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SECTION CALENDAR AT-A-GLANCE

August 24, 2009 ~ [Section Spring Conference Call for Proposals Submission Deadline](#)

**September 21-25, 2009 ~ [National Mediation Training for Judges](#)
Embassy Suites Atlanta at Centennial Olympic Park, Atlanta, GA**

**October 15-16, 2009 ~ [Advanced Advocacy and Mediation Skills Institute](#)
Sheraton City Center, Philadelphia, PA**

**October 17, 2009 ~ Section of Dispute Resolution Fall Council meeting
Sheraton City Center, Philadelphia, PA**

**February 3-9, 2010 ~ ABA Midyear Meeting
Orlando, FL**

**February 10-13 ~ 5th Annual Arbitration Training Institute
Omni Shoreham Hotel, Washington, DC**

**April 7-10, 2010 ~ 12th Annual DR Section Spring Conference
Hyatt San Francisco Embarcadero, San Francisco, CA**

Consumer Arbitration Heats Up

On July 15th the Minnesota Attorney General filed suit against the National Arbitration Forum (NAF) alleging that NAF had violated Minnesota's statutory prohibitions against consumer fraud, deceptive trade practices, and false advertising. In the subsequent weeks a great deal of national attention has been focused on consumer arbitration.

On July 17th NAF announced that it had reached a settlement with the Minnesota Attorney General and would cease administering consumer arbitration disputes as of Friday, July 24, 2009. The focus on consumer arbitration moved to Washington, DC on Wednesday, July 22, 2009, when the House Domestic Policy Subcommittee held a hearing on consumer arbitration entitled "Arbitration or 'Arbitrary': The Misuses of Mandatory Arbitration to Collect Consumer Debts." Witnesses at the hearing included Michael Kelly, Chief Operating Officer, National Arbitration Forum, Richard W. Naimark, Senior Vice-President, International Centre for Dispute Resolution, a division of the American Arbitration Association, F. Paul Bland, Staff Attorney, Public Justice, Professor Christopher R. Drahozal, John M. Rounds Professor of Law, University of Kansas, and Lori Swanson, Attorney General, of the state of Minnesota.

Representative Dennis Kucinich, Chairman of the Subcommittee, began the hearing by stating, "The subject of this hearing – the use of mandatory pre-dispute arbitration as a method of obtaining judgments for consumer debts – is not what we normally think of when we hear the terms 'arbitration' or 'consumer arbitration' We are talking about mass-production arbitrations, where businesses file thousands of claims against consumers to obtain judgments on credit card debt; where the claims are assigned to arbitrators in 'batches' of dozens; where the consumer almost never appears or even responds; and where the so-called hearing consists of nothing more than the arbitrator looking at a statement written by the creditor and awarding the amount that the creditor requests."

Michael Kelly, Chief Operating Officer of NAF defended consumer arbitration stating, "I want to emphasize that the FORUM's exit from the consumer arbitration arena represents a significant loss for consumers. Without access to arbitration, consumers with smaller value claims will not be able to secure legal representation, and will be left to navigate the litigation system by themselves."

Richard Naimark, Senior Vice President, International Center for Dispute Resolution at the American Arbitration Association (AAA) also testified that the AAA has stopped administering consumer debt collection disputes until new guidelines are established.

Section members have been following these developments closely. We asked several Section members to comment.

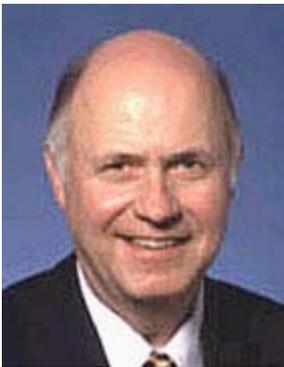
A vocal critic of NAF's practices, Section member Jean Sternlight commented on the suit: "NAF's behavior, while shocking and extreme, is emblematic of why mandatory arbitration is unwise as a matter of public policy. When a company is allowed to impose arbitration on consumers or employees who need not give knowing or voluntary consent the company has both the incentive and the opportunity to tilt that arbitration process in its own favor. Similarly, arbitration providers have both the incentive and the opportunity to cater to the companies who are imposing arbitration on their consumers and employees. To protect consumers and employees from unfair uses of arbitration we should adopt the Arbitration Fairness Act which will allow voluntary post-dispute arbitration but proscribe mandatory pre-dispute arbitration clauses."

Dwight Golann added, "The allegations made by the Minnesota Attorney General, the City of San Francisco and others about NAF arbitration are shocking. To allow strong players in the marketplace to use ADR as a weapon against unsophisticated ones corrodes the entire foundation of the dispute resolution movement. It demonstrates the truth of a basic principle -- Regulation is the price we pay for the failure of morality."

Commenting on the hearing, Kurt Dettman, Section Arbitration Committee co-chair said, "The critics of the current system of consumer dispute arbitration have raised some legitimate problems with the state of consumer arbitration practice today. That said, however, we think that reform is a better answer than an outright ban. With proper reforms that incorporate fundamental principles such as reasonable cost, procedural and substantive due process protections, and truly neutral arbitrators, consumer arbitration can be an efficient, expeditious, and fair process that provides consumers and businesses with a good alternative to the often lengthy and expensive litigation process in today's overburdened court system."

Stephen Yusem, Section Arbitration Committee co-chair further noted, "Arbitration critics must consider the alternative: litigation, with its inflexible procedure, its pleadings, discovery (interrogatories, depositions, motions to inspect, requests for admissions), pre-trial motions and arguments, jury selection, trial before a judge with minimal subject matter expertise, post-trial motions, multiple appeal levels and remands for new trials. Banning arbitration outright would merely send disputants from the proverbial frying pan to the fire."

In Appreciation of our Friend and Colleague Jack Cooley



Hon. John W. "Jack" Cooley passed away on July 21st, 2009, after a valiant and graceful fight with cancer. The cause of death was Multiple Myeloma, a cancer of the bone marrow in relation to exposure to Agent Orange during his tour of duty in Vietnam. His death is a great loss to the dispute resolution community and to his many friends and family. He is survived by his daughter Christina of New York, NY and his son John of Glencoe, IL.

Judge Cooley was born in St. Louis, Mo in 1943. He was a nationally recognized neutral, who has been mediating in government and private practice since 1977. He was a member of the JAMS panel and served as a Special Master and as an arbitrator and mediator in a wide variety of complex, multi-million dollar commercial disputes, both domestic and international. He is a former United States Magistrate, Assistant United States Attorney, Senior Staff Attorney for the United States Court of Appeals for the Seventh Circuit and a litigation partner in a Chicago law firm. He was a graduate of Notre Dame Law School and the U.S. Military Academy at West Point.

Jack Cooley was also a teacher, serving as an adjunct at Northwestern University School of Law teaching negotiation. In a tribute to Jack by the Dean's Office at Northwestern it is no surprise that he was "beloved by his students and colleagues alike". He offered numerous workshops and CLE programs to dispute resolution professionals over his long career.

Jack was a pillar supporting the growth of the ABA Section of Dispute Resolution. He served on the Section of Dispute Resolution Council, and as Mediation Committee Chair. In those posts, he

was always a ready volunteer for difficult tasks involving convening groups and producing a written product at the end. When a call was made for someone to volunteer for a leadership role, and heads went down, Jack's hand would go up. In addition to his other work for the Section, he masterminded and edited the two-volume Creative Problem-Solver's Handbook for Negotiators and Mediators (ABA 2005).

Beyond this contribution to our Section, he was an equally significant contributor to the Association for Conflict Resolution (ACR), a Past President of Chicago Chapter of the Society of Professionals in Dispute Resolution (SPIDR), a leader of the Task Force on the Authorized Practice of Mediation on behalf of the Association for Conflict Resolution (ACR), and a member of the ACR Task Force on Mediator Certification.

He was a prolific writer. He published more than 100 articles on ADR topics and six books! His additional work included:

Mediation Advocacy (2nd ed., NITA Practical Guide Series 2002) Arbitration Advocacy (2nd ed., NITA Practical Guide Series 2003) The Mediator's Handbook: Advanced Practice Guide for Civil Litigation (2nd ed., NITA 2006) The Arbitrator's Handbook (2nd ed., NITA 2005) Pracademics: Creative Problem Solving in Negotiation and Mediation (Xlibris, 2009) Litigation: Callaghan's Appellate Advocacy Manual (2 vols.) (Callaghan, 1989, supplemented through 1995).

Jack's energy, imagination and talent also encompassed fiction writing and as an accomplished jazz pianist. His fiction work includes: Queen of Battle (Xlibris, 1999), and Windsong of Irish Hollow, (Xlibris, Forthcoming in 2009). He would often draw analogies from the artistry in his jazz improvisations to the work of a neutral.

Jack's work ethic, his impeccable manners and bearing, his awesome completion of every task he took on (on time), were the only hints that he was a graduate of West Point. He was so remarkably humble about his achievements--quick to give recognition to others and deflect it from himself. In many senses, he embodied traits of a consummate mediator: a ready smile and sense of humor, steady patience and perseverance, remarkable intelligence and creativity, and optimism.

With respect to the latter trait, at Jack's suggestion, we were planning to meet with him in Chicago at the ABA meeting. He wasn't feeling strong enough to attend the ABA meeting, but he wanted to see his friends, and there was a plan to meet at his home in Evanston. He was in the middle of life to the moment he died. He published one book in 2009 and another is forthcoming. But you would never guess this industry as his friend, because he was a willing, kind and engaged companion. We will miss seeing him in Chicago, and, beyond that, we will always revere and miss him.

Homer La Rue, Section Chair-Elect
Lela Porter Love, Section Chair

As we have shared this sad news this week other friends and colleagues have added their voices to our appreciation for Jack.

Jack Cooley was a good friend and a true renaissance man. He was not only a superb mediator and lawyer, but also an accomplished jazz pianist and author. His passion, though, was peacemaking and finding appropriate ways of resolving complex disputes.

The mediation community has lost an extraordinary person.
-- Jim Alfini, Past Chair of the Section of Dispute Resolution

Jack Cooley was a unique personality within the field of dispute resolution. His quiet, unassuming manner betrayed his thoughtfulness and inventiveness as an educator, scholar and neutral. Jack taught us to think differently about conflict resolution bringing imagination and creative thinking to the profession in ways not previously imagined. To say that Jack taught us to think "out of the box" is truly an understatement.
-- Bruce Meyerson, Past Chair of the Section of Dispute Resolution

ADR News Briefs

New Comprehensive Bibliography of ADR

If you are still looking for summer reading go no further than the Section of Dispute Resolution's Bibliography on ADR. Professor Lawrence D. MacLachlan, Director of Research & Instructional Services at the University of Missouri - Kansas City School of Law, has generously compiled this bibliography as a service to Section members.

The comprehensive Bibliography is posted to the Section's web site at http://www.abanet.org/dispute/docs/2009Books_Articles_JanJun.pdf

Foreclosure Mediation

Section of Dispute Resolution recommends ABA policy on Foreclosure Mediation

The Section has submitted a report and recommendation for consideration at the August 2009 Meeting of the ABA House of Delegates that endorses the utilization of mediation services for homeowners in residential foreclosure situations. The proposed recommendation will enable the ABA to support and encourage the creation of state and federal legislative and court programs that utilize mediation to help resolve pending foreclosure cases of mortgages of residential real property, as well as pre-suit situations that might lead to foreclosure.

Collaborative Law

Uniform Collaborative Law Act Adopted by the Uniform Law Commission

On July 15, 2009, at its Annual Meeting in Santa Fe, New Mexico, the Uniform Law Commission, by a unanimous vote, adopted the Uniform Collaborative Law Act. The Act will be before the ABA House of Delegates in February, 2010. The Section of Dispute Resolution has endorsed the Act.

Words Work

The Section has a new resource available to teach middle-school kids communication, leadership, and decision-making skills. We encourage our members to share this curriculum with community members. Teachers, school administrators, and after-school programs have welcomed this curriculum for its easy-to-use and fun lessons.

<http://www.abanet.org/dispute/wordwork/>

AFCC Offering Four Scholarships to their Regional Training Conference

The Training *Interventions for Family Conflict: Stacking the Odds in Favor of Children* is scheduled for at the Peppermill Resort Spa Casino in Reno, Nevada, November 5-7, 2009. The four conference scholarships include registration fees for one full-day pre-conference institute, general conference registration, and a three night stay in a standard room at the Peppermill. Additional expenses, such as travel and meals, are the responsibility of the recipient. Applications must be submitted by September 15, 2009. Click here for the scholarship application: http://www.surveymonkey.com/s.aspx?sm=L_2fvzaGCuANkt8AovpkNTRA_3d_3d.

Get to Know Your Leaders - July 2009

Linda Toyo Obayashi



As part of our on-going series of questions and answers with Council members of the Section, we asked Linda Toyo Obayashi, World Bank Group, Washington, D.C. to answer some questions about her corner of the ADR field.

What is your current position?

I am the Mediation Officer with the Mediation Services Office of the World Bank Group. I joined the Bank full time in May 2009. My responsibilities include intake, convening parties, and mediating. Our office serves over 10,000 staff members which include staff in more than 100 country offices around the world. We also conduct trainings to promote better communication skills.

How did your ADR career develop?

After graduating from Rutgers School of Law, Newark, New Jersey, I clerked for Hon. Charles J. Tejada, King's County Family Court in New York. Later, when I moved to Pennsylvania I developed a practice aiding Japanese companies with offices and branches in the U.S. Many of my Japanese clients were frustrated with the U.S. court system because employees were resorting to the court system to resolve their disputes and management wanted an alternative. I started mediating informally, before I fully understood the field of dispute resolution.

When I moved to Maryland in 1996 I began preparing for the bar exam when I realized that there was a court process for mediation. By this time many of my Japanese clients had returned to Japan and I assisted them with the closing of their offices due to the recession in Japan. I decided to refocus my practice on mediation. I was trained around the country in various styles of mediation and dedicated myself to the field of conflict resolution. I signed up for every Mediation Roster I could find and volunteered to gain experience. The more involved I became I found that the field was more in line with my personal philosophy and world view. I felt much more comfortable and natural as a mediator than in the adversarial role of many attorneys in the legal field.

I slowly started to build a full time mediation practice and around 2003 I became a mediation consultant for the World Bank Group, eventually becoming the primary mediation consultant. When my current position was posted in 2009 I applied, and was fortunate to have been selected.

What were some of the challenges you had to overcome in your ADR career?

The profession has evolved with the expectation that mediators will serve on a volunteer basis and do not need to be compensated for their work. As a sole practitioner I struggled with this. While I understand that many mediation programs are not funded to support payment for mediators or are new and have limited resources, mediators must be valued and be paid. The public and parties to legal disputes must be better educated about the benefits of mediation. Businesses and organizations should be informed that in the long run it is really worth building and promoting an ADR system. Having an Ombuds and Mediation Program in an organization saves time, money, and promotes good employee relations. The more educated people are about mediation, the more they will understand its worth and value.

How did you get involved in the Section?

I first became a member of the Section after law school. Once I dedicated my practice to the field I began attending the Section's annual conferences. I was so impressed with how highly dedicated and passionate many of the practitioners were and I loved the work I was doing as a mediator. I became even more involved in the Section as time progressed. The conferences offered me further training and gave me a better perspective of the work I was dedicated to and eventually I was elected to serve on the Council. I represented the sole practitioner with a varied practice, which included family, real estate, employment, and I understood the challenges of the small business owner. There was a push for more diversity within the Council. I have been blessed to have met many people who have supported me.

What is the most valuable advice anyone ever gave you about ADR?

The best advice I received when I first embarked on my mediation career was to get involved in the field and the various organizations that support it. I attended as many conferences as I could and met as many people as possible. I was also advised to "never say no." I mediated, presented and served on numerous committees. I volunteered a great deal. It is important to always find a way to stretch yourself and to find a way to make it happen.

What role does ADR play at The World Bank?

The Bank is a non-governmental organization and employee rights and obligations are covered under the Bank's Staff Rules. The Internal Justice System (IJS) manages employment conflicts, issues, concerns. This includes any employment issue ranging from performance, promotional issues, resignation, terminations and exit strategies, to manager and staff communication problems.

The IJS is comprised of six independent offices. Our staff comes to us when they have a problem with a manager, colleague, or team member. The Ombuds Office addresses concerns with the individual staff member. The issue may then be referred to my office, the Mediation Office, where we provide mediators who facilitate dialogue to aid in the resolution of the problem. We strive to keep the process informal, voluntary, and confidential, where the parties control the outcome.

If a formal administrative decision is made an employee has the right to have it reviewed, the Peer Review Services (PRS) provides a panel of World Bank Group peers to review the circumstances of the action, and they will issue a recommendation. Finally, if the employee is still dissatisfied with the recommendation of the PRS they may file an application with the Administrative Tribunal Office for its review. This decision is final and binding. There are also the Ethics and Integrity Offices which monitor and investigate allegations of ethic violations as embodied by the Bank's core values and staff rules, corruption, fraud and misconduct.

Our Mediation Office boasts a 95% satisfaction rate, even when there is no resolution. Additionally, we resolve 80% of all issues at the mediation level. Our goal is to increase job satisfaction at The Bank and for our employees to resolve their conflicts early on, feeling comfortable and trusting the entire process so The Bank is truly a conflict competent organization.

The Dispute Resolution Section would like to thank Ms. Obayashi for sharing her insights and experience with our members. Her contributions and continued dedication to the field of ADR are greatly appreciated.

Interview conducted by Allyson Lambert, a rising third year at Mississippi College School of Law.

Case Law and Legislative Updates from the Section of Dispute Resolution

David Moora, Staff Attorney
Allyson Lambert, Legal Intern

Arbitration Case Law

Mansoor v. SC&A Const., Inc.

Delaware Court of Chancery

The case involved a request for an order vacating an arbitration award related to a dispute over the renovation and expansion of a restaurant. The Delaware Court of Chancery found that summary judgment is an appropriate judicial mechanism for reviewing an arbitration award, because the complete record is before the court and no de novo hearing is permitted to determine whether the award should be vacated. The court, however, may take appropriate steps if the arbitrator's actions are "in direct contradiction to the express terms of the agreement of the parties" because, then, "he has exceeded his authority." Not Reported in A.2d, 2009 WL 2140030 (Del.Ch., Jul 9, 2009)

Grant v. Magnolia Manor-Greenwood, Inc.

South Carolina Supreme Court

Nursing home moved to compel arbitration of action by widower and personal representative of deceased resident's estate for survival, wrongful death, and loss of consortium. The South Carolina Circuit Court, Greenwood County, denied motion. Nursing home appealed. The South Carolina Supreme Court held that arbitration agreement was unenforceable due to designated association's unavailability to act as arbitrator. No. 26668, 2009 WL 1678204 (S.C. June 15, 2009)

Hayes v. Oakridge Home

Supreme Court of Ohio

Nursing home resident brought action against nursing home for negligence and/or recklessness in connection with injuries she sustained in a fall. The Supreme Court of Ohio found that voluntary arbitration agreement between nursing home resident and nursing home, in which resident agreed

to submit claims arising out of her treatment to arbitration and waived right to jury trial, attorney fees, and punitive damages, was not substantively unconscionable; agreement was not precondition to admission, terms were commercially reasonable, agreement to have arbitrator hear dispute necessarily resulted in waiver of right to jury trial, and although punitive damages waiver applied only to resident, nursing home also waived statutory legal rights to seek costs and attorney fees and right to pursue action for filing groundless complaints and to seek dismissal of action. Slip Opinion No. 2009-Ohio-2054

Lloyds Underwriters v. Netterstrom

Florida Court of Appeals

Case arose from a dispute over insurance coverage for a tort claim. The Florida Appellate Court addressed an appeal from a nonfinal order determining that a party is not entitled to arbitration. The court held that the arbitration clause in the insurance policy at issue was clear and unambiguous and that the case law prohibiting arbitration of insurance coverage disputes must give way to the contrary requirements of the Federal Arbitration Act and the Convention governing international arbitration agreements. --- So.3d ----, 2009 WL 2048915 (Fla. App. 1 Dist., Jul 16, 2009)

Graves v. BP America, Inc.

United States District Court for the Southern District of Texas

Survivors of employee killed in work-related accident brought diversity wrongful death action against employer. The United States District Court for the Southern District of Texas, denied employer's motion to compel arbitration, and employer appealed. The Court of Appeals held that survivors were bound by arbitration clause in employment agreement, even though they were nonsignatories to agreement. 568 F.3d 221 C.A.5 (Tex., 2009. May 06, 2009)

Schatz v. Allen Matkins Leck Gamble & Mallory LLP

Court of Appeal, Fourth District, Division 1, California

Client signed a retainer agreement hiring a firm to represent him in a dispute concerning the assignment of income from a partnership. The retainer agreement contained an arbitration clause with the language "any additional matters we handle on your behalf or at your direction" would be included in the terms of the original agreement. Later, the client hired the firm to represent him in a separate easement dispute. The court held that the original retainer agreement unambiguously encompasses any additional work the law firm performs at the request of the client, therefore arbitration was compelled as originally agreed upon for a fee dispute between the parties. Not Reported in Cal.Rptr.3d, 2009 WL 2008395

Aero Air, L.L.C. v. Sino Swearingen Aircraft Corp.

Court of Appeals of Texas, Amarillo

Plane manufacturer/distributor and a plane chartering/servicing company enter into an agreement that includes an arbitration agreement. The agreement stated that if either party brings legal action against the other with respect to any dispute required to be arbitrated under an arbitration agreement, the other party is entitled to recover damages, costs, expenses, and attorney's fees. At issue was whether the parties subjected themselves to the terms of the original agreement through reinstatement. The court held that the validity of the distributor and servicing agreements was implicated in the dispute, therefore qualifying it to be arbitrated. Any award issued by the arbitration panel is consequently valid. Not Reported in S.W.3d, 2009 WL 1940916

Alexander v. Wells Fargo Financial Ohio 1, Inc.

Supreme Court of Ohio

Homeowner entered into a mortgage agreement with a corporation signing a mandatory arbitration agreement. Homeowner extinguished the mortgage before the statutory duty to file the mortgage release arose. The corporation failed to file the mortgage release, incurring a fine for the homeowner. Homeowner brought suit, stating the claim did not arise out of or relate to the mortgage agreement. The court held that an arbitration agreement that covers any claim “arising out of or relating to” the mortgage will be enforced regardless if the mortgage was extinguished before the statutory duty to file the mortgage release arose. --- N.E.2d ----, 2009 WL 1885873

Delta Catering Management, LLC v. Universal Sodexho (USA), Inc.

Supreme Court of Ohio

Shareholder brings a derivative suit alleging accounting violations of the company agreement. Defendant argues that the dispute must be arbitrated as it arises out of the company agreement. Plaintiff argues that because the suit is on behalf of the LLC, and not brought by an individual “unit holder” it is not covered by the arbitration agreement. The court held that a derivative suit brought by a “unit holder” is covered by an arbitration agreement. Allegations of accounting fraud in violation of the company agreement satisfy the “arising out of, or relating to” substantive requirement to invoke the arbitration agreement. Slip Copy, 2009 WL 1870894

Regions Bank v. Herrington

United States District Court, S.D. Mississippi, Eastern Division

Bank improperly dispersed funds from account without the signature of both account holders. Injured account holder filed suit demanding compensatory and punitive damages. Bank moved to compel arbitration pursuant to the terms of the Customer Agreement. The court held that the fact that a signature card that served to open a bank account did not explicitly reference an arbitration obligation, and that there was no discussion of any arbitration provision at the time joint account holder signed the signature card is immaterial. The signature card incorporated the terms of the Customer Agreement, which joint account holder admits contained the arbitration provision. Therefore, arbitration must be compelled. --- F.Supp.2d ----, 2009 WL 1851018

ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.

U.S. Court of Appeals, Second Circuit

The Court considered whether parties' inclusion of a general statement in an arbitration agreement that each will bear the expenses of its own arbitrator and its own attorneys deprives the arbitration panel of the authority to award such expenses as a sanction against a party whom the panel determines failed to arbitrate in good faith. The U.S. Court of Appeals, Second Circuit, held that the agreement was sufficiently broad to confer on the arbitrators the equitable authority to sanction a party's bad faith conduct, and the agreement stating that the parties should bear arbitration expenses did not limit arbitrators' authority to award attorney and arbitrator fees as sanction for bad faith conduct. 564 F.3d 81 C.A.2 (N.Y. April 09, 2009)

Mediation Case Law

Santana v. Olguin

Kansas Court of Appeals

Residential real estate purchaser brought action against vendor, real estate agent, and building inspection company, alleging negligence, fraud, and violation of Kansas Consumer Protection Act (KCPA). Inspection company moved to dismiss or for summary judgment, purchaser moved

to compel mediation, and agent and vendor moved to dismiss for failure to mediate. Court held that the mediation provision created condition precedent to litigation that parties mediate disputes; and it was within district court's discretion to dismiss purchaser's lawsuit against vendor and agent for failure to mediate, rather than considering less egregious remedy. 208 P.3d 328 (Kan.App., May 29, 2009)

Windham Land Trust v. Jeffords

Maine Supreme Court

In a dispute over a requirement in a conservation easement in a private contract, the Maine Supreme Court held that mandatory mediation prior to commencing of a lawsuit against the owners, did not divest trial court's subject matter jurisdiction over action initiated by trust seeking to enjoin landowner from violating easement after landowner refused mediation; court's jurisdiction over subject matter of dispute was not contingent on parties' pre-litigation mediation, which was merely a condition precedent to filing suit created by easement. 967 A.2d 690 (Me.,2009. March 19, 2009)

Legislative Update

Sen. Roberts Introduces Bill to Continue Agriculture Mediation Program

U.S. Senator Pat Roberts of Kansas introduced legislation June 26, 2009 seeking to continue agricultural mediation programs. The legislation requests that the Certified State Agriculture Mediation Program be authorized to continue for an additional five years. The program provides a neutral, confidential forum to discuss complex issues between farmers and ranchers and their lenders and government agencies. It addresses issues in a confidential, non-adversarial setting dealing with foreclosure, bankruptcy, appeals, and litigation. Currently, 35 states participate in the Department of Agriculture's program.

Financial Services Bill Addresses Arbitration in Consumer Financial Services

In July the Treasury Department submitted a draft bill to Congress entitled "Investor Protection Act of 2009." The draft bill proposes to give the Treasury Department the authority to prohibit or impose conditions or limitations on the use of pre-dispute agreements that require customers or clients of any broker, dealer, or municipal security dealer to arbitrate a future dispute arising under federal securities laws.

Florida Adopts Comprehensive Parenting Coordination Legislation

The Florida legislature created Florida Statute § 61.125 providing for parenting coordination as an alternative dispute resolution process to resolve parenting plan disputes. The purpose of the statute is to provide a child-focused ADR process facilitating the resolution of disputes between parents in creating or implementing a parenting plan. By providing education, making recommendations, and with prior approval of the parents and the court, the parenting coordinator may make limited decisions within the scope of the court's order of referral. The parenting coordinator is an impartial third person who must meet a variety of qualifications, such as holding a license as a mental health professional, physician, or be a certified family law mediator with at least a Master's in mental health.

Making Marketing Authentic

This is the second installment of a two-part article focused on helping you make your marketing program feel authentic. (To view the 1st part of this article and the June newsletter, [click here.](#))

Most people who get into mediation or other ADR services don't do it because they love to market their services. For many of us, marketing has a pejorative feel to it; marketing feels unprofessional for a professional service industry. Yet, because so much of the public is unfamiliar with the types of services that ADR practitioners offer, and with less support from litigation attorneys than we'd like, we need to find an authentic, comfortable way to market our services and mediation programs.

Choosing Where and How to Market

Specialize. It's easier to market that way. You can accept any kind of case that comes into your office, but you're only going to market one or two specialties. You're also going to pick your geographical area. Marketing every service to everyone everywhere is too difficult and expensive. The more you define your services, practice areas and geographic area, the easier it is to market.

It's counter-intuitive, but as we've narrowed our services our income increased. In 2008 gross income increased 80% yet we *cut back* on the services that we offer. The less we do, the more we make. It makes sense when you think about it, because the less you do the easier it is to describe what you do, including the value, benefits and results, and the easier it is for clients to conclude, "yes, this mediator can help me."

Likewise, it's important to define your mediation style. Do you generally practice in a more narrative, evaluative or facilitative style? Can you explain to clients how you do what you do, and why you've chosen to practice the way you do? What about the other styles do you include in your practice, and what parts don't work given your mediation style? Being able to articulate why your particular mode of practice works will help clients have confidence in you and in your practice. *Mediation Career Guide*, by Forrest S. Mosten (Wiley Jossey Bass 2001), has some great chapters on developing your signature style.

Getting Started: You'll learn about marketing your mediation practice with a combination of trial-and-error and professional advice. Hopefully, this article will help you avoid some expensive lessons. A marketing approach that worked in your previous professional life might not work for mediation and just because it worked for someone else doesn't mean it will work for you. My best investment was using an ADR marketing consultant. It cost money, but it saved both time and money in the long run. Individual consultations helped me to develop marketing plans that feel authentic, professional, and comfortable to execute. A few good books were also helpful: *Essential Guide to Marketing Your ADR Practice*, by Natalie J. Armstrong (Golden Media Publishing 2001); *Selling the Invisible: A Field Guide to Modern Marketing*, by Harry Beckwith (Warner Business Books 1997); *Guerilla Marketing: Secrets to Making Big Profits in Your Small Business*, by Jay Conrad Levinson (Houghton Mifflin 1998); and *Marketing Without Advertising* by Michael Phillips and Salli Rasberry (Nolo 2003), were all good starting points.

The strategies below range from low out-of-pocket costs and a high time investment to a high cost and low time investment. When you're able to spend lots of time, but little cash, you'll spend your time networking, speaking, writing, and serving before you sell.

Networking: Educating people about mediation in a social or networking context is free or nearly so. Connecting with another person and talking about what you do is an invaluable part of marketing for any business, and particularly for mediators. Join your professional organizations, or, better yet, the professional associations of a gatekeeper organizations. A gatekeeper is someone who frequently comes into contact with the demographic you're trying to reach. For example, as a family law mediation firm, I get referrals from therapists and accountants. As a result, I've joined the local therapists' organization and the family law section of the accountants' organization and actively participate in the meetings and committees. If you're really outgoing, you can make good use of your time at their networking functions. If you're more of a workhorse, you can gain points by volunteering on committees. What better way to prove that you're honest, trustworthy, hard working and worthy of their referrals?

While joining organizations is a great way to meet people and to network, dues can be expensive. Try attending various associations' functions without joining first. Look for their calendar of events listed either in their newsletters or web site and make sure that the event is not "members only". It's a great way to try out a new organization without a big cash outlay.

Wear your nametag on your right shoulder so when people shake your hand they're staring at your name. Make your business cards easy to reach. If you have a name badge on a lanyard, put your cards in the back of the pouch. Get their card because the key element to networking is following up. After the event, follow up with a letter or call and remind your contact about who you are and what you do. The plan is to land in their Rolodex so that when they're asked about a mediator, they think of you first.

Maintain a database of your contacts and former clients so you've got all the information in one place, and make follow up calls or contacts on a regular basis. If you're uncomfortable telephoning, consider writing a mediation newsletter or e-newsletter to send to your mailing list, or sending an article or holiday card. Break up the task of following up with your entire database into small pieces, like 10 calls a day, to make the task less daunting—and more likely to get done. Contact every 60 to 90 days is ideal.

Speaking: Public speaking is also a great free opportunity to make personal contact with specific groups that could use your mediation services. Again, make sure you target your efforts to "gatekeepers"—those who can refer you business—or to individuals who are likely to need your services, *e.g.*, speak to couples' counselors if you're a divorce mediator. Expect mixed results with large, general membership groups like the Chamber of Commerce, and more promising responses from more targeted groups, like an HR professionals association. A group with a focused demographic, especially one in your geographic area, is ideal.

Writing: Writing about mediation, or mediation as it relates to another topic, like entertainment law or conflict resolution for educators, is a great no-cost high-profile way to market your services. Most professional organizations have a magazine or newsletter and they need content. As a result, it's easier than you might think to get published in a newsletter. In addition, you can submit articles to general interest and professional websites, post them on your website and reprint them in your own newsletter. If you're a talented writer, think big: your local newspaper or well known professional publication. If you're just starting out, think smaller: letter to the editor or smaller newsletter. Make sure your topic fits your intended audience and targets your gatekeepers in a way that highlights your services without self-promoting.

Volunteer Mediations: Demonstrating how mediation works through participation in a volunteer mediation panel is a widely-used yet controversial marketing technique. Volunteering your time to build your skills or to give back to the community is one thing. If you're volunteering for marketing purposes, make sure your time is productively spent.

Spending a Little Money: One reasonably low-cost marketing strategy which can be incredibly useful is building and maintaining a web site. From my own experience, the web site has consistently paid for itself in clients generated, and has saved money because it also functions as an on-line brochure. For more information on web sites, please read James Melamed's article "Marketing Your Mediation Practice on the Internet" in this issue. Don't forget to register your name, address and domain name with major on-line yellow page style directories, like Yahoo Yellow Pages, switchboard.com and smartpages.com. Basic listings are free on many sites. You can also use your web site for reciprocal links and strategic partnerships. Find sites which you feel would interest your potential clients and link to those sites; ask those sites to link to your site as well.

Blogs, either on your own website or someone else's, can work the same way. If you start a blog on your own website, you can update the content of your website constantly, which may help your search engine rankings. If you start a blog on a blog website, link back to your web site, which may also help your search engine rankings. Make sure that your blogging is professional and well-edited. Don't be fooled by the informality of blogs. Everything you post anywhere that the public can read must be your best effort.

You can use the concept of "permission marketing" on your web site and with your e-mail address list. Each month (or whatever frequency), send out a newsletter to subscribers. The key is that the newsletter is strictly opt-in. You don't want your newsletter to look like spam. Web site visitors subscribe by signing up on the site and you can send it to your e-mail address list with their permission. Keep each newsletter short and simple, less than 2 minutes to read. Make it informational and timely. At the bottom, include some information about your practice and services, as well as your contact information. Encourage readers to forward the e-mail newsletter to anyone who might find it of interest. With luck, you'll get more subscription requests from people who received your newsletter as a forward. This is one way to use "viral marketing," *i.e.*, the forwarded e-newsletters do your marketing for you. If you have the time to do several different targeted newsletters, then send different newsletters to different groups. This is a great way to develop word of mouth about your services.

Spending Money Doesn't Work: Spending lots of money on print, radio or TV advertising is usually a poor investment unless you're committed to an ongoing advertising campaign, which is cost-prohibitive for most mediators. The problem with advertising is that the person who needs your services must see the ad at the exact moment that he or she needs your services. Your chances of hitting a target on the first few tries are slim. Limiting your ads to publications read by your gatekeepers is more effective, but given the expense, your return on investment will generally be too small to be worthwhile. The same is true for direct mail advertising and Yellow Pages ads. Your money and time are better spent elsewhere.

Once you get your marketing plan into place, it's time to think about how to turn those prospects into actual clients.

Turning Prospective Clients into Actual Clients

We sometimes forget that our most valuable marketing contact—the prospective client who telephones our office—is our most viable marketing prospect.

Step one is to serve before you sell. This is a concept I learned from my marketing coach at Golden Media, and the idea is that before you ever talk to anyone about paying you for your services or becoming a client, first answer all of their questions and be as helpful as possible. Let prospective clients get to know you, your services and your practice before you ask them to become clients. It's good business for your practice, and it's also good business for mediation in

general. During this “serve before you sell” period you’re making sure that the case is a good fit for your practice as much as clients are evaluating your firm. Answer questions about mediation, give a tour of your office, offer an orientation session, have articles and handouts ready to help the clients get prepared to mediate, and make them feel like they’re getting special attention from your firm. All of this is free of charge, of course. The serve before you sell stops with the actual mediation of the case—that’s when you go on the clock. By the time the caller becomes a client, he or she will not only be sold on your services, but will have the confidence that your firm is dedicated to client service.

Consider how much time, effort, and money that it took to make this call happen. Every speaking engagement, networking luncheon, article and marketing activity is designed to make the telephone ring. Yet when it does, few of us are as prepared as we need to be to turn that interested caller into a paying client. Forrest Mosten pointed this out to me early in my career, and convening is still the backbone of my firm’s marketing.

That ringing telephone signals the beginning of a process called *convening*, or getting both sides to the table. Do you know what your call-to-client ratio is, i.e. how calls you get and how many turn into paying clients? Knowing your call-to-client ratio from each of your sources of referrals, as well as your overall ratio, is important in order to know which marketing plans work, which are cost-effective, and where you should focus your time and money.

Telephone Calls

Who will take your telephone calls? Is it a receptionist, unskilled at mediation and unable to answer basic questions about your services? Is it a Dispute Resolution Associate, trained in mediation and in convening? Will you take the calls yourself? A general receptionist is fine if you’re taking the intake calls yourself, but your first line marketing person should know all about the mediation process.

After you’ve decided who is doing the intake, what model will you use? Will you spend a few minutes, off the clock, and then send out your brochure, marketing materials, or a follow-up letter? Or will you do a thorough phone intake, on or off the clock? Will you schedule an orientation session during the first call? A critical part of your intake is where the client heard about your services. You’ll use this information to track the efficacy of your marketing efforts.

The next piece of information you need from the caller is whether or not the other party is aware of the caller’s desire to mediate. Is the other party even aware that the call is being placed? If not, ask how best to approach the other party.

For cases in which the parties have already agreed to mediate, your intake is then geared toward selling the potential client on your services. What do you offer that other mediators do not? Why should the client choose your services over someone else’s? Write a short script or outline in case you get tongue-tied on the phone. After the telephone call, send out a “thanks for calling” letter along with some printed information about your practice. Give prospective clients a tangible reminder of having called you.

Information Packages

After a call has come into the office, send an information package to the callers. Your information package should instill confidence in clients and differentiate your services in the marketplace. You might include brochures, business cards, a firm newsletter, a short biography of yourself and your experience, pointers on how clients can prepare for their mediation session, or articles about mediation. Use a simple pocket folder so you can mix and match your materials for different types of cases.

Just as with serving before you sell, remember that clients are looking for value, benefits and results. Ninety percent of your brochure, information package and website should be centered around value, benefits and results for the clients. Only 10% should be about you and your qualifications. The same 90/10 rule holds true of all of your marketing materials, your web site, and any other descriptions of your practice or program.

When prospective clients call your office, they already believe you're an expert. Laypeople and attorneys [generally] perceive all mediators to be equal and qualified. As a result, they don't care much about your qualifications. The way mediators can differentiate themselves is by describing their services in terms of value, benefits and results.

Price is not as important as you'd think. In Western culture, people tend to believe that they get what they pay for. If it's free or inexpensive, it has no value. People who are 100% price sensitive are always going to be a problem. You're never going to build a practice on price competition. The good news is that mediation offers so much value, so many benefits, and such great results, it's relatively easy to compile your information packages.

Clients appreciate the fact that you're organized and have materials to send out. It conveys that you're committed to client service.

Mediation Orientation Sessions

You may wish to offer a free orientation session in order to supplement the intake. Orientations allow the parties to see the office, meet the mediators and discuss how the mediation process might work for their case. Both the mediator and the parties can use the orientation to decide if the practice is a good fit for the case.

Thoughtful convening is the bridge between marketing and building a practice. Being ready to handle the calls when they come in is instrumental in your success.

Featured Contributor: Diana Mercer is the founder of Peace Talks Mediation Services (www.peace-talks.com) and the co-author of *Your Divorce Advisor* (Fireside 2001).

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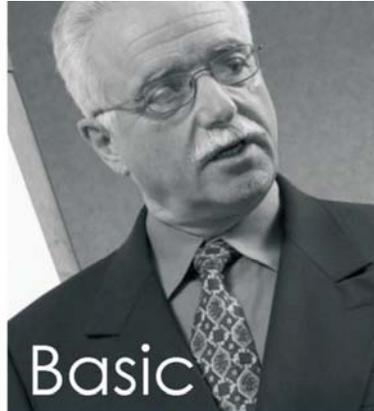
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