

The Better Business Bureau of Metropolitan Houston, Inc. wants to use this training to continue the growth and development of its ADR program and to increase the size of its arbitrator pool. The BBB hopes that one day its arbitrator pool will match the size and recognition of other providers' pools. The BBB's pool will incorporate arbitrators who are consumers, business people, and attorneys. The BBB envisions an improved ADR environment in which the BBB provides panel arbitration to consumers and businesses at a more reasonable cost and the panels' awards are backed by consumer, business, and legal expertise.

If you would like to become a member of BBB's arbitrator panel, the Better Business Bureau of Metropolitan Houston, Inc. is now offering training to all. For further information, please see the "Calendar of Events" section of this newsletter.

For its part, the BBB will continue its role as the "Johnny Appleseed" of the ADR world and educate the public about the advantages of mediation and arbitration. It will continue to spread the word about ADR so that mediation and arbitration are no longer used synonymously. It will continue to hold companies to a high ethical standard and use ADR to achieve that goal. It will continue to provide cost-effective solutions to real-life problems.

****Kim Lawrence** is the ADR Coordinator of the Better Business Bureau of Metropolitan Houston, Inc.*

THE USE OF ARBITRATION CLAUSES IN ESTATE AND TRUSTS

By John K. Boyce, III*

Introduction

Arbitration has been used extensively throughout America's history to resolve issues such as the ownership of colonies, the ownership of particular pieces of territory, the recovery of money owed by one state to another, and all sorts of religious matters.[1] In the specific context of wills, no less a personage than the father of our country, George Washington, included an arbitration clause in his will:

> My will and direction expressly is, that all disputes (if unhappily should any arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one and the third by these two. Which three men thus chosen shall, unfettered by Law, or legal constructions, declare their Sense of the Testators intention—and such decision is, to all intents and purposes to be as binding on the parties as if it had been given by the Supreme Court of the United States.

Perhaps because of the inchoate development of the courts, arbitration appears to have been a more favored means of resolving disputes in the nineteenth century in the area of estates and trusts. Today, however, while arbitration provisions are becoming common, even ubiquitous, in certain kinds of business contracts, in construction contracts, and even in employment agreements, they still are not widely used in wills or inter vivos trusts, despite George Washington's example and the wholehearted acceptance of arbitration at the state and federal level. To understand why this is, it is necessary to look at the cases involving these instruments.

Quasi-Arbitration Provisions

The interest in avoiding litigation is not a new one, and over the years many testators and trust settlors have included provisions in their wills and trusts that attempt to make litigation unnecessary. Because people have not changed either, these quasi-arbitration provisions were often challenged.

One of the most interesting cases challenging one of these provisions is Pray v. Belt.[2] The case required the interpretation of the terms of a very prolix will left by one James P. Heath, which appointed a number of executors to handle his affairs post-mortem and left detailed instructions regarding the disposition of bonds, the construction of "fire-proof buildings" on lots he owed, etc.[3] Recognizing that his will was "lengthy" and that it was "possible that I have committed some error or errors," Mr. Heath empowered his executors to decide disputes regarding the will by majority vote and provided that these determinations would be "final and conclusive, without any resort to a Court of Justice."[4]

A dispute arose regarding the disposition of Mr. Heath's estate, and a suit was filed.[5] The executors contended that because Mr. Heath had given them the authority to construe the will, any decisions they made were final and were not subject to judicial review.[6] In rejecting this assertion, Chief Justice Marshall noted that, while provisions empowering executors to make decisions regarding the estate are proper, they are subject to being interpreted in order to determine what the testator reasonably intended.[7] Finding that a reasonable testator would not have intended to allow his executors to make decisions contrary to the plain language of the will—such as "paying to A, a legacy bequeathed to B"—the Supreme Court held that the executors' decisions could not be final and binding in all respects and that the only entity that could determine whether such a "gross misconstruction of the will" had occurred was the court.[8] Over the years, other cases from other jurisdictions have reached similar results.[9]

In essence, these cases recognize that a testator can make the determination of named individuals regarding the estate, claims against it, etc., but these decisions are nevertheless still subject to judicial oversight and review. For example, the El Paso Court of Civil Appeals cited with approval cases holding that, although the decisions of an appointed arbitrator may be "final and binding on all the parties interested," these decisions are binding only if they were "fairly and honestly made," and therefore decisions that "evidenced a gross departure from the manifest intent of the testator as disclosed in the will" are subject to judicial review.[10] In another case, the Michigan Supreme Court held that an agreement to submit the question of a testator's mental competence to "a leading Detroit attorney" for determination did not affect the probate court's right to make the same determination on its own, without reference to the decision of the agreed-upon arbitrator.[11] A few years later, in a case involving a testamentary trust, the same court held that a provision empowering two trustees to interpret the will, which required them to seek the opinion of a third if they could not agree, did not mean that their decisions could not be reviewed by the court.[12]

I have characterized such provisions as "quasi-arbitration provisions" because, although they somewhat resemble an agreement to arbitrate disputes, they also differ from arbitration agreements in many important respects. First, although quasi-arbitration provisions empower someone to make a binding decision without reference to the courts, the decisions are often being made not by a third-party arbitrator but instead by an

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THE USE OF ARBITRATION CLAUSES IN ESTATE AND TRUSTS
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individual with some interest in or connection with the estate or trust, such as the executor or the trustee. Therefore, unlike "true" arbitration provisions, the arbitral decisions are not being made by a neutral decision maker, but instead by someone whose own interest may color the result, a fact that may explain why courts are more willing to review the determinations of these quasi-arbitrators. Additionally, because these quasi-arbitration provisions are subject to broader review by the courts, they do not remove a dispute from the jurisdiction of the courts in the same way a "true" arbitration agreement does; ultimately, there is still a judge lurking in the background, perhaps even Chief Justice Marshall.

True Arbitration Provisions

The question then becomes how to include a valid and binding "true" arbitration provision in a will, trust, or family limited partnership. In this respect, the primary hurdle is also one of the central elements of any arbitration agreement: the element of consent. As set forth above, Texas courts will not send parties to arbitrate their differences unless they have all agreed to do so in a binding manner. Beneficiaries under a will, trust, or similar instrument are almost never parties to the agreement and therefore are almost never in a position to have agreed to arbitration before a dispute arises. I believe that this is the reason we have not seen arbitration clauses used more widely in connection with wills and the like, despite the fact that the advantages arbitration offers are the same in a dispute arising under a trust as they are in a dispute arising under a contract, and despite the fact that these advantages are widely recognized.[13] In an attempt to address this consent issue, I have come up with three possible ways to make an arbitration provision in a will, trust, or family limited partnership binding.

The first is far and away the most direct and obvious and consists simply of having those who will be affected by the document sign the document, i.e., have the beneficiaries sign off on the will or trust. However, for all of its simplicity, there are several disadvantages to such an approach. The first is that it is somewhat cumbersome, requiring potentially dozens of beneficiaries, possibly scattered all over the country, to sign a single document. Additionally, it will result in the beneficiaries knowing in advance what it is they will receive, with all the potential for trouble and hurt feelings that can be created. It may also restrict the right of the testator or settlor to change the terms of the instrument at a later date, at least without getting everyone to sign again. Finally, such a regime would be very far at odds with current practice, which means that it is less likely that lawyers and clients would be willing to adopt it.[14]

The second possibility is if all of the affected parties agree to arbitrate a dispute after it has arisen. Of course, the downside to this approach is obvious: It requires two or more people who are already at odds with each other to agree on something. While many clients are reasonable and rational, even during a dispute, many are not, and so it will never be certain whether such an agreement can be reached until a dispute has arisen. Also, if one of the central purposes of arbitration is to confer certain benefits, any method that leaves the question of whether these benefits will be realized up in the air is less than optimal.

The third, and in my opinion the most interesting, option is to use an arbitration provision that is coupled with an in terrorem clause. Broadly, an in terrorem clause is a clause in a contract or will that is designed to frighten someone into compliance with the wishes of another, such as when a will provides that anyone who brings a will contest will receive only a nominal bequest, even if the challenge is successful.[15] Although Texas law does not favor in terrorem clauses, they will be enforced if they apply.[16] Accordingly, it might be possible to insert into a will, trust, or family limited partnership a provision stating that if a dispute arises regarding the instrument, the dispute will be referred to arbitration, and if any interested party refuses to consent to arbitrate then he or she will be cut out of the will, forfeit his or her interest in the trust, etc. Although coercive, such a provision is no more coercive than a similar provision in a will, and, while it cannot be certain that an aggrieved beneficiary might not still choose to litigate (thereby cutting off his nose to spite his face), such a provision would provide a powerful incentive to arbitrate rather than to litigate.

Conclusion

The use of arbitration in estates and trusts may be a case of “back to the future.” What was once accepted but fell out of vogue- perhaps because of lingering doubts about its ability to bind non-signatory parties- is coming around to be understood in a new light. Certainly unqualified judicial endorsement has played a role. The rising costs of formal litigation with its perceived deficiencies, the proliferation of controversies inherent in the non-traditional family situations of today, and even the confusing legal standards of investment management[17] all bode well for the use of arbitration. It is common in virtually every other area of law. If arbitration can indeed deliver “better, faster, cheaper” results, it will become an integral part of dispute resolution in estates and trusts as well.

* ***John K. Boyce*** *has practiced law 26 years, most of that time in San Antonio, in the areas of business and estate planning. He is a graduate of the University of Texas School of Law. Mr. Boyce currently sits on the commercial panel of the American Arbitration Association, frequently hearing cases on its large and complex case docket. He is licensed as a registered investment advisor. As such, he regularly consults on the management of investment portfolios. Also, he sits on the arbitration panel of the National Association of Securities Dealers and hears disputes regarding breach of fiduciary duty, investment mismanagement and other claims.*

Endnotes

1. AMERICAN ARBITRATION ASSOCIATION, MANUAL FOR COMMERCIAL ARBITRATORS 11 (1999) (citing 1 *Arbitration in Action*, Nos. 4 and 5, April-May 1943, at 5).
2. 26 U.S. 670 (1828).
3. *Id.* at 671-72.
4. *Id.* at 672-73 (emphasis in original).
5. *Id.* at 673.
6. *Id.* at 676.
7. *Id.* at 679-80.
8. *Id.* at 680.

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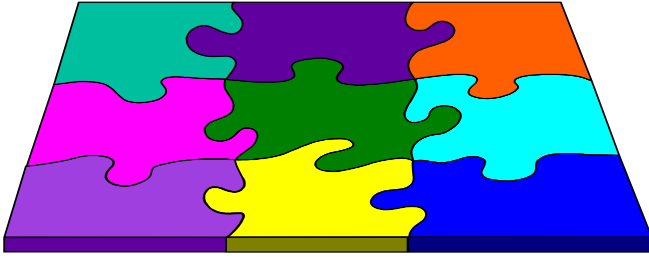

ETHICAL PUZZLER

by Suzanne Mann Duvall

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

Ethical Puzzler Question

In the course of a mediation, one of the parties suggests that Mr. E., a contractor, be agreed upon as a monitor to assure future compliance with the construction plan for the project that is the subject of the mediation. You happen to have been the arbitrator in an earlier, unrelated dispute involving Mr. E. in which you learned that he has a reputation as corruptible, incompetent, and dishonest. In your opinion, the use of Mr. E. in this monitoring would be disastrous. Furthermore, you suspect that the party to whom the suggestion was made is clueless as to Mr. E's reputation. What do you do?

Michael A. Elliott (Corpus Christi): My first option would be simply to recommend that since this is a very important position, there should be several candidates considered. If this was not sufficient, I would separate the parties and suggest to each, "Do you really want the other side choosing your monitor?" That would usually do the trick. I would then suggest that each side pick a person and that the two choices come up with a third choice for monitor.

Karen Hubbard (Dallas): The goals in any successful mediation are to help the parties reach an agreement with which all parties can and will comply, to halt ongoing litigation, and to prevent new litigation. There's a poor probability of maintaining a settlement if Mr. E. does the monitoring and acts in accordance with his reputation, thereby spawning new litigation. Since a revelation to "clueless" of Mr. E's reputation might fuel distrust of opposing party, I believe I would first suggest to "clueless" that they also recommend a contractor (even if it's one to be named in the future within a specified time period if they can't name one that day). Then those two contractors would actually monitor the construction. If the parties balk over this suggestion, then I would discuss my concerns with the attorney for the party suggesting Mr. E. and attempt to enlist the attorney's assistance in getting his client to recommend another contractor.

Linda Gibson (Temple): The mediator in this situation is facing the dilemma of maintaining his own integrity while protecting the confidentiality of the arbitration and remaining neutral in the current mediation. He has several choices: (1) he can recuse himself from the mediation; (2) he can caucus with each party individually; or (3) he can suggest that the mediation session be ended for the day and resumed in the near future. For ease of illustration in the scenarios below, I will refer to the party who suggested that Mr. E. be the monitor as "Suggester" and the party whom the mediator feels is clueless as to Mr. E's reputation as "Clueless."

Recusal: If the mediator recuses himself from the mediation after Mr. E's name is brought up, telling both Suggester and Clueless that he feels he can no longer maintain his neutrality, they will almost certainly conclude that he has knowledge about Mr. E. and that this knowledge is affecting his ability to remain neutral. Such recusal will leave the dispute unresolved and likely will color the outcome of any future mediation between the two parties.

"The mediator's obligation is to give the disputants a safe place to consider options and enter into an agreement."

Even though Clueless may not be aware of Mr. E's reputation, he is not stupid and will probably read between the lines, deciding that Mr. E. is not to be trusted. Clueless will probably reason that if Mr. E had a good reputation, it would be much easier for the mediator to maintain his neutrality than if Mr. E. had a bad reputation. Clueless might also decide that Suggester is trying to "pull one over on him" by bringing up Mr. E's name in the first place. Recusal could turn a dispute with a very good chance of resolution into one in which resolution is much more difficult, if not impossible.

Caucus: The mediator can caucus with each party individually, attempting to determine whether either party is aware of Mr. E's reputation. If both parties are aware of Mr. E's reputation and are still willing, for some unfathomable reason, to go forward with the mediation, the mediator's dilemma will be resolved. He will not be required to break the confidentiality of the arbitration, can remain neutral, and can live with himself at the end of the day.

However, such an outcome is highly unlikely. At best, the mediator might discover that neither party is aware of Mr. E's reputation as corruptible, incompetent, and dishonest. At worst, his suspicions may be confirmed that Suggester knows about Mr. E. and is trying to take advantage if Clueless's lack of knowledge about his reputation. The result of this scenario would be to place the mediator in the same position he was in originally. He would still be facing the dilemma between arbitration confidentiality and

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Ethical Puzzler
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mediation neutrality, the only difference being his confirmation of what he had earlier suspected. Clueless is indeed clueless, and Suggester is trying to put his own dishonest person into a position of making sure things are done to Suggester's advantage at the construction site.

Resume the Mediation at a Date Specific in the Near Future: I favor this solution to the dilemma. I would probably caucus with each party separately to see whether either of them is familiar with Mr. E's reputation. If they are both aware, there is no need to stop the mediation at this point; however, I sincerely doubt that this will be the outcome.

Whether neither of them knew Mr. E's true nature or whether Suggester was aware and Clueless was not, I would thank Suggester for his idea of having an agreed-upon third party act as a monitor in order to assure future compliance. However, I would suggest that we stop the mediation at this point and give each party an opportunity to develop a list, within the next several days, of three to five persons who could serve in the monitor position. The parties would then trade lists and would have time to investigate the qualifications of each person named. We would then resume the mediation at a specific date in the future to determine who would serve as the monitor and to complete the mediation. I would hope that this would remove Mr. E from the equation and with him my ethical dilemma.

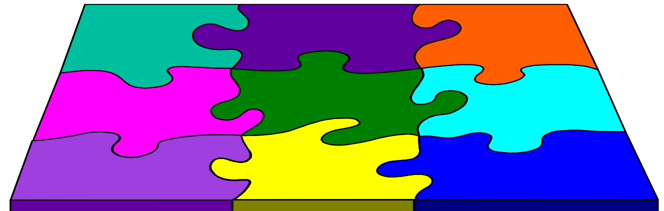
Jeff Kilgore (Galveston): The mediator's obligation is to give the disputants a safe place to consider options and enter into an agreement. Even though a party accepting Mr. E may not be making an informed choice, the mediator should let the parties enter into their own agreement. If a party has a statute of limitation problem that has not been considered by the other side, a mediator should not interject the limitation defense. I see this extra information in the same light as not giving legal advice.

I do, however, believe that the integrity of the mediation process would allow a mediator to inquire as to Mr. E's qualifications to fulfill the role of project monitor. This would allow the parties the possibility of conducting further inquiries into Mr. E's qualifications. The mediator could ask such questions as who recommended the person, what are his qualifications, what organizations does he belong to, have the parties seen his resume, has he served in this capacity before, have you talked to any of the parties or companies he has worked with in the past, has he been removed from any jobs for any reason, and how will his services be obtained.

The parties are in charge of the agreement, and the mediator should not directly interject his opinion as to the efficacy of using Mr. E as the proposed monitor.

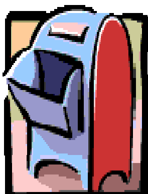
COMMENTS:

In situations such as this one, it is sometimes difficult to be neutral and non-judgmental. However, as our commentators have pointed out, these are precisely the skills required for this ethical puzzler. Then it is simply a matter of going "back to the basics": living in the question, reality testing, brainstorming, information gathering, offering suggestions without placing value on each suggestion, and other techniques in the ethical mediator's toolbox so that the parties themselves come to their own recognition of Mr. E's qualifications (or lack thereof).



SUBMISSION DATE FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Fall	September 15, 2004	October 15, 2004
Winter	December 15, 2004	January 15, 2005
Spring	March 15, 2005	April 15, 2005
Summer	June 15, 2005	July 30, 2005



SEE PUBLICATION POLICIES ON PAGE 23 AND SEND ARTICLES TO:

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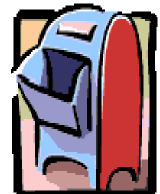

THE USE OF ARBITRATION CLAUSES IN ESTATE AND TRUSTS

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9. *See, e.g.*, *Taylor v. McClave*, 15 A.2d 213, 112 (N.J. Ch. 1940); *Nations v. Ulmer*, 122 S.W.2d 700, 703 (Tex. Civ. App.—El Paso 1938, writ dism'd); *see also* 96 C.J.S. *Wills* § 828 (2003). One Texas case, *Couts v. Holland*, 107 S.W. 913, 915 (Tex. Civ. App. 1908, writ ref'd), contains language appearing to give such appointed arbitrators the absolute authority to make decisions regarding wills—i.e. not subject to judicial review. However, as the subsequent decision in *Nations* indicates, this is likely not the case. A careful review of the decision in *Couts* shows that the appellant argued not that the decision of the executors was subject to judicial review but, rather, that the decision of the executors on a particular issue did not fall within the ambit of the authority granted to them by the will. *Id.* at 915. Accordingly, it is possible to square *Couts* with *Nations* because the *Couts* court was not asked to decide whether it had the authority to review the decisions of an executor, and therefore its statements regarding the binding nature of these decisions are *dicta*.

10. *Nations*, 122 S.W.2d at 703; *see also Coffee v. William Marsh Rice Univ.*, 408 SW.2d 269, 284 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.) (citing *Nations* for the proposition that the court cannot interfere with the exercise of a trustee's discretion except "in a case of fraud, misconduct, or clear abuse of discretion").

11. *In re Meredith's Estate*, 266 N.W. 351, 352-53, 356-57 (Mich. 1936).

12. *Matter of Estate of Jones*, 99 N.W.2d 365, 367 (Mich. 1959).

13. *See, e.g.*, Stanard T. Kleinfelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value to Estate Planners*, 22 Est. Plan. 147, 147-48 (1995). The authors of this article observe that arbitration provisions in wills and trusts are often not enforced, citing a number of the same quasi-arbitration cases already discussed. However, they ultimately make the prudential recommendation to include an arbitration provision in wills and trusts on the theory that it can do no harm. If the provision is challenged, the court may refuse to order an arbitration, but even if this happens, the parties are in the same place they would have been in if the provision had not been included (i.e., on their way to court). *Id.* at 150-51. I am not sure I agree with this conclusion, because the challenge itself will require the expenditure of money and resources, and so as a practical matter may not end up being the zero-sum game they suggest.

14. In the context of an agency/custodial agreement with a trust department, non-signatory parties are not an issue because all parties typically sign the agreement. This arrangement fits the traditional mold for arbitration where there are consenting parties to a contract. An agency or custodial agreement is, after all, no more than a contract with fiduciary implications. The same consensual arrangement is true where all general/limited partners sign a family limited partnership, itself just a specialized type of limited partnership vehicle used for years in an investment context, where arbitration clauses are commonly inserted. The issue arises when non-signatory parties have a beneficial interest in an inter vivos or testamentary trust or a donee receives a gift of a limited partnership interest as a part of estate tax planning. While research discloses no twentieth-century case on whether non-signatory parties to these types of instruments may be bound by an arbitration clause, the prior century saw three theories to uphold at least testamentary arbitration clauses: (1) "contract": a will was enough like a contract to justify contract principals to uphold these clauses, *Phillip's Estate*, 10 County Court (Pa.) Rep. 374, 378 (1891); (2) "agency": the arbitrator appointed by the testator as his agent, *Wait v. Huntington*, 40 Conn. 9, 11 (1873); and (3) "intent": the courts are bound to carry out the testator's intent in requesting arbitration, *American Bd. of Comm. of Foreign Missions v. Ferry*, 15 Fed. 696, 699 (W.D. Mich. 1883).

15. *Black's Law Dictionary* (6th ed. 1990).

16. *Marion v. Davis*, 106 S.W.3d 860, 865-67 (Tex. App.—Dallas 2003, pet. denied).

17. For example, the Uniform Prudent Investor Act (UPIA), Tex. Prop. Code §§ 117.001-117.012 (2004), which became law in Texas effective January 1, 2004, dramatically alters standards for investment management from prior law. It adopts the so-called "total asset management" approach. *Id.* § 117.004. Similarly, the UPIA's sister Act, the Uniform Principal and Income Act, *id.* §§ 116.001-116.173, allows trustees broad discretion to reallocate between principal and interest to protect the relative rights of income versus remainder beneficiaries. *Id.* §116.105. With the spiraling of wealth in managed accounts, these statutes, given their breadth and ambiguity, are certain to spawn litigation on investment performance and trustee discretion in making adjustments. Arbitration is the perfect vehicle to provide relatively inexpensive and expeditious resolution of these sophisticated controversies with a minimum of public scrutiny. Note that the UPIA allows a trustee to delegate investment and management functions to an agent, such as a professional investment advisor, and *not* be liable to the beneficiaries for the agent's performance. *Id.* § 117.011. Interestingly, an exception to avoidance of liability is if the trustee or beneficiary is required to arbitrate disputes with the agent. *Id.* § 117.011(c)(2).

BOOK REVIEW

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- "No one ever said you could work hard – harder even than you ever thought possible – and still find yourself sinking ever deeper into poverty and debt."

Now, just because I think the book is important, doesn't mean I *like* the book. That's a deep question. I will say it has one welcome quality: it's *skinny*, only 221 undersized pages. You read along, go nuts, and throw it against the wall, only to pick it up a day or so later to love a bunch more pages before your next slam-down . . . and you pick it up again. Why? Because you, like I, are one of the upper 20% who live in a "magical world where needs are met, problems are solved…If we want to get somewhere fast, we hail a cab (p. 215)," And, when the wheels fall off, and these folks show up at our offices to share a little of their lives with us, this small volume answers that good Louisiana question, "Where you at?"

It seems a little presumptuous in this day and time for me to write a book review, don't you think? Just a couple of clicks away and you've got 686 reviews of this book on something called www.amazon.com. 3 ½ stars! What's that all about?? I could understand 0, I could understand 5. But, 3 ½? Well, they must average, because our book has plenty of both: "Enlightening and scary"; "Have your quiche and eat it too"; "I can't live on minimum wage in Key West either"; "An important glimpse"; "Selling a story – another way to capitalize on those in need"; and "Read the book, not the author." Check them out.

The real questions aren't whether we like the book, agree with the author's motives in striking out to write it, or her opinions. The real questions are, "Is what she says true?", and "Is it important for us as mediators who want to be informed about and sensitive to the people we serve?" I think the answers to those questions are "yes" and "yes."

**Mike Amis is a mediator, attorney, and mediation trainer based in Dallas.*

"There is no way to peace; peace is the way."

A.J. Muste

2004 CALENDAR OF EVENTS

SOUTHWEST PROGRAMS

Two-Day Arbitrator Training Houston; The Better Business Bureau of Metropolitan Houston, Inc. The State Bar of Texas approved for twelve hours of MCLE credit. The cost of the course for ADR Section members is $300, and group discounts are available. For class schedules and additional information, contact klawrence@bbbhou.org.

Workplace Conflict Resolution (24 Hours); Houston; September 22 - 24, 2004; Worklife Institute; Contact Diana C. Dale 713-266-2456

Basic 40-Hour Mediation Training; Houston; October 14-16, 21-23, 2004 (20 hours each week); Worklife Institute; Contact Diana C. Dale 713-266-2456; meets TMTR standards; 40 hours CLE/CEUs including 3 hours ethics

Conflict Resolution October 21-24, 2004 $699 (Add $50 after September 30) Texas Woman's University - Denton 940-898-3408 www.twu.edu/lifelong Approved for 28.75 participatory hours by the State Bar of Texas

One Day Arbitration Training Houston Community College, Continuing Education Department October 21, 2004 8:30 a.m. – 4:30 p.m. 7 Hours MCLE Pending Contact Sherry R. Wetsch @ 713.974.2115

40-Hour Basic Mediation Training; October 29-31 and November 5-7, 2004; Two consecutive weekends—Fridays 4:00 p.m. to 9:00 p.m.; Saturdays—8:30 a.m. to 5:30 pm and Sundays—11:30 a.m. to 6:00 p.m. sponsored by the A.A. White Dispute Resolution Center, Houston, Texas; $985; **Registration**: www.law.uh.edu/blakely/aawhite; Meets TMTR Standards State Bar of Texas MCLE approved hours 40.00 and 4 hours of ethics.

Family and Divorce Mediation Training (30 Hours); Houston; November 10-13, 2004; Worklife Institute; Contact Diana C. Dale 713-266-2456; meets TMTR standards; 30 hours CLE/CEUs including 2 hours ethics

Fall Advanced Mediator Training Austin, Texas November 12, 2004 Association of Attorney-Mediators (AAM) a.m. to 5:00 p.m. Check AAM's website at www.attorney-mediators.org in the coming weeks for more details on the program and registration.

OUT OF STATE PROGRAMS

ABA Section of Dispute Resolution

Fourth Annual Indian Tribes, Natural Resource Conflicts and Dispute Resolution September 29-30, 2004 Conference Minneapolis, MN

Third Annual National Institute on Advanced Mediation and Advocacy Skills Training October 14 -15, 2004 Chicago, IL

Family Matters: A Symposium on Preventing and Resolving Family and Family Business Disputes October 22, 2004 Sheraton Boston (617) 236-6034 Boston, MA

Build Better Corporate Boards: Better Decision Making Through Collaboration November 4-5, 2004 The Cardozo School of Law, New York, NY

Seventh Annual Section of Dispute Resolution Conference Los Angeles, CA Millennium Biltmore Hotel April 14-16, 2005 (866) 866-8086

Mediation for Judges Phoenix, AZ November 29-December 3, 2004 American Bar Association Judicial Division and Section of Dispute Resolution For more information contact Regina Ashmon, Section of Dispute Resolution ashmonr@staff.abanet.org 202.662.1686 (phone), 202.662.1683 (fax)

Arbitration for Advocates with Special Federal Track Clearwater, FL - September 29 – October 1, 2004 CLE Credits Available Please visit our website for information and registration http://www.fmcs.gov/fmcsinst/

Fourth Annual Indian Tribes, Natural Resource Conflicts and Dispute Resolution Conference Minneapolis, MN Contact ABA Section of Dispute Resolution, dispute@abanet.org or 202-662-1680

Third Annual National Institute on Advanced Mediation and Advocacy Skills Training Oct. 14 -15, 2004 Chicago, IL Contact ABA Section of Dispute Resolution, dispute@abanet.org or 202-662-1680

Family Business Symposium October 22, 2004 Boston, MA Contact ABA Section of Dispute Resolution, dispute@abanet.org or 202-662-1680

Activities for Group Problem Solving October 29, 2004 Center for Public Policy Dispute Resolution The University of Texas School of Law Trainers: Corder/Thompson & Associates MCLE hours submitted to State Bar For information, please call the Center at (512) 471-3507

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

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

BENEFITS OF MEMBERSHIP

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

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

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

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

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

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2004 to June 2005. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name____________________ Public Member______ Attorney______

Address____________________ Bar Card Number__________

City____________________ State________ Zip________

Business Telephone________________ Fax________________

E-Mail Address:____________________

2003-2004 Section Committee Choice____________________

ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. Articles must be submitted for publication no later than 6 weeks prior to publication. The deadline for each issue will be published in the preceding issue.
2. The article must address some aspect of alternative dispute resolution, negotiation, mediation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. If possible, the writer should submit article via e-mail or on a diskette (MS Word (preferably), or WordPerfect), double spaced typed hard copy, and some biographical information.
4. The length of the article is flexible: 1500-3500 words are recommended. Lengthy articles may be serialized upon author's approval.
5. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.
6. All quotations, titles, names and dates should be double checked for accuracy.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.
2. In the event of a decision not to publish, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right to edit articles for spelling, grammar, punctuation and format without consulting the author.
2. Any changes which affect the content, intent or point of view of an article, shall be made only with approval of the author.

Future Publishing Right

Authors reserve all their rights with respect to their article in the newsletter, except that the State Bar of Texas Alternative Dispute Resolution Section obtains the rights to publish the article in the newsletter and in any State Bar 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 addresses 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."

ALTERNATIVE DISPUTE RESOLUTION SECTION

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