

The Goals of Peer Mediation: Are We “Merely” Solving Problems, or Are We Changing the World?

Richard Birke and Loren Podwill

This article looks at the ABA’s high school peer mediation program, Project Out-Reach, as a vehicle for exploring a hotly debated issue within the mediation community: Should mediation focus on “satisfaction” or “transformation”?

Mediation and “Peer Mediation”

Mediation is probably the most widely used dispute resolution tool in the American civil justice system. It resolves disputes much more frequently than does litigation. Today, civil verdicts are few and far between, but mediated resolution of civil cases occurs hour after hour.

In the last 20 years, mediation has begun to work its way into the mainstream public education system. The vehicle it has taken is called “peer mediation.” This is a method by which disputing parties gather with a person trained in mediation, called a neutral, in an effort to resolve a pre-existing conflict. The neutral has no authority to choose a solution, but has exclusive responsibility for guiding the conflict resolution process. Mediation is generally voluntary. While attendance at some mediations may be mandatory, reaching final agreement is always up to the parties and not the mediator.

In the high school setting, mediation is typically conducted on site by and between high school students in a confidential setting. Mediators work in pairs and mediations last anywhere from 30 minutes to several class periods. They involve two or more parties, and they may deal with anything from very serious issues, like fighting, to small problems between friends.

Project Out-Reach

Project Out-Reach began in 1996, when TIPS, the ABA’s Young Lawyers Division (YLD), and the Section of Dispute Resolution formed a working partnership almost unprecedented within the ABA. The three entities created ABA Project Out-Reach to promote the strengthening of existing school-based conflict resolution programs and the creation of new programs. Since that time, TIPS, YLD, and the Dispute Resolution Section have worked cooperatively to train over 100 attorney members of the association from 27 communities to assist in peer mediation programs in the schools.

ABA Project Out-Reach has been recognized with the “Best of the Sections” Award and has prompted both the U.S. Attorney General, Janet Reno, and Associate Justice of the U.S. Supreme Court Sandra Day O’Connor to sing its praises.

The program’s primary goal is to reduce societal conflict and school violence. The program provides students with peaceful means to resolve disputes, diminishing the likelihood of school violence recently experienced in some schools. Currently, Project Out-Reach programs are operating in 14 school systems across the country; two new sites will be added for the 1999-2000 school year.

At each site, a trio of ABA volunteers—from each of the entities involved—attends a session at which they learn to train students to be peer mediators. Instruction includes a day each of mediation training, how to teach mediation, and logistics about how to set up and run a program. When the school year begins, the trained volunteers conduct a multi-

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ADR in ERISA Claims: TIPS Funds Pilot Pension Project

Linda E. Rosenzweig

Pension laws confer important legal rights to millions of older Americans. However, many individuals cannot enforce their rights because litigation is the only impartial dispute resolution mechanism provided by ERISA, the federal private pension law. The legal fees incurred in bringing an ERISA claim to trial typically far outweigh the monetary benefits at stake, and older participants are often reluctant to subject themselves to the delay, stress, and other nonpecuniary “transaction costs” of court proceedings.

Lawyers are often reluctant to agree to handle such litigation because of

- the difficulty of explaining complex ERISA concepts to judges;
- the disinterest shown by many courts in small, highly individualized benefit claims; and
- judicial reluctance to exercise their discretion under ERISA to award attorneys’ fees to a prevailing participant.

Consequently, there is a significant and serious gap in the delivery of legal services in this area. No program currently exists that addresses this nationwide problem.

Paving the Way with an Early Expert Evaluation Program

A logical choice for addressing this deficiency is an alternative dispute resolution program. The objective of the TIPS pilot pension project is to ascertain the feasibility of a voluntary, nonbinding alternative dispute resolution program for pension claims.

The concept of implementing a voluntary, nonbinding ADR approach using expert neutrals has been the subject of considerable discussion within the ERISA bar, as well as on Capitol Hill. TIPS Employee Benefits Committee members have met informally with members of four of the ABA Employee Benefits Committees to discuss the elements of such a program.

As envisioned by this group, the program would be an Early Expert Evaluation program established by federal legislation and administered by the Labor Department, together with a private sector board of dispute resolution experts and pension professionals.



The group has also met with counsel and staff for the Senate Special Committee on Aging to discuss the Pension Tools Act. The Act addresses the establishment of a dispute resolution program for pension claims. It was introduced by Sen. Charles Grassley (R-IA), Chair of the Senate Special Committee on Aging, and Sen. John Breaux (D-LA).

Legislation has not yet been enacted. A major obstacle has been the unwillingness of a private bar group to take responsibility for developing and maintaining the roster of expert neutrals, and to provide for their training. This innovative pilot project would directly address this problem and pave the way for development of a nationwide program.

Who’s Involved?

The Project will develop and test a model voluntary, nonbinding method of resolving pension disputes that will meet the needs of plan participants and plan sponsors. The project will invite private bar ERISA experts to serve as neutral evaluators. The TIPS Employee Benefits Committee will maintain the roster of the participating lawyers, who will be given training in Early Expert Evaluation techniques.

Potential clients for the program will be identified by the Pension Information and Counseling Demonstrating Program of the

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1999 Annual Meeting Roundup: Cool Times in Hotlanta

Cale Conley



B.C. Hart, Andrew Hecker
Award winner



Gun Violence Liability program panel



Excess, Surplus Lines and Reinsurance
Committee members



Hate Crimes program panel



The Hon. Robert Keeton,
McKay Award winner



Herb Baumann, Annual Meeting
program chair, and Linda Klein,
Council member and Atlanta host



- **Aviation Litigation**, October 21-22 in Washington, DC
- **Health And Welfare Benefit Plans**, October 21-22 In Washington, DC.
- **Cash Balance Plans**, October 22 in Washington, DC
- **Handling Fidelity Bond Claims**, October 27-29 in Boston
- **Executive Compensation**, November 4-5 in New York
- **ERISA Litigation**, November 11-13 in Chicago
- **Principles of Chinese Law Seminar**, November 14-17 in Guangzhou, Guangdong
- **Insurance Insolvency**, December 2-4 in San Francisco
- **Life Insurance Law, Health and Disability Insurance Law, Public Regulation of Insurance Law and Employee Benefits Midwinter Meeting**, January 12-15 in Key Biscayne, FL
- **Fidelity and Surety Law Committee Midwinter Meeting**, January 27-28 in San Francisco
- **ABA Midyear Meeting**, February 9-13 in Dallas
- **Insurance Coverage Litigation Committee Midwinter Meeting**, February 23-28 in San Diego

Visit www.abanet.org/tips or call 312.988.5708 for more information.

Photos courtesy of John Pavlou, Bill Levasseur, and Sharon Murphy

What do peach trees, dinosaur bones, hate crimes, jazz riffs, and ERISA have in common? Not much—unless you were one of the TIPS members who sampled the cornucopia of TIPS activities at the 1999 Annual Meeting in Atlanta August 6-10. Visiting TIPSters were treated to cutting-edge programs, enlightened entertainment, and productive planning for the future in the city “too busy to hate.”

Never let it be said that TIPS starts slowly. On Friday's opening day, some 22 business meetings, three CLE programs and three receptions packed the schedule, including a blockbuster presidential showcase program on Hate Crimes in America that was followed by a reception by the Women and Minority Involvement Committee. Among the business of the day was the CLE Board's discussion of final plans for the first-ever TIPS Trial Academy in Reno, Nevada, to be held in May 2000, and a planning committee meeting for the New York 2000 Annual Meeting program. The day concluded with a welcome reception for numerous first-time TIPS attendees at Section Chair **Kip Reader's** suite, which flowed seamlessly into a night among the dinosaurs, artifacts, ambience (and really good food) at Atlanta's Fernbank Museum of Natural History. The fine work of Atlanta Arrangements chairs **Hall** and **Becky McKinley** was evident to all.

Diverse and beneficial programming, orchestrated by Annual Meeting Program Chair **Herb Baumann**, continued over the remainder of the meeting. A focus on the tripartite relationship of defendants, plaintiffs, and corporate counsel was evident, as TIPS programs covered the spectrum from survival tactics in the courtroom, to minimizing ERISA litigation exposure, to focuses on technology and “e-commerce,” to a very well-attended look at “hot topics” in plaintiff's personal injury practice, to the grand finale: the presidential showcase program on Gun Violence Liability.

On Saturday night, however, the legal pads were put aside and the dancing shoes came out. Sponsor **CNA Insurance**, in conjunction with TIPS and the Young Lawyers Division, brought a fun-loving crowd to its feet with hot brass and cool jazz all under one roof.

The annual Section luncheon on August 9 featured guest speaker **Dennis Henigan** from the Center to Prevent Handgun Violence. The luncheon honored **Robert E. Keeton**, U.S. District Judge of the District of Massachusetts, the recipient of the **Robert B. McKay Law Professor Award**. The Section also applauded **B.C. Hart**, the recipient of the 1999 **Andrew Hecker Award**, as the TIPS member who best personifies the qualities of leadership, outreach, and professionalism.

The week of business (and dare we say pleasure, too) came to a close with TIPS at the forefront of debate in the ABA House of Delegates. Led by **Leo Jordan** and **Marvin Karp**, TIPS helped resolve an amendment to Canon 3(e)(1) of the Code of Professional Responsibility concerning judicial contributions. Moreover, TIPS members took an active role in the ABA House of Delegates in the discussion of one of the hottest topics of this meeting, multidisciplinary practice. ♦

Cale Conley, a native Atlantan, is a plaintiff's lawyer with Butler, Wooten, Overby, Fryhofer, Daughtery and Sullivan.



Program materials from the Annual Meeting CLE programs in Atlanta are now available! Please call 312-988-5708 for more information. For ABA registration and housing information on the 2000 Annual Meeting in New York and London, call 312.988.5672 or visit www.abanet.org.

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Barbara J. Leff

How to Use Online Discussion Groups to Increase Traffic To Your Law Firm's Web Site

The online discussion group—or mailing list—is an often-overlooked way to promote your law firm's Web site. With an online mailing list, someone sends an e-mail to the group's e-mail address, and that e-mail is sent to everyone on the group's mailing list. These discussions groups can be a valuable means to promote your firm's site because the members of the groups are actively involved in discussing the topics at hand. Even better, participation is free.

What Type of Mailing List Should You Join?

The type of online discussion group you subscribe to is up to you. You may want to network with attorneys in different cities to obtain referrals from them. Alternatively, you could join a group where the attorneys do *not* handle the same types of cases that you do. Another option is to join a discussion group that has nothing to do with the

practice of law but discusses an area of interest to you. The possibilities are endless, as you will see when you visit the web sites mentioned below.

Where Do You Find Mailing Lists?

Legal. To find legal online discussion groups, go to *Law Lists* at www.lib.uchicago.edu/~llou/lawlists/info.html (those are Ls, not ones). *Law Lists* contains hundreds of online discussion groups and includes descriptions of many of them, as well as information on how to subscribe.

The ABA also administers a variety of mailing lists. Go to www.abanet.org/discussions, and search for topics of your choice. You can subscribe to those discussion groups via the TIPS Web site at www.abanet.org/tips/listservs.html.

General. Liszt offers an extensive database of mailing lists at www.liszt.com. The Liszt database contains both legal and non-

legal discussion groups.

Another helpful directory is CataList, located at www.Lsoft.com/Lists/Listref.html. This database is maintained by the producer of the LISTSERV® software that manages mailing lists.

How Do You Participate?

The “soft sell.” Blatant promotion or advertising in online discussion groups generally is frowned upon. However, if you participate, over time other members will get to know who you are and what you do. When someone posts a question that you can answer, you respond with the appropriate information. The more you participate, the more people see you as a good resource.

Mail versus digest. Discussion groups typically offer one or two options as to the manner in which you receive e-mails from the mailing list. With the “mail” option, you receive individual messages on an on-going basis as they are sent to the mailing list. With the “digest” option, you receive all of the day's messages in one large message once per day. If you want to participate fairly regularly, you may prefer the “mail” option so that you can respond to pertinent posts more quickly.

E-mail signature block. An e-mail “signature block” simply is a block of text appearing at the end of e-mail messages that you send. Be sure to include a signature at the end of every e-mail when posting to an online discussion group and when respond-

ing to anyone in the group via private (or off-list) e-mail.

You determine the content of the signature. At a minimum, you should include your name, firm name, address, telephone number, fax number, e-mail address, and, of course, web site address. Depending upon your areas of practice and your particular state's regulations, you may or may not be able to add any information about the types of matters that you handle. Your particular e-mail program determines whether your signature block appears automatically every time you type an e-mail message or whether you must take some sort of action in order to have the signature appear.

Online discussion groups are not only wonderful opportunities to attract visitors to your web site and cultivate new clients, but, depending upon the nature of the group, they also are terrific sources of information for your practice. ♦

Barbara J. Leff, Esq., is president of Denver-based Legal Web Works (www.legalwebworks.com), a company specializing in web sites for solo attorneys and small law firms.

Visit the Tort and Insurance Practice Section's newly re-designed Web site at www.abanet.org/tips.



In Motion

In Memoriam. **Thomas A. Harnett**, who served as TIPS Chair in 1975-76, died recently at the age of 75. A Bronx native, he served with the Army Air Force in the Pacific during World War II and was awarded the Air Medal. He received his law degree from Fordham University School of Law and taught product liability law there as an adjunct professor. During the 1970s he was appointed by the governor to serve at the cabinet level as the superintendent of the New York State department of insurance. A partner in the Manhattan law firm of **Lane & Mittendorf** for many years, he retired last year and became a founding partner of **Gallagher, Harnett & Lagalante**, also in Manhattan. His private practice focused on commercial litigation and insurance regulations pending before governmental bodies. Mr. Harnett continued his active participation in Section activities, including attending the 1999 winter meeting of the Life Insurance, Health Insurance, Public Regulation and Employee Benefits Law Committees. He is survived by his wife of 48 years, Doris Harnett, and many other family members, including four grandchildren. TIPS extends condolences to Mr. Harnett's family and friends.

Congratulations to **Lisa A. Krouse**. She has been appointed vice-president and general counsel of the **Zenith Insurance Co.**, a property and casualty insurance company specializing in workers' compensation programs. **Keith Hanenian**, formerly a name partner in the Florida firm of Carman, Beauchamp, Sang, Hanenian, also recently joined **Zenith Insurance** as assistant vice president. He is responsible for all workers' compensation claims defense in the state of Florida.

Francine L. Semaya and Peter H. Bickford, formerly of Werner & Kennedy in New York, have become members of **Cozen and O'Conner**. They will continue their practices in insurance and reinsurance law, including insurance regulatory, corporate, transactional, brokerage, insolvency, and compliance matters.

The Illinois State Bar Association board of governors honored **William Tribler of Tribler Orpett & Crone**, Chicago, with its highest honor, the Medal of Merit. He was only the fifth recipient of the award in the ISBA's 122-year history.

The *New York Law Journals* June 22, 1999, “decision of the day” featured a case involving a victory for **Judith Goodman's** client, Federal Insurance Co. Ms. Goodman is a partner in the firm of **Goodman & Jacobs** in New York.

Condolences to *TortSource* designer **Andrew Alcalá** on the sudden death of his beloved mother, **Zenaida Alcalá**.

First Annual ABA/TIPS National Trial Academy: A Rare Opportunity for Learning and Mentoring

Young lawyers with two to five years of trial experience are invited to enhance their courtroom skills when TIPS conducts its first annual National Trial Academy April 29-May 3, 2000, at the National Judicial College in Reno, Nevada.

The Trial Academy will limit participation to just 30 students: 15 each from the plaintiff and defense bars. Employing state-of-the-art technology and instruction, students will be exposed to a broad array of trial techniques and methodologies ranging from computer animation and litigation software technology to instruction on *voir dire* by nationally renowned jury consultants.

The Academy curriculum will involve a core case study and will be taught by a faculty of leading trial lawyers from throughout the United States as well as professors from the National Judicial College. Each faculty member will be responsible for three students and will participate interactively through exemplar trial court presentations as well as constructive feedback, including videotape reviews of the students' performance in the courtroom.

Several weeks before the Academy begins, students will receive practice materials for the core case study, including depositions and expert reports. Students will be required to submit a trial brief, jury instructions, and a set of stipulated facts.

In addition to individual courtroom presentations, students will also be provided with lectures and courtroom demonstrations by faculty members on direct and cross examination of medical and scientific witnesses, opening statements, closing arguments, and jury selection. Each student will be videotaped while conducting an opening statement and a closing argument. Doctors from the University of Nevada Medical School and engineers from the engineering department will serve as expert witnesses. Two nationally renowned jury consultants will assist the students in a mock jury trial, which will take place on the final day involving the case study involved in the program. Jurors will be selected from the surrounding community and a trial will conclude with televised jury deliberations and a panel discussion with jurors, faculty members, and jury consultants on each side's presentation.

Enrollment in the Trial Academy is by application only. Please contact Janet Hummons at 312.988.5656. Students at the National Trial Academy will qualify for about 38 hours of CLE credits in all states.

A Different Perspective on Privatizing Business Dispute Resolution:

ADR Thwarts and Distorts Development of Commercial Law

Chris A. Carr and Michael R. Jencks

The common law, and how it develops rules for allocating risk and deciding disputes through a body of reported public decisions, has provided a framework for governing commercial trade and commerce. Recent research suggests that the common law is a significant reason why some countries develop at a more advanced rate than others (see *The Law of the Market*, THE ECONOMIST, April 19, 1997, at 78). Further, the common law, and its reputation for stability and predictability, is often cited as a major reason why companies are attracted to particular states (e.g., Delaware) and countries (e.g., Bermuda) to do business. In a nutshell, the accomplishments of the common law with respect to commerce are impressive.

Today, however, courts and the development of commercial precedent are under attack, perhaps more than ever before. ADR is hot; courts and traditional litigation are not. Thus, in light of the common law's track record, it is more than ironic that our business and commercial disputes are becoming more and more privatized, thereby stunting the growth and development of the very body of law that has traditionally served business so well. Let us explain further.

ADR: The First Level of Privatization

The nature of business transactions and disputes have changed over the years. Among other things, they are more global; there has been a proliferation of new rights, causes of action and defenses; they move with increased speed; and they often involve multiple parties. They are quite complex, and there is no question that our court system sometimes struggles to service them. As a result, businesses appear increasingly to be selecting private ADR over the courts to resolve their disputes. This is unfortunate, as there are substantial bodies of research that demonstrate that the traditional reasons behind this flight from the courts—court congestion and delay; the expense of litigation; alleged juror bias and prejudice against business; privacy and confidentiality; the advertised ability of private ADR to provide “win-win” solutions and preserve business relationships, and so on—are based on claims that are vastly exaggerated, if not outright false.

It is also unfortunate from the standpoint that when these business cases turn away from the courts for private ADR, the development and growth of a contemporary body of commercial law is thwarted.

Changes in How Courts Service Business Disputes: The Second Level of Privatization

Not only are businesses increasingly turning to private ADR on their own to resolve their disputes, but significant changes have occurred with respect to how our own courts have decided to service such disputes. These changes are also unfortunate in that they constitute yet another form and level of privatization that distorts the development of a contemporary body of commercial precedent. For example, many judges spend the majority of their time acting as private case managers rather than on-the-record dispute resolvers. Courts are also becoming more bureaucratized (e.g., judges are farming out more of their decision-making responsibilities to referees, magistrates, research attorneys, law clerks, and the like). As a result, courts are becoming increasingly perceived as impersonal institutions, which in turn gives businesses yet another reason to stay away from the court system and turn to private ADR.

Moreover, for the business cases that do opt to enter and remain in the court system, they often find trial (and even appellate) courts diverting them into some form of ADR against their will in order to clear court dockets and preserve judicial resources for other types of cases.

Finally, through the increased use of tools such as vacatur (often called stipulated reversal), selective publication, rules prohibiting the citation of unpublished opinions, depublishing (where a higher appellate court depublishes a certain decision because it disagrees with a lower court of appeal over a portion of its reasoning), filings under seal, and confidential settlements, the development of our commercial law is further thwarted and distorted.



Proposals for Reform

We do not contend that our courts and the common law system of precedent are perfect. We know that they are not. But we do submit that in removing the evolution of a common body of public decisional authority from the courts, we are depriving businesses—and those governing and advising them—of the very body of information that might have helped avoid such disputes in the first place. This policy is both short-sighted and erroneous.

How can we retain the continued vitality and utility of a contemporary body of commercial law, based upon many courts' experiences with similar business cases, and the evolution of a set of rules to govern business conduct? It will require the achievement of two goals:

- First, that there continue to be a substantial pool of business cases processed and decided by our public court system.
- Second, the decisions in those cases must be available as precedent and become part of the evolving framework for governing and deciding business disputes.

To accomplish these two goals, we suggest that the following course adjustments be made.

Changes to Help Maintain Business and Commercial Cases at the Trial Court Level

- Bar associations and business groups should encourage appointing authorities and voters (where judges are elected) to appoint judicial candidates who have actually practiced in business transactional or litigation fields prior to assuming the bench. Former prosecutors do not always make good business and commercial dispute resolution judges.

- Judges should be better exposed, through continuing education, to evolving business and commercial practices and, for those judges who have not had extensive trial experience, training in trial practice and evidence.

- State trial courts in particular should consider the increased usage of law clerks and research attorneys to provide support to the judges (but *not* to assume their decision-making responsibilities). This not only better prepares such judges to hear and

decide business cases, but is likely to result in an improved framing and deciding of issues, which in turn should better delineate issues on appeal.

- Businesses themselves have to become more informed and more sophisticated consumers of legal services. Runaway litigation expenses out of proportion to amounts in controversy require businesses to take more responsibility as consumers. Stated differently, the decision to use a corporate megafirm to handle a company's legal work is not always the best decision.

Changes to Increase the Availability and Use of Decisions

- Judges argue that workload concerns drives their use of selective publication. Thus, in spite of the political challenge it presents, more appellate judges (not parajudicial staff) should be hired to handle the critical work that such judges perform—deliberating, deciding, and writing thoughtful decisions.

- Change applicable rules to permit the citation of any decision by an appellate court of record. This would effectively cause the publication, official or otherwise, of all decisions of a court, and avoid the self-selection of those cases to be published. Indeed, in this age of computers and the Internet, there can be no reasonable objection made to the burden or expense of making available all decisions of appellate courts of record. If anything, the ability to search cases by computer may actually promote access to and use of precedent.

- Bar the practice of depublishing. If the judgment is good enough to stand, so should the lower appellate court's opinion.

By implementing these remedial measures, we submit that courts can become a much more important, attractive, and efficient instrument in shaping our business and commercial lives. ❖

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Check out the following in TIPS:

Alternative Dispute Resolution Committee
(312.988.5573)

ABA PROJECT OUT-REACH Supporting School Mediation

A Joint Project of TIPS, the Section of Dispute Resolution and the Young Lawyers Division
(312-988-6229 or www.abanet.org/tips/publicservice/outreach)

Erisa Claims

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U.S. Administration on Aging (AoA). Project sponsors anticipate that between one and three cases will be resolved during the one-year grant period, which started in September 1999.

During the grant period, Project coordinators will encourage the active involvement of other TIPS committees, other ABA Sections' employee benefits committees, and the TIPS and other Section ADR committees. Coordinators will also encourage involvement from the U.S. Labor Department, the AoA, and the Senate Special Committee on Aging. Toward the end of the grant period, project coordinators will seek support from government agencies and private foundations to expand the institutionalize the program. The Pension Rights Center will serve as

consultant to the project the grant period.

Project Stages

The project will consist of several distinct stages:

- Stage One will involve development of materials, including newsletter articles describing the project, and inviting lawyers to volunteer for the roster of Expert Neutrals.

- Stage Two will involve working with the ADR community to identify an appropriate training program for the Neutrals, and contracting with that program.

- Stage Three will involve identifying potential clients and contacting plan sponsors.

- Stage Four will be implementation of the dispute resolution process.

- The final stage will be the evaluation of the feasibility of the project.

If it is determined that this form of dispute resolution is feasible, the model ADR

will be adaptable for use in resolving disputes involving other types of employee benefits. One of the primary intentions is that this unique project will be replicated and used by other interested groups throughout the country.

TIPS Employee Benefits Committee to Work With Pension Rights Center

The TIPS Employee Benefits Committee has more than 400 members from whom the project director will draw as volunteers.

In addition, the Pension Rights Center, a 23-year-old consumer organization that works to protect and promote the pension interests of workers and retirees, will serve as a consultant throughout the project. The Pension Rights Center served as the technical assistance backup center for the AoA's Pension Information and Counseling Demonstration Program, involving ten local pension counseling projects across

the country. The Center will have primary responsibility for identifying potential plan participants for the project. ♦

Linda E. Rosenzweig, an ERISA lawyer from Bethesda, Maryland, who was the chair of the TIPS Employee Benefits Committee from 1995-1997, will serve as the director of the TIPS Pilot Pension Dispute Resolution Project.



Any TIPS member interested in volunteering to participate as an expert neutral in the Pilot Pension Dispute Resolution Project should contact Linda Rosenzweig at 301.986.0084 or lrosenzwei@aol.com.

Peer Mediation

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day training for the high school mediator trainees.

"No-Caucus" Mediation Model

The mediation model used in Project-Outreach is a basic "no-caucus" model. (A caucus is when the mediator meets alone with only one of the disputants.) The steps involved are typical for those in the vast majority of mediations. What makes Project Out-Reach novel is that the trained ABA volunteers provide their services on a pro bono basis and make a commitment for at least one academic year. Peer mediation training, if purchased from the private sector, can cost upwards of \$2,000 per day of training.

The Debate: Satisfaction or Transformation?

The mediation community is locked in a number of heated debates, including issues of licensing, credentialing, confidentiality, and mediator privileges. The question of whether the goal of mediation should focus on "satisfaction" or "transformation" is also being raised—whether mediation as a tool solves problems or changes people. This issue can be explored in the context of Project Out-Reach.

When two people come to a mediation with a specific problem and what they want is for that problem to go away as quickly as possible, they are asking for what is called the "satisfaction model" of mediation. In this model, mediators try to guide or push parties toward conflict resolutions that satisfy their interest better than the continuation of the conflict. A satisfaction-oriented mediator would be inclined to determine the parties' interests and then see if a bargaining range exists. Satisfaction-oriented mediators may be somewhat evaluative, although it is possible to be a satisfaction-oriented mediator and merely facilitate the parties' decision-making process. In a satisfaction model, the mediator may tend to meet individually, or "caucus," with the parties; if the parties are angry with each other it may be easier to problem-solve if they are not in the same room.

In contrast, the mediator's goal in a transformation model is to empower parties to do a thoroughgoing self-examination and encourage the parties to strive for mutual recognition of the other disputants and their interests. Transformative mediation will attempt to resolve underlying questions in the belief that if underlying questions about conflict are resolved, then the conflict will ultimately resolve itself, whether it is resolved during the mediation or at some unspecified future time. A transformative mediator will not look to a final solution, and is more likely to be someone who merely prods the parties to do introspection relative to a particular problem. Caucusing is more rare.

A False Dichotomy?

In our view, this dichotomy is false. An individual chooses mediation always to solve a discrete problem and enters into mediation because it is a satisfaction-oriented venture. Transformation is only an appropriate goal if all parties consent to make it so. Otherwise, their expectations may be upset unnecessarily.

Despite mediation's popularity, few people understand the breadth of the mediation landscape. They come to a mediator because they have a problem. They expect the mediator to help them solve it—not transform them. For mediation to be voluntary, it must be client-oriented. If the expected client goal of satisfaction competes with the goal of transformation, the clients, not the mediator, should make choices about how to resolve that tension.

Whenever there is a good mediation, a party will necessarily come to a heightened realization of their actions and how their actions contribute to the perpetuation of conflict. The possibility of transformation exists in even the most rudimentary satisfaction-oriented mediation model.

Project Out-Reach: Resolving Conflicts Between Mediation Models

The high school mediation model used by Project Out-Reach aspires to be a satisfaction-oriented mediation model, with the possibility of individual and grander social transformation looming large every time parties and mediators convene to attempt to resolve a dispute. Administrators at schools with mediation programs report that these goals are being achieved.

When asked about the numbers of mediations that are occurring in schools with the program, the school coordinators usually indicate that while the numbers are good, they are misleadingly low because mediators will intervene in an informal way with parties before a dispute erupts into a formal argument. Disputants often approach mediators informally in the hall or during recess, which helps nip disputes in the bud.

It appears that the entire culture of a school may change so that the most respected way to deal with problems is to try in the first instance to talk it out with the help of a trained third party. The use of what starts as a satisfaction-oriented process helps teach students to talk about issues before conflict escalates.

Mediation is still an evolving art. It is the hope of all of us connected with Project Out-Reach that our mediation model will achieve nationally the kinds of impact it has had locally so that—through introduction of better paths to satisfaction—we may ultimately undergo a transformation into a more peaceful culture. ♦

Loren Podwill, a shareholder with Bullivant Houser Bailey, P.C., in Portland, Oregon, is a member of the TIPS Law in the Public Service Committee. Richard Birke is a professor at Willamette University College of Law in Salem, Oregon, and is also the director of the Center for Dispute Resolution there.

Tracking Key People Will Increase Project's Success

According to Jim Carr, a TIPS Council member and volunteer in the Denver peer mediation program, Project Out-Reach is now expanding vertically. Rather than focusing on adding more high schools in more cities, the focus is on taking areas that have a strong interest and expanding into other schools in that same area. This enables the project to build on resources that already exist, and lowers training costs.

As with many school-based programs, Carr notes that the involvement of key people is essential to any program's success. Project Out-Reach is trying to track these people. If a key teacher moves to a different high school in the same district, every effort will be made to have him or her replicate the same program in the new school, and at the same time to enlist the help of another key person at the original school, to take advantage of proven success.

Carr believes that had a program like Project Outreach existed in Columbine High School in Littleton, Colorado, it would have made some difference in the underlying problems that recently erupted into violence. ♦



“When I Was a Young Lawyer”

Richard Turbin
Honolulu, Hawaii

“My Mentoring Advice: Listen-- Really Listen--To Your Clients”

Richard Turbin, a plaintiffs' lawyer, is Chair of the Tort and Insurance Practice Section.

What inspired you to be a lawyer?

No one in my family was a lawyer, but I wanted to be one from the time I was a kid. I've always liked to talk and argue. I grew up in a fairly tough working-class neighborhood in Flushing, NY. There was quite a bit of anti-Semitism and a lot of fistfights, which I usually didn't win. Since I didn't like to be pushed around, I decided I'd be better off learning to fight with my mouth.

Where did you go to law school, and what did you do after that?

I graduated from Harvard in 1969. After that I was recruited into the Peace Corps and I became the assistant attorney general for the new nation of Western Samoa. In 1971 I moved to Hawaii, where I was one of the first state deputy public defenders. In that capacity I tried about 30 jury trials representing indigent defendants, and won acquittals in many capital cases where defendants were wrongfully charged for major offenses. In 1976 I opened up the Legal Aid Office for Windward Oahu, which I directed for two years before opening my own law offices in Honolulu, specializing in plaintiffs' personal injury and medical malpractice law.

What led you from New England to the middle of the Pacific Ocean?

I had a certain amount of wanderlust, wanting to strike out completely on my own before settling in to a traditional practice.

How did you use your legal skills in the Peace Corps? Do you speak Samoan?

Yes, I do speak Samoan, although all official business there is conducted in English. My name in Samoan is “Lisati.” I was the only lawyer in the Peace Corps program. In some ways I was a rabble rouser in that I “unionized” the volunteers. I also drafted Samoa's Fisheries and Ocean Law, their first hotel contracts and a city planning code, and revised their criminal code.

What makes a good plaintiffs' lawyer?

Listening—really listening—to your client is what it's all about. The three most important things to a plaintiffs' lawyer are your client, your client, and your client. Besides listening carefully, being creative is extremely important: try not to practice by the book. Each case is different.

What are your favorite kinds of cases?

The ones where my work makes life safer for the public.

Whom do you admire most, and why?

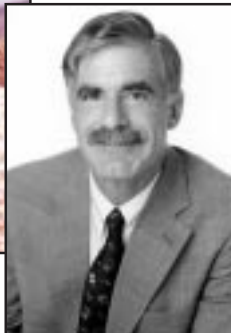
Ralph Nader is right up there. He's probably saved more lives than Mother Teresa has. He befriended me in law school, and asked me to help found an Appleseed Foundation for Hawaii, which is a pro bono law service organization.

What is your greatest source of professional pride?

Besides being Chair of the Tort and Insurance Practice Section, I am most proud of the victories I helped achieve for the victims of breast cancer. The most important case I was involved in was *Beiser v. Kaiser Medical Center*, in which Kaiser was found negligent for failing to diagnose my client's breast cancer. As a result of this well-known case, medical standards for breast cancer screening have vastly improved, not only in Hawaii, but throughout the country.



Richard Turbin as a Peace Corps lawyer in the 70s



Richard Turbin today

What was the worst professional advice you ever received?

“Take this case—it's going to get you a lot of money and publicity.” These are the worst reasons to take a case.

“One thing I can't stand is . . .”

. . . Too much procedure. Form over substance. Justice is sometimes being lost through a morass of rules that can be used to deny access to the system. One of my fears is that the justice system will be taken over by bookkeepers and bureaucrats.

What challenges you the most?

I'm still trying to achieve some level of justice for the little person. A basic problem is that the costs of litigation are so high, if a low- or middle-income falls and breaks her leg, she can't afford the thousands of dollars in discovery and experts' fees that will help her get her day in court.

What's ahead for younger lawyers in the twenty-first century?

Some will be working for big corporations and law firms, making large sums of money. The rest will have to go back to the basics and be the old type of lawyer working with low overhead, and learning to do more with less. This will be a big part of the law office of the twenty-first century. The days of big support staffs are long gone. And of course everyone will have to be smart technologically. We will also have to work hard to get more cases into ADR and lobby the court system to move claims faster without the current abuse of discovery and elevation of form over substance. Younger lawyers will have to fight to win back the legal system from the bookkeepers and bureaucrats.

What can TIPS do to be a good home for younger lawyers?

We're doing a good job of putting younger lawyers in leadership positions. And the committees are doing a lot of exciting things, especially the Solo and Small Firm Practitioners Committee, which will aim to teach

younger lawyers how to run a practice economically and practice good law at the same time.

What themes will you focus on for 1999-2000?

First, TIPS is going global. As free markets expand the less-developed world becomes industrialized and “wired,” the tort and insurance system of the United States will become increasingly internationalized. The International Committee has planned the Section's first mission to China in November 1999. And in July 2000, TIPS will be in London for the ABA Annual Meeting to network with European lawyers. We are also planning missions to South Africa and Japan.

A second important theme is to expand TIPS's role as the leading provider of continuing legal education in the tort and insurance areas of law. To this end, our sponsorship of the first Trial Advocacy Academy in Reno, Nevada, in May 2000 is truly unique.

Third, TIPS will continue to respond to attacks on our civil justice system by providing legal analysis to congress, state legislatures, and the ABA's House of Delegates on the important issues that affect our country's tort and insurance systems.

In sum, I hope that I will help TIPS continue its tradition of “doing the right thing” in terms of programs and policies. ❖

Anne Spencer Ellis

Richard Turbin's Advice for Young Lawyers

- Don't follow the money—follow your dream in the law. Don't be seduced by a big corporate practice. There's a lot more to the law than that.
- Get over the super-competitive mentality that gives permission to destroy the opposition.
- Really listen to your clients.
- Lobby the court system to move claims faster without the current abuse of discovery and elevation of form over substance.
- Work hard to get more cases into ADR.
- Get involved in your community.
- Take advantage of the many fine CLE programs that TIPS offers.

Mediation Practice Tips

continued from page 8

allocation of settlement dollars among defendants. Likewise, if defendants have information that suggests adjustments should be made to the damage calculations, consideration should be given to sharing that information pre-mediation.

• **With telephone participation, access and availability are critical.** If consent is given for telephone participation, certain parameters should be established so that the absence of any particular party does not impede progress. For example, it is more than frustrating to be participating in a mediation with the other 20 parties present, and the one on the telephone elects to take a long lunch just as the mediator needs an answer to a crucial question. The parties should insist on continuous availability with no deadlines.

Similarly, if it is known that certain critical parties who are attending the mediation may be arriving late or have deadlines that cannot be avoided, arrangements should be made to keep the dynamic going either by someone coming to take the place of the person leaving or to participate by telephone. One party's schedule should not be allowed to impede the

progress of the group.

• **Identify unresolved legal issues that exist prior to mediation.** Other issues that may create barriers to the process include insurance coverage issues, statutes of limitation and repose, and product identification. To the extent that these issues are known to a party and believed to be significant enough to frustrate the process, counsel should consider identifying and communicating the issues to opposing counsel and the mediator. Understanding that there may be some argument for holding certain issues to leverage the negotiation, such an analysis should be carefully made before the mediation process begins.

The ideal mediation is when all of the above pieces of the puzzle fall into place. Dealing with issues that are known barriers prior to the negotiation can allow for a more productive mediation. ❖

René Stemple Ellis is the executive director of the Private Adjudication Center at Duke University School of Law; her experience includes mediation of hundreds of complex cases including administration in mass torts.



Book Review

Reviewed by Muzette Hill

Directors And Officers Liability Insurance Deskbook

David E. Bordon, Christopher Kerns, Michael R. Davisson and Ellen B. Van Vechten

It is a widely held belief among those who would malign lawyers that “quick research” is an oxymoron. If you like to ramble through the scholarly works, this book is not for you. However, if you’ve ever been asked to give the answer to a specific question and been frustrated by the amount of time it can take to formulate a search that will get you anywhere close to the right answer, search no more. This is not your law professor’s D&O book.

I approached this book with two questions in mind: (1) If I know nothing about D&O liability insurance, would it help me to identify the important issues and answer the basic questions? (2) If I have a fair amount of experience in this area, will it answer my questions? The answer to both questions is a resounding “YES.”

Attempting to do quick legal research is like playing a game of Jeopardy: You can’t get the correct answer unless you can frame the question in exactly the right way. This is my kind of deskbook. The editors waste very little of the reader’s time before getting right to the point.

Starting with the table of contents, it immediately becomes apparent that this is more a tool than a treatise. The book is organized much like any other D&O book, with the chapters tracking the sections of a typical policy form. The chapter headings are what we’ve come to expect in a discussion of D&O insurance: *The Insuring Agreements, Trigger of Coverage, Policy Exclusions*, etc. But there the similarities end.

Once you take a look at the subheadings, it is clear that this book means business: *Severability: Whether a Misrepresentation by One Applicant Will Permit Rescission as to Other Insureds; In Some Jurisdictions, Intentional Acts are Uninsurable; Information Submitted in Support of an Application for Coverage is Generally Insufficient to Constitute Notice of a Potential Claim.*

Each chapter starts with a brief discussion of the general topic. These are generally no more than four or five paragraphs. After the introduction, the editors dive directly into a case-by-case format. The case descriptions themselves are standard fare, but they get the job done. For the most part, the editors refrained from string citing cases in law review style. There are a few exceptions, specifically in areas where the case law is voluminous.

A helpful section, which could have been expanded, is the chapter on *Other Insurance Clauses*. That chapter does, however, provide enough case law to point the reader to the vast body of “other insurance” cases.

There were only a few shortcomings. There are no standard D&O policies, but it would not have hurt to have included a D&O form as well as an application. Also, for those who do want to delve in deeper, a list of secondary references would have been helpful. There are a number of very good scholarly articles on D&O policies.

Overall, this is a no-frills, practical, readable and user-friendly deskbook. It will pay for itself the first time you have a question like “Is the insured’s oral request for renewal sufficient to trigger the right to an extended discovery period?” By the way, the answer, according to the Texas Court of Appeals, is “yes.”

Muzette Hill is counsel at Ford Motor Company, where she handles all of Ford’s insurance and risk management issues. Prior to joining Ford, she was a partner at Lord, Bissell & Brook in Chicago, specializing in D&O and employment practice liability matters.

Directors and Officers Liability Deskbook is a TIPS publication and is available to members for \$79.95 (\$89.95 for nonmembers); PC 5190292. To order this or other TIPS publications, call 1.800.285.2221.

The law firm brochure is often the primary tool in a lawyer’s marketing arsenal. It’s the all-purpose vehicle you can use for any occasion. But many lawyers don’t make effective use of their brochures and leave out important elements. Here are costly brochure mistakes to avoid.

Mistake 1: The brochure doesn’t contain all the elements of a competent marketing message. Bits and pieces of information aren’t enough. Your brochure should take your prospect through your message from beginning to end. It should provide all the facts and persuasion necessary to get your prospect to take whatever action you want him or her to take.

Mistake 2: The brochure doesn’t offer enough information about your qualifications and experience. A detailed biography is important to build credibility. The content in your biography isn’t all that important. But the more information you provide, the better—because as familiarity increases, trust increases. The more prospects know about your background, the more comfortable they feel.

Mistake 3: The brochure doesn’t contain a personal message from you to your prospect. Since the brochure is a stand-alone document, a personal message takes the place of a cover letter. A short written message over your signature adds a personal



Practice Management

Trey Ryder

Eleven Brochure Mistakes Lawyers Make

touch and helps build a trusting relationship.

Mistake 4: The brochure doesn’t contain a detailed list of services you offer. Prospects often look at your service list to see if you provide what they need. If they don’t see what they want, they may assume you don’t provide that service and call another lawyer. Make sure you list all the services that prospects look for.

Mistake 5: The brochure doesn’t include your photo. Photographs are effective marketing tools because they establish a sense of relationship between you and your prospect. Don’t worry too much about your appearance. Prospects don’t care what you look like. But they feel better when they know.

Mistake 6: The brochure doesn’t invite calls or contact from prospects. Giving

information by itself isn’t enough. You must create a reason for prospects to contact you. Interaction is the critical marketing step most lawyers overlook. Your brochure must result in your prospects taking whatever action you want them to take.

Mistake 7: The brochure doesn’t contain client comments. In jurisdictions where they are allowed, testimonials can be the most persuasive part of your brochure. If you have letters of recommendation and thank you letters from clients and colleagues, ask their permission to use those comments in your brochure.

Mistake 8: The brochure doesn’t offer educational information and advice. If you want your prospect to keep your brochure, make sure it contains helpful tips and advice. If the brochure simply touts your services, your prospect may see it as an

advertising piece and toss it into the round file. But prospects often feel compelled to keep your brochure when it contains information they value.

Mistake 9: The brochure doesn’t explain how you differ from other lawyers. If prospects don’t know your competitive advantages, they have no more reason to hire you than another lawyer. Make sure your brochure features your positive differences.

Mistake 10: The brochure doesn’t contain your guarantee or promise. The deeper the commitments you express, within ethical limits, the more prospects appreciate your desire to help them. A written personal promise makes a statement that few other lawyers will match. Prospects perceive this to be a significant competitive advantage.

Mistake 11: The brochures collect dust in your stock room. Many lawyers don’t have an organized plan to distribute their brochures. What a waste! If you hope your brochures will attract new clients, you must get them into the hands of your target audience and referral sources. ❖

Trey Ryder (trey@treyryder.com) is a law firm consultant who specializes in education-based marketing for attorneys.



“My Dallas” ABA/TIPS Midyear Meeting Site February 9-13, 2000

Susan Jennings

Come to Big D, where people want everything bigger and better!

The TIPS hotel for the meeting, the **Renaissance Dallas Hotel**, is located close to several interesting areas. Next door is the **Dallas Apparel Mart** and nearby is the **Design District** for direct-from-the-manufacturer shopping. Discount clothing shopping directly from the vendor is within a mile from the Renaissance.

If sports are your interest, then Dallas is the place. The **Dallas Stars** hockey team, the first team in the south to win the Stanley Cup, will be in full swing. The **Dallas Mavericks** basketball team will also be playing. Both teams play in **Reunion Arena** downtown.

Dallas has not neglected any of the fine arts. The Dallas Arts District downtown contains the **Dallas Museum of Art**, the **Morton H. Meyerson Symphony Center**, the **Arts District Theater**, and **Dallas Black Dance Theater**. Visitors from all over the world marvel at the Symphony Center, where Gregory Hines once tap danced off the stage on the marble floor without ampli-

fication and was easily heard in the last row of the top balcony. Don't miss at least a tour of this facility!

Whatever your favorite food, there is a restaurant for you in Dallas. If you're homesick for New York, visit **The Palm** in the West End of downtown. Lunch at the **Zodiac Room** at Neiman's and enjoy modeling of the latest fashions at your table. Five course gourmet dining more your style? Don't miss the **French Room** at the **Adolphus**, which boasts the best painted sky ceiling in Dallas. Or enjoy an English tea in the midst of European antiques at **Lady Primrose** in the **Crescent**. Southwestern nouvelle cuisine can't be beat at the restaurant at the **Mansion Hotel**. While you're there, have a night cap at their bar, where many of the movers and shakers of Dallas along with lots of visiting celebrities tip a glass. Country cooking more your style? Elbow those truckers aside and grab a bite near the hotel at **Mama's Daughters Diner**. If you've heard of that famous Texas barbecue, head over to **Sonny Bryan's** behind your hotel. It looks like a

dump, but the barbecue is famous. You've heard of those Texas steaks—try **Bob's Chop House** in the Oak Lawn area near the hotel. And if you think you've tasted Mexican food, taste again and try **OJeda's** or **Rosita's** near the hotel or the upscale version at **Javier's** near Highland Park.

If you're in a partying mood, two areas full of nightlife are downtown. The **West End** is a restored warehouse district that boasts restaurants, a movie theater, and lively bars. If you are more eclectic in your tastes, then head down to **Deep Ellum** for great jazz music and swing dancing. The place for live country western dancing and mechanical bull riding is **Billy Bob's** in Fort Worth.

Don't forget the kids on this trip. **Science Place at Fair Park** has a basement dedicated to hands-on fun for pre-schoolers with interactive exhibits upstairs for the older ones. **Highland Park Pharmacy** is a great secret for kids. It's worth the wait to sit on swivel bar stools and have lunch at the soda counter. The **Dallas Children's Theater** boasts great productions for children and plays in one of two downtown locations. If the kids are looking for cowboys, they won't be in Dallas, but less than an hour away is Fort Worth where men in cowboy hats and boots still walk the streets! If African adventure is more to their tastes, drive an hour to **Fossil Rim** where wild African animals

roam on a ranch with landscape that looks like a western movie set. Nearby is Dinosaur Park where, if it's dry enough, you can see real dinosaur footprints. Both the Dallas and Fort Worth zoos are also worth a visit.

Finally, if you are just a dreamer for the big life, don't miss a drive through **Highland Park** a few miles from the hotel. This is a town of 10,000 surrounded by the city of Dallas. Multi-million dollar mansions line many of the streets. Highland Park Village, supposedly the first connected shopping area in the United States, is here with upscale shops and some well known restaurants. Other great shopping malls further north include **Galleria** and **Northpark**.

Come to Dallas. See why they call it the Big D! ♦

Susan Jennings is general counsel and vice president of Life Insurance Company of the Southwest in Dallas.



To register for or receive additional information regarding the TIPS Midyear Meeting in Dallas, call 312.988.5672.

continued on page 6

exposure analysis is particularly important in multiparty construction cases that involve an information is provided before the mediation convenes. The need for effective pre-mediation to make an effective assessment of their respective exposures if well-documented damages and the liability battle is saved for trial, defendants and their insurance carriers are better able to make a strategic assessment about what information to share with opposing parties to make a strategic assessment about what information to share with opposing parties. It is often difficult for

• **Consider sharing more pre-mediation information, not less.** It is often difficult for mediation before the remaining participants spend a day with clients and adjusters spinning expensive wheels.

Regardless of what party is technically responsible for identifying appropriate participants, it would be beneficial to contact the mediator in advance so that she/he can determine if real progress can be made without that party's participation. In a multiparty mediation in which the absence of a party is a real barrier to progress, it may make more sense to delay the mediation before the remaining participants spend a day with clients and adjusters spinning expensive wheels.

missing party is viable and has insurance, but the mediation is ordered before adequate investigation has occurred.

Some of the defendants may be difficult to identify, bankrupt, or uninsured, or incorporated. The myriad of legal and factual defenses argued has leveraged an informal allocation of risk among defendants depending on the circumstances. When one defendant that typically shares in this allocation is absent from the table, the defendants remaining are often unwilling to compromise to cover that party's respective share. Likewise, the plaintiff is unwilling to compromise their position because of a party's absence. In many cases, the

developed certain expectations concerning respective defendant contributions to settle-ment. ERF-related lawsuits that are ordered to mandatory mediation. This has created a rich history of negotiation between the parties. Because of the history, parties to these cases have

• **Assure that all appropriate parties are present.** One potential barrier to effective mediation contexts as well. Because of the number of individual ERF-related mediations that I have facilitated, I was able to identify some common barriers to successful negotiation and resolution. My comments are limited to the mediation process issues that arise and not the substantive issues. In many cases, additional steps can be taken in advance of the mediation to create an atmosphere for a more productive negotiation. Many of these observations may apply to other mediation contexts as well.

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René Stemple Ellis

Mediation Practice Tips: Removing Barriers to Negotiation

TortSource

A Publication of the Tort and Insurance Practice Section

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