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Welcome to the first issue of *Dispute Resolution Magazine* in 2020. I wish everyone a very happy and healthy new year and hope you enjoyed your holidays with time well spent with friends and families.

In this issue, we explore dispute resolution and criminal law. Because a focus within our practice area is party self-determination and autonomy, many of us don’t think about using our skills in criminal justice matters. The authors in this issue identify how our skill set can be used effectively as a tool in aid of criminal justice, particularly in the areas of plea bargaining, system design, and restorative justice.

Innovative applications of the dispute resolution practitioner’s skill set are a theme running through this bar year as well as through our profession. Our ability to identify and resolve conflict can be deployed to improve access to justice. For example, our Online Dispute Resolution Task Force is exploring current and emerging uses of online dispute resolution in the public and private sectors. The task force is studying possible legislative initiatives as well as ethical principles and standards.

In addition, the Task Force on Innovative Processes of Conflict Prevention is exploring how we can adapt our skills to conflict prevention through the use of standing and stand-by neutrals as well as deal facilitators. This task force is focused on effecting the implementation of our dispute resolution techniques at ever earlier stages in order to help manage and maintain relationships and prevent nascent conflict from devolving into litigation.

With all these efforts, our goal is to keep Section members informed about and ready for change in our profession even before it happens. As we help you grow the areas of dispute resolution subspecialties, we also want to help you manage and grow your personal practices. Anna Rappaport and Natalie Armstrong-Motin are engaged in a project to establish a Practice Development/Practice Management Library. This new and evolving effort aims to provide you with the most comprehensive and definitive collection anywhere, one that will help you manage the cases you have, get new ones, and manage all that extra work.

Among the volunteers working tirelessly on behalf of our Section and our profession are those who organized our very successful Mediation Institute, which was held in November at the South Texas College of Law Houston. Sincere thanks go to Jim Alfini and Debra Berman, South Texas faculty and Section leaders. Another very loud shout-out goes to our amazing Planning Committee members Susan Guthrie, Edd McDevitt, Harold Coleman, and Ana Sambold. The program was outstanding, but we expected nothing less from this first-class committee and its carefully selected institute faculty.

Looking ahead: the next event to put on your calendars is the Arbitration Institute in Phoenix on March 9 and March 10, 2020. Our Institute Program Committee, Chairs Bruce Meyerson and Dana Welch, with help from Thomas Hanrahan, Harrie Samaras, Ron Wiesenthal, and David Tenner, have been planning this program for more than a year. Among this year’s highlights will be a lunch plenary on the topic of how arbitrators get into trouble and what to do about it, presented by Tracey Frisch of the American Arbitration Association. Last year this event sold out.

Please also note that our Annual Spring Conference will be held in New Orleans from April 22 to April 25 during Jazz Fest. Our 2020 theme, “Innovation, Improvisation, and Inspiration,” dovetails beautifully with the work of the Section and the conference locale. Our Spring Conference Committee is led by Alan Weiner, Jaya Sharma, and Gina Miller with help from many others who have been working nonstop since last spring. April will be here very soon. I look forward to seeing many of you in a few short months.

Our Section exists because so many professionals choose to support us. We welcome you whatever your level of interest, but we enthusiastically welcome your involvement. Please reach out if you would like to be active. Thanks for the honor of serving as this year’s Chair.

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Dispute Resolution and Criminal Justice Reform
Urgent needs present great opportunities

W
e have all heard the dismal statistics when it comes to the United States’ criminal legal system, particularly incarceration. According to a report by the nonprofit Prison Policy Initiative, the United States imprisons 2.3 million people, more people per capita than any other country in the world. In total, almost 7 million Americans are under some sort of criminal supervision. These numbers become even more astounding when they’re brought home: today, more than half of all Americans have an immediate family member who has been incarcerated at some time. If you are wondering why we are devoting an issue of Dispute Resolution Magazine to this topic, these numbers are a big part of the answer.

As you will learn from this magazine, dispute resolution professionals are already playing important roles in helping change how criminal cases are handled in America, although much more work is needed. In the first article, legal educators Andrea Kupfer Schneider of Marquette University Law School and Cynthia Alkon of Texas A&M School of Law provide a broad-brush look at the urgent need for reform of the criminal justice system, highlighting the importance of transparency and the lack of negotiation training for those involved in plea bargain discussions, the shortcomings of problem-solving courts, and why restorative justice programs deserve our support.

Three other articles show different initiatives on the ground led by lawyers interested in reform. Plea bargaining is a crucial part of the criminal legal system, yet most legal professionals who are regularly negotiating case outcomes have had little or no training in how to negotiate. Jennifer Reynolds, who teaches law and directs the ADR Center at the University of Oregon School of Law, looks at how such training could be organized through a conversation with Heather Kulp, who has introduced plea negotiation training to attorneys, public defenders, private defenders, and others in New Hampshire, where Kulp serves as ADR Coordinator for the judicial branch. (We are also pleased to note that Kulp is a member of this magazine’s Editorial Board.)

In New York state, concerned about the many innocent defendants who were pleading guilty, a lawyers’ group recently established a task force to study how the justice system itself is encouraging such pleas and recommend reforms. Elayne E. Greenberg, who leads the Hugh L. Carey Center for Dispute Resolution at St. John’s University School of Law and helped task force members discuss one of the many options they were considering, reports on this unusual group’s contribution to criminal justice reform.

Finally, Kristen M. Blankley, a Professor at the University of Nebraska College of Law, gives us a creative example of how restorative justice can be used in the school system when one of the parties in a case refuses to participate — a factor that once might have meant that the case could not proceed.

We hope that this issue of Dispute Resolution Magazine will get you interested in this topic, get you thinking about what you might do in your own community, and get you involved in helping change a part of our society that urgently needs serious and far-reaching reforms. Your expertise, your passion, and your voice are all needed.

— The Dispute Resolution Magazine Editorial Board
Presented by nationally recognized experts, this two-day training features sessions on every stage of the arbitral process examined from the vantage point of neutrals, advocates, and in-house counsel. Small group discussions allow participants to interact in depth with the faculty and each other. Substantive sessions address particular areas of arbitral practice.

Some of the new features of the Institute in 2020 are:

- Concurrent sessions on employment, technology, securities, international and construction arbitration
- Plenary speaker – Tracey Frisch, Senior Counsel, American Arbitration Association on: “How Arbitrators Get In Trouble…And What to Do About It”
- Interactive Ethics discussion
- Concurrent sessions on contemporary topics in arbitration including:
  - Will Legal Analytics Make Arbitrators Obsolete?
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The important movement toward reforming the United States’ criminal legal system is widespread geographically and politically. Elements of reform have occurred top down, judicially or administratively, as well as bottom up, driven by nonprofit organizations, litigants, court administrators, and community groups. Dispute resolution professionals bring particular skills and mindsets that can advance criminal justice reform. This article looks at three areas where reform can be promoted and powered by dispute resolution professionals: plea bargaining, problem-solving courts, and restorative justice.

As we all know, trials are no longer the dominant resolution process for either criminal or civil cases. Plea bargaining, which has existed since Colonial times, started to be heavily used in the criminal justice system in the middle of the 20th century, and now it is used just about every day in just about every criminal court in the land. As the United States Supreme Court has observed, today plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”

Yet like the criminal justice system itself, plea bargaining has many shortcomings and serious critics. Some observers say it reinforces unjust outcomes, including supporting bias in our criminal justice system and enabling mass incarceration. Critics also express concern about extreme power imbalances and the trial penalty, which is the fact that defendants often get significantly more prison time at trial if they reject a plea deal. All these factors contribute to pressuring innocent defendants to plead guilty. (The article by Elayne E. Greenberg on page 14 explores how one task force in New York has tried to understand and address this pressure.)

One first step that dispute resolution professionals can take is to demand better data and information about plea bargaining. Despite its pervasiveness, we actually know surprisingly little about how plea bargaining works in practice. We do not know what
percentage of criminal cases have plea offers at the arraignment, the first formal appearance in court. We do not know what percentage of criminal cases plead out early in the case or on the eve of trial. We do not know how frequently prosecutors threaten to add charges or enhancements if the defendant does not take the plea deal — although we know this does happen. We do not even know what percentage of cases plead out to the same charges that were originally filed, compared to lesser charges. We don’t know how often, or how, judges get involved in the plea bargaining process. Gathering better data surrounding plea bargaining would surely help determine what kind of reform might be useful to address concerns of inequity, bias, and mass incarceration.

The lack of transparency also affects the implementation of any reform efforts. Without data showing what is actually happening in plea bargaining — how offers are given and countered; the timing and communication of offers; who gets offers and for what; and so forth, providing judicial oversight and requiring various actors to correct egregious behavior patterns are challenging. This analysis of how plea bargaining works — from negotiation expertise in theory and practice — is long overdue and would be a welcome addition to the criminal legal reform movement. And it is a task that dispute resolution practitioners, with their deep understanding of process design and creative approaches to finding solutions, can be a huge help with as we push institutions to provide this information.

A second concern with plea bargaining is the lack of negotiation training. As two legal educators with particular interest in the art and skills of negotiation, we are shocked at the almost complete lack of training practitioners receive. Most of the legal professionals who are regularly negotiating case outcomes have had little or no training in how to negotiate. Perhaps this stems from a view that negotiation skills cannot be taught. Even the US Supreme Court has argued that plea bargaining — like all negotiation — is a matter of personal style, an individual mix of tactics and approaches, in which effectiveness cannot be defined. But dispute resolution professionals know better and understand that training — in everything from preparation to psychology and behavior economics to social intuition and emotional intelligence — will improve effectiveness.

As the United States Supreme Court has observed, today plea bargaining ‘is not some adjunct to the criminal justice system; it is the criminal justice system.’

A plea negotiation — complex, multiparty, and high-stake — deserves the attention of the dispute resolution community without fear that lack of experience in criminal law makes advice useless or that differences between criminal and civil cases are too vast to bridge. Of course there are differences between negotiating plea bargains as compared to corporate contracts. But there are also differences between negotiating corporate contracts and divorce cases. Negotiation theory can easily be applied to plea negotiations, and prosecutors and defense lawyers can improve their negotiation skills in the same way that civil litigators can.

The challenge is actually getting this training institutionalized. Prosecutors and defense lawyers regularly attend continuing legal education programs on trial skills, prosecuting or defending homicide cases or capital cases or cases involving driving while intoxicated, but that training rarely involves negotiating plea bargains. This gap is one that we have tried to address in our work, which has resulted in a textbook with chapters specifically focused on negotiation theory and skills in the context of plea bargaining. (For a look at how one scholar and dispute resolution court coordinator has introduced negotiation training to New Hampshire lawyers, prosecutors, and others, see Jennifer Reynolds’ article on page 9.)

The dispute resolution community has another big opportunity in the creation, oversight, use, and reform of problem-solving courts. These are specialized dockets within the criminal justice system that seek to address the underlying problem or problems contributing to certain criminal offenses, such as drugs or mental health concerns, or focus on particular defendants, such as veterans’ court. Since the United States’ first drug court was introduced three decades ago, more than 3,000 problem-solving courts have
been established nationwide, including drug courts (which make up 44% of all problem-solving courts) and mental health courts (which account for 11% of the total).\(^5\) These courts, which often are set up by judges who are looking for innovative and humane ways to deal with particular populations that they think deserve a different kind of process, include treatment and counseling with the threat of punishment for non-completion.

But the courts have vocal critics. Scholars and professional groups, such as Physicians for Human Rights, have cited problem-solving courts for having narrow eligibility criteria (limiting which defendants can go to these courts), demanding guilty pleas as part of the process of qualifying for the court (applying undue pressure and surely causing some innocent parties to plead), and for not using appropriate remedies (such as methadone treatment). Standard dispute-system design factors could help both in creating newer courts and evaluating and deciding the future of older, more established ones. For example, are there multiple process options? Can parties loop back and forth among these options? Were stakeholders involved in the design? Is participation truly voluntary? Does the system have both transparency and accountability? These types of questions are not always rigorously applied to problem-solving courts and are definitely not applied consistently across the country.

Finally, the field of restorative justice offers equally large opportunities for dispute resolution professionals. Restorative justice processes, which are used both as a form of diversion from formal criminal processes and as a post-conviction practice, include diverse processes such as victim-offender mediation, restorative circles, and facilitated dialogue between offenders and other survivors. Although these processes are often created from the ground up and seem to prompt fewer concerns about fairness than problem-solving courts, attention to how these operate through a dispute resolution lens is important. For example, the option of pursuing diversion through restorative justice often turns on the jurisdiction, if not the particular prosecutor. If we in the dispute resolution community believe that restorative justice is a valuable process — and most scholars agree that it is — we should be advocating for its establishment across the country with systemic support and even statutory guidelines that could ensure its use.

The dispute resolution community has important roles to play in examining how processes and institutions such as plea bargaining, problem-solving courts, and restorative justice are used and exploring how they might be made more effective. Decades ago, many professionals became involved with (and leaders of) what was then known as ADR, the “alternative” dispute resolution movement, with the hope that mediation could help improve the world. That same idealism is needed in our criminal legal system.

As a nation, we pour tremendous resources into our criminal justice system, from the cost of policing to courts, lawyers, probation and parole officers, and prisons. Some states are spending more incarcerating their citizens than educating them. In the face of this kind of public spending and the serious impacts on so many communities, we could use more idealism. We could use people who think, no matter how corny (or overwhelming or impossible) it might sound, that we can make this world a better place.

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**Endnotes**


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**Andrea Kupfer Schneider** teaches ADR, negotiation, ethics, and international conflict resolution at Marquette University Law School, where she is Professor of law and serves as the Director of the ADR program. She is also the inaugural Director of the Institute for Women’s Leadership at Marquette University. She can be reached at andrea.schneider@marquette.edu. **Cynthia Alkon** teaches criminal law, negotiation theory and practice, criminal justice, and ADR survey courses at the Texas A&M School of Law, where she is Professor of law and Director of the Criminal Law, Justice & Policy Program. She can be reached at calc@law.tamu.edu.
More than 95 percent of all criminal convictions are the result of plea bargaining, a process in which a defendant pleads guilty in exchange for some sort of favorable treatment from the prosecutor. Pleading guilty leads to conviction and sentencing as well as possible probationary requirements and “collateral consequences,” such as losing eligibility for certain jobs, housing, or social services, that defendants must grapple with after completing their sentences.

Given how common the practice of plea bargaining has become and keeping in mind the serious and sometimes lifelong consequences that flow from guilty pleas, one would think that law schools would train lawyers to participate in plea bargaining. Yet most criminal attorneys learn to plea bargain on the job.

Is this really the best way for plea bargaining practice to evolve? I sat down recently with Heather Kulp, the ADR Coordinator for the New Hampshire judicial branch, to talk about this question. Before working with the judicial branch, Heather was a Fellow and Clinical Instructor at the Harvard Negotiation and Mediation Clinical Project and a Lecturer on Law at Harvard Law School, teaching classes in negotiation and facilitation while working with clinical students on dispute systems design. Her experience developing plea bargaining training while at Harvard and then again in New Hampshire has given her a unique perspective into the challenges and possibilities around teaching plea bargaining effectively. What follows is an edited version of our conversation.

In New Hampshire, dispute resolution professionals train prosecutors, defenders, and judges in plea negotiations

By Jennifer Reynolds

Before designing anything, the students looked at how plea negotiation in New Hampshire actually worked, through interviews with county attorneys, public defenders, private defenders, judges, and court administrators.
Q. When you were a Clinical Instructor at Harvard, you worked with law students on putting together plea bargaining training. How did that project come about?

A. In the fall of 2014, the chief justice of the New Hampshire Superior Court, Tina Nadeau, agreed to have the Harvard Negotiation and Mediation Clinical Project perform an assessment of the court’s new program for felony settlement conferences. Two of my clinical students did that assessment, and one of their recommendations was to offer interest-based negotiation training to members of the criminal bar and judges in New Hampshire. The idea was that this training could help everyone participate more effectively in the settlement conference program and benefit their practice around plea bargaining. We offered to provide the training as a clinical project, and the chief justice agreed.

Q. Did you design this training from scratch?

A. We did. The students had completed basic criminal law coursework but had no other background in criminal law, which turned out to be an advantage in some ways. Before designing anything, the students looked at how plea negotiation in New Hampshire actually worked, through interviews with county attorneys, public defenders, private defenders, judges, and court administrators. What was the culture? What was the practice? The students also observed some court processes, including some plea negotiations, that gave them a sense of the current state and helped spark ideas around what an effective training might look like.

The assessment piece was key. Students tend to get a picture of criminal negotiations as heated banging on the table, and that’s not what my students saw in New Hampshire. After seeing how things were actually done, the students did not include unnecessary advice in the training (such as “Don’t yell”) and were able to acknowledge what was already working (such as the way New Hampshire lawyers tended to be respectful in exchanges and returned each other’s calls). That helped the students design a tailored training that focused on the interest-based skills they thought were most useful for the population.

Q. What did the actual training look like?

A. The students put together a full day of training consisting of mini-lectures and skill practice that was held in 2015 for criminal justice practitioners and judges. For the mini-lectures, the students focused on the basics of interest-based negotiation. For the skills piece, they created an extensive scenario based on research they’d done about New Hampshire law and court practice, based on real people who had been arrested and gone through a plea process. This scenario resonated with participants, more than a generic burglary example might have, for example. And it gave the students credibility in the room.

The students used this scenario from the beginning of the training, carving off pieces for the short skill practice sessions and then concluding the longer session with the actual plea negotiation. One example of the shorter skill practice sessions was an interest-based interview with the defendant, who was played by one of the students.

Q. Who sent out the invitations to potential participants?

A. That was a critical piece. It came from the chief justice. Whenever a judge champions some kind of training or process shift, it helps bring people in the door.

Q. How did the training go?

A. About 40 people came, a good mix of county attorneys, public defenders, and private defenders. We also had a couple of judges and some neutrals. The training itself went incredibly well. The students
did the entire training, trading off who did the mini-lectures and who led discussions. I sat off to the side and helped when needed. It was amazing to see students engaging in this way — they were so skilled and put so much time and work into the training. The training manual they created is 200 pages long. The participants were impressed by how much the students were able to cover in such a short period of time, and they appreciated having a practice scenario based on real life in New Hampshire.

As you might expect, there were some “this is nice, but it will never work here” comments. Luckily, the students left a chunk of time in the afternoon to talk about the barriers that participants saw to using interest-based skills in New Hampshire plea negotiations. That discussion was really rich, because attorneys were able to raise issues about how certain judges try to speed the negotiations along, how some attorneys send one-line offers through email, and how some of the required timelines make things challenging in terms of doing interest-based work with the client. This conversation was critical to making the training effective, because it made people talk about what would be needed to make a cultural shift around plea negotiations.

Q. What did you learn about teaching plea bargaining?

A. First, having a multidisciplinary audience — prosecutors, defenders, judges, neutrals — was critical, especially when we had the conversation around barriers. Having just one type of participant does not provide the same insight as having different people with different roles and responsibilities present. When people from different parts of the process are present, they can hear about barriers that they may be creating without even realizing it.

Second, words are important. The students thought a lot about what language to use in the training. Do we use the language of the seven elements of a negotiation, as articulated in Roger Fisher and Daniel Shapiro’s book *Beyond Reason: Using Emotions as You Negotiate*? The language of criminal practice? Some kind of hybrid? We wanted to get rid of language that might be framing the process in unhelpful ways. For example, the students decided to call the training a “plea negotiation training” instead of a “plea bargaining training.” They figured that using the word “negotiation” would put the activity in a context similar to that of negotiating a contract, where people pay attention to the details and the underlying interests. The word “bargain” encourages us to simplify the situation and to haggle. Another example: during the assessment phase, the students often heard the phrase “that’s what the case is worth” as justification for offers, usually without additional explanation. Identifying what a case is worth is not necessarily a bad strategy for preparing for a negotiation, but it can become damaging in two ways: one, as the sole justification for an offer (because we have no idea what it’s based on); and two, because we are talking about people, not cases. “What the case is worth” moves the focus from something involving people to something abstract, a numbers game. It’s like an auction. It doesn’t help the lawyers unpack where the numbers are coming from.

Q. Maybe lawyers base the “worth” of a case on their experience?

A. And that right there is a useful entry point to a broader conversation. If someone says, “this case is worth X,” and we ask, “based on what?” and they respond, “years of experience,” we can follow up by asking them to say more about their experience. Is there specific data they are relying on? Are they keeping track of cases? Are they referring to a pattern or policy around what the office has authorized them to offer? The assessment of worth could be coming from a hundred different places. People may be using very different sources for what the case is worth, and if they don’t ask further questions, they could be talking past each other. With this in mind, in the training the students talked about objective criteria and how to unpack these ideas of worth in
more helpful detail, so that participants could see what might be behind a particular offer. People may not agree on each other’s criteria, but at least if they can identify what sources both sides are using, they have somewhere to go.

Q. Anything that didn’t work?
A. Looking back on it, we should have conducted more research in advance about what options were available for pleas in the communities in which people were operating. Maybe we could have conducted more interviews with attorneys or asked more probing questions around options in those interviews so we could have stayed as specific to New Hampshire as possible. When it came to the discussion around generating options, for example, the students had a list of the kinds of programs, alternatives to jail, et cetera, that were available in Massachusetts, which was somewhat unhelpful.

Q. I imagine that one challenge in training people to do plea negotiations is how local and jurisdiction-specific the practice can be.
A. That’s true. So much is based on the actual people, offices, policies, and statutes involved.

Q. Did you do the plea bargaining training again?
A. After I supervised the 2015 training, one of the original students and I conducted an adaptation of the training two times, both times in New Hampshire. By the time we finished the second training, we had spoken to many of the criminal lawyers in the state. So the language of plea negotiation is out there. It may be time to do it again in the Superior Court setting, now that almost five years have passed.

Q. You left Harvard in 2017 for your current position as ADR Coordinator for the New Hampshire state courts. Was providing plea bargaining training part of your job description?
A. Although I have not offered the plea negotiation training that we developed in the clinic lately, I have done trainings around how to participate effectively in felony settlement conferences. These trainings have much in common with training people for plea negotiations. Felony settlement conferences often result in negotiated pleas, but they are a little different from the regular plea bargain in the way they are structured. Plea bargaining usually involves a prosecutor and a defender. Felony settlement conferences involve the prosecutor and defender, and also a judge (not the same judge presiding over the defendant’s case) and the defendant. Sometimes other people, like family members or the victim, participate.

These conferences offer a great deal of interaction between the various parties. The judges let the attorneys and parties talk to each other pretty openly before stepping in and redirecting an unhelpful comment, for example. Third parties can participate in the conferences, so victims of the crime can come — as can police officers, advocates, family members, and others — and the defendant is almost always invited to talk.

Q. Sounds a little like restorative justice.
A. There is a restorative component, which is one benefit of the settlement conference. Also, everyone benefits from the evaluation of the judge, who can give an opinion of what might happen at the trial. Judges tend to share this later in a conference and generally only if asked. This expert knowledge helps people think through how various options might meet their interests.

In New Hampshire we are expanding the felony settlement conferences statewide because attorneys are recommending it and people are asking for this program. One challenge from the court’s perspective is to make sure there are enough resources to meet
If attorneys can start to do more interest-based negotiation at the beginning of their practice, if they see how the culture they create around negotiation impacts their reputation and how others respond to them, they will be able to reap the benefits of interest-based practice.

this demand. In my role, I have been providing the training and will be doing additional meetings soon to support the state-wide rollout.

Q. How do judges get trained to participate in the felony settlement conferences?

A. Some of the judges took the original students’ training in 2015, and I have provided additional facilitation training, along with coaching on when to give advice. To manage these conferences well, judges really need to have facilitation and interest-based negotiation skills. In our settlement conference trainings, I have seen that lawyers and judges appreciate the opportunity to talk about best practices. It has especially been helpful to hear from judges about what has worked and what has not.

Q. Plea bargaining training could happen in many places: in law school, through the courts, or in prosecutor or defender offices, just to name a few. It could be offered by different people, such as professors, court administrators, senior attorneys in prosecutor or defender offices, or people in training firms. Given that plea bargaining is so important to criminal justice yet so often is location- and personnel-dependent, what are your final thoughts on the best ways to teach plea bargaining?

A. One of the participants in the felony settlement conference trainings last year told me that she had tried to take negotiation in law school but couldn’t get in because the class was full. She said having taken negotiation would have enhanced her practice from the start.

Culture is set at the beginning of one’s life as a criminal attorney. If attorneys can start to do more interest-based negotiation at the beginning of their practice, if they see how the culture they create around negotiation impacts their reputation and how others respond to them, they will be able to reap the benefits of interest-based practice. It would be helpful to do this early. It is harder to train someone who’s been a public defender for 30 years, because they may be asked to reexamine what has been effective for them.

With this in mind, I think that law schools are key players in providing the support, like training and assessments, needed for making positive change in plea negotiation. I am so grateful for the students I worked with on these issues. Conflict resolution organizations are also great resources. I hope that other people in my position in the country can tap into the support provided by law schools, law students, and conflict resolution organizations to help everyone look at their legal culture and processes.

Jennifer Reynolds is an Associate Professor of Law and the Faculty Director of the ADR Center at the University of Oregon School of Law, where she teaches civil procedure, conflict of laws, negotiation, and dispute systems design. Her research interests include public disputes, plea bargaining and specialty courts, and cultural influences and implications of alternative processes. She can be reached at jwr@uoregon.edu.
In February 2018, the Justice Center of the New York County Lawyers Association (NYCLA) established a Plea Bargaining Task Force. The task force was charged with examining why factually innocent defendants in the New York metropolitan area plead guilty and with prescribing viable recommendations to remedy this injustice.

Criminologists estimate that between two and eight percent of convicted felons have pled guilty even though they are innocent. Yet this estimate fails to capture the full scope of the problem. This number does not include all those innocent people who have still opted to plead guilty to a misdemeanor.

Those unfamiliar with how the criminal justice system works may wonder why innocent defendants would take such seemingly illogical action. Criminal justice reform scholars explain that for many innocent defendants who suffer through the burdens and intimidations of the criminal justice system, pleading guilty can be a logical choice. Some innocent defendants may see such a plea as an immediate way to end an arduous process that compels them to make numerous court appearances before they get a final determination, often at the risk of jeopardizing their jobs. Others may fear that if they don’t plead guilty and accept the charges before them, they will receive even more draconian sentences. Some innocent defendants may believe that a guilty plea, especially one involving a misdemeanor, will end their ordeal, not understanding the long-term effect a guilty plea can have on securing future employment, housing,

[The] breadth of members’ experience, professional affiliations, and backgrounds allowed everyone involved to move beyond individual perspectives and develop a broad understanding of why innocent people might choose to plead guilty.
and government benefits. Finally, a guilty plea may be the only way an innocent defendant might qualify for a diversion program, which many people consider a much more appealing alternative than imprisonment or other punishment. With these multiple realities in mind, task force members were asked to identify how the current processes in the New York criminal justice system incentivize innocent defendants to plead guilty and then to suggest viable reforms.

The NYCLA Justice Center Plea Bargaining Task Force took a page out of the dispute system designer’s playbook and structured a work process that advanced the task force’s charge as much as its final report. In short, process matters. This article, written from the dual vantage point of a task force member and a dispute system designer, reports on the group’s contribution to criminal justice reform, focusing on how the task force’s structure enhanced members’ engagement, deepened their understanding of the problem, and galvanized them to propose reforms. It also summarizes the task force’s final recommendations.

Diversity matters

Lewis Tesser, the Task Force Chair, has been practicing law in New York City for more than 30 years. He has served in numerous leadership positions, including President of the New York County Lawyers Association and founder and Director of the Ethics Institute at the New York County Lawyers Association. Because of this depth of experience and range of associations, he was able to assemble a task force that represents a broad and diverse group of professionals in the criminal justice system. The task force’s 70 members include public defenders, prosecutors, former appellate court and criminal court judges, bar leaders, academics, and criminologists. The professionals vary in age, gender, ethnicity, and experience, working in the federal and state courts based in the five boroughs that make up New York City. This breadth of members’ experience, professional affiliations, and backgrounds allowed everyone involved to move beyond individual perspectives and develop a broad understanding of why innocent people might choose to plead guilty.

Task force members prepared by reviewing the relevant scholarship. It was the in-person meetings, however, in which members shared their different perspectives, that really allowed them to shape a more nuanced understanding of the problem, provided unforeseen opportunities for learning, and stimulated realistic reform possibilities. As one example, task force members began to realize that although they all worked in the criminal justice system, each office in each region, in federal and state courts, had different rules and procedures that shaped its work. Through discussions, members began to appreciate how this patchwork quilt of rules and procedures in the five boroughs complicated the task force’s work — and how, from the perspective of defendants who were trying to make sense of the system and how it applied to them, the different rules could be crazy-making. This same complexity also added to the challenge of devising any recommendations that would be applicable across the board.

The discussions between legal actors in the federal and state plea bargaining process are another clear example of why diversity matters. Both federal and state task force members confessed that they never have the opportunity to speak with each other. Thus, many involved in the group’s efforts found great value in listening to someone who works in a different system. In the federal plea bargaining system, for example, a full investigatory phase, including a grand jury inquiry, comes before a defendant is indicted and charged. The state system, however, applies a much quicker guilt assessment after individuals are arrested and charged. Such a rapid decision-making process, which increases the probability of error and the likelihood that the defendant will be presumed guilty, might make defendants believe that they have been pre-judged, that they have no chance to defend themselves, and that a guilty plea is their only option. Through discussions such as this, task force members from the state system began to consider changes in the information-gathering stage that would reduce the pressure for innocent defendants to give up all hope of proving their innocence.

Strategic design maximizes reform possibilities

The task force convened on January 22, 2019, with an inspiring keynote address by Jed S. Rakoff,
a judge of the United States District Court for the Southern District of New York who spoke about the severity of the problem and the importance of the task force’s mission. Throughout the following spring, task force members continued their work in six focus groups organized around the topics of how charges are filed; the role of defense counsel; bail reform; judicial involvement in the plea bargaining process; New York legislation; and sentencing. The purpose of each two-hour focus group was to examine different aspects of the criminal and plea bargaining process and brainstorm about options for possible reform. Task force members could participate in all the focus groups or just those that caught their interest.

I had the privilege of attending several focus group meetings, co-chairing the charging focus group, and facilitating a discussion on one of the options being considered. I was surprised and pleased by how task force members engaged in the discussions with a humbleness and desire for a greater understanding of why innocent people plead guilty. In the focus groups, task force members experienced the power and value of brainstorming and the commitment to effect meaningful reform. This process helped members focus on viable options instead of feeling overwhelmed by the enormity of the problem. Each focus group generated a minimum of 25 options to resolve the problem.

For me, the richness of the discussions was not only about points of agreement but points of disagreement. There were ongoing tensions between the competing ideals of aspiration and pragmatism. During one riveting exchange, participants disagreed about whether to identify and address the root causes of the problem or recommend procedural fixes. Despite their idealistic fervor, members soon had to confront the limitations of what they could realistically achieve in the short run. I can still hear the frustrated voice of one member who protested that none of the final recommendations dealt with the systemic problems that caused many innocent people to plead guilty: the lack of opportunities in education, inadequate or unavailable housing, poverty, and racism. Although the proposed recommendations were decided by the majority, most agreed that the final recommendations did not address the core problems.

The NYCLA Justice Center Plea Bargaining Task Force’s Six Proposed Recommendations

The task force prioritized options that would decrease the pressure and intimidation that compel innocent defendants to plead guilty. For example,
Proposal 1 recommends that the defendant be required to attend only meaningful court appearances. Implicit in this proposal is the recognition that innocent defendants might plead guilty to a misdemeanor just so they can avoid missing time from work, family, and other obligations. Proposal 6 is a recognition that some low-level and non-violent offenses should not even be resolved in the criminal justice system. Proposals 2 and 3 recognize the value of empowering innocent defendants with legal information and recommend removing barriers that interfere with pre-trial communications between incarcerated clients and their lawyers. Proposal 4 seeks to remove the threat of a longer sentence or trial penalty if a defendant decides not to accept the plea offer and instead go to trial. As a further power-balancing effort, Proposal 5 encourages judges to have sentencing discretion.

Two of the factors that contributed to the success of the Plea Bargaining Task Force are well worth consideration by others engaged in justice reform: a diverse group of collaborators is more likely to expand individual perspectives and create a more nuanced understanding of the problem, and a well-designed process is more likely to engage and incentivize collaborators to become reform agents themselves.

After taking an overdue look at criminal injustices, New York has now become a hub of criminal reform. Criminal justice reformers are encouraged by the groundbreaking 2019 New York State Criminal Justice Reform Legislation, which explicitly requires that prosecutors turn over to defendants all discoverable material within 15 days of arraignment and before a defendant pleads guilty. In other examples of needed court changes, the Independent Commission on New York City Criminal Justice and Incarceration Reform recommended affirmative steps to close Riker’s Island, a prison complex known for its harsh conditions. Progressive district attorneys such as Brooklyn’s Eric Gonzalez are implementing procedures to create more just outcomes for defendants.

Now that the task force has completed its work, individual members, including me, remain energized. We have been introduced to new possible collaborators who might work with us on criminal justice reform. I am continuing to develop a plea bargaining training for defense attorneys and prosecutors so that the process results in more just outcomes. (For more information about training in New Hampshire, see the article by Jennifer Reynolds on page 9 of this issue). As we go forward, we must never forget the faces of innocent defendants who inspire us to develop stronger criminal justice safeguards that ensure fairer outcomes for everyone.

Endnotes


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- Exhibit Hall open on Thursday and Friday
- Thursday Conference Reception
- Friday Awards Breakfast
- Saturday Legal Educators’ Colloquium Luncheon
- ABA Section of Dispute Resolution Committee Meetings and Events

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Expanding Options for Restorative Justice
When a Victim Decides Not to Participate, the Use of Surrogates Can Bring Cases to the Table

By Kristen M. Blankley

Janie is a high school sophomore who never quite fit in. Unlike most of the other girls at her suburban school, she is being raised by a single mom with little disposable income. Janie doesn't wear the latest fashions or have the newest smartphone. Ever since sixth grade, Alyssa has picked on Janie, making fun of her clothes, her hair, and her lack of a boyfriend. One day, Janie, who is fed up with the bullying, spray paints the word “SLUT” on Alyssa’s locker. The school principal and resource officer quickly identify Janie as the “offending” youth. Confronted and asked to explain, Janie takes responsibility for the incident. She is charged with vandalism, her first offense in or out of school.

As part of a diversion program, the court in the district where Jamie goes to school allows first-time youth offenders to participate in a restorative justice (RJ) process such as victim-offender mediation or conferencing. Janie is interested, but still stinging from Alyssa's longtime taunting, she refuses to sit in a room with her schoolmate. Alyssa has no interest in participating, partly because she views the process as a waste of time and partly because she knows she might have to admit her bullying. Should Janie be prohibited from participating in the restorative justice program — and possibly gaining the benefits of diversion — because Alyssa declines to participate?

Traditional mediation programs require the voluntary participation of both parties, and one party's
refusal to participate in the process is usually grounds to terminate the process. Restorative justice processes, however, have different underlying philosophies and goals that can still be applied and accomplished without the participation of the person who was wronged. This article discusses how the principles of restorative justice are achievable through the use of victim surrogates and suggests some best practices for the use of surrogates.

Using surrogates in restorative practices

Unlike traditional criminal justice, restorative justice focuses on the accountability of the person who caused the harm, the needs of the wronged party, and the reintegration of both into society. Restorative processes seek to account for the needs of the person who caused the harm, the person or persons harmed, and the community, with the ultimate goal of repairing relationships and reducing recidivism. Through dialogue, the offending party can express accountability or remorse, and the victimized party may be able to speed the process of healing through understanding and restitution.

One of the most common RJ processes is victim/offender mediation or conferencing, which is a process in which the wronged party and offending party meet together to discuss the event and determine the best resolution. Early versions of these programs used the term “victim/offender” mediation, focusing on the categorization of the parties as if they were in criminal court. Today many programs today use terminology such as the “person who caused harm” or the “victimized party” to emphasize the relationship between the two, as opposed to their procedural labels. Whatever the program is called, during the in-person meeting, the parties generally have three conversations, each from their own perspective: 1) What happened? 2) What are the effects of the incident? And 3) How can the situation be made better?

Successful conferences usually result in reparation agreements, which might include apologies, restitution, community service, or other terms agreed on by the parties.

Intake processes determine whether cases are eligible for RJ. Some programs, for example, require a participant to admit fault or responsibility as a condition of participating. Using RJ is a challenge when an alleged offending party maintains innocence, although some programs allow participation if that party acknowledges accountability but not true remorse. Intake is also an excellent time to learn whether all the parties are interested in participating in the process and whether they can have a conversation and sit together.

Some parties may be willing to attend only if they can participate from different rooms, as happens in a caucus-based mediation. In other instances, a party, usually the wronged party, may not be willing to participate in a conference at all, as happened with Alyssa. Sometimes the wronged party has experienced trauma from the incident or is simply afraid of sitting in a room with the person responsible for the original harm. Occasionally, the person who was harmed may not appreciate the process, as Alyssa indicated, and its potential value to both parties. In cases involving youth-on-youth incidents, the underlying relationships may be complicated, as they were with Janie and Alyssa, with some level of fault

When the person who was harmed refuses to participate, the use of a victim surrogate allows an offending party to participate in the process — and gain from its benefits.
or responsibility on both sides. Even if a party does not participate in the conference, during the intake process the facilitator can still determine what the person who was harmed would like to see out of the process — such as restitution, an apology letter, or other terms that are satisfactory to all concerned.

When the person who was harmed refuses to participate, the use of a victim surrogate allows an offending party to participate in the process — and gain from its benefits. A victim surrogate stands in the shoes of but does not role-play as the person who was harmed. The most effective victim surrogates are those who have lived through a situation similar to the case at hand. In the case of Janie and Alyssa, a good surrogate would be someone around their age who has endured bullying or a hateful act. The victim surrogate participates in the conference by sharing the surrogate’s own story and how it affected the surrogate. The surrogate will know in advance the type of remedy that the person who was harmed is seeking and will be authorized to agree to a resolution on that person’s behalf.

Even with a stranger sitting in the chair of the person who was harmed, the person who caused the harm can still realize many of the benefits of the RJ process. The offending party must still account for his or her actions leading up to the incident and must listen to the surrogate’s story about being the victim of a crime. In listening, the offending party may be able to empathize with the surrogate’s situation and draw comparisons to his or her own past experience. Because the surrogate has authority to agree to a reparation agreement, the person who caused the harm will still be accountable to the harmed party and attempt to make that person whole.5

Best practices

The use of surrogates can bring more restorative justice cases to the table, but people facilitating RJ dialogues must devote special care to finding, training, and choosing surrogates. While best practices and standards for surrogates are still emerging, some basic principles are worth noting.

Prior to their use in any case, surrogates should receive training in restorative justice, including specific training on the processes in which they will participate. Program administrators should begin by teaching surrogates the underlying purposes and values of restorative justice and the surrogate’s role within that program. Surrogates should be instructed to share their own experiences and not to role play for the victimized person. In addition, surrogates should receive training on their specific role in the process, including what they are expected to contribute to the conversation. Surrogates need not be trained in mediation, although those who have been through mediation training may need less direction in how to approach RJ processes.

Any effective restorative justice program should strive to have a broad roster of surrogates. The program should seek to recruit surrogates with diverse ages, genders, races, ethnicities, and sexual orientations. Surrogates who have a variety of experiences as victims of crime can provide real detail and immediacy. Depending on the program, surrogates may be recruited from schools, including colleges and universities, community organizations, and mediation organizations.

When an RJ program has broad diversity within its surrogate pool, the program administrator can use a surrogate in an individual case who shares salient traits with the person who was harmed. If the offense involves burglary of a home of an 85-year-old woman, a surrogate in a resulting restorative process should be an older woman, particularly one who was the victim of a crime involving property. If the offense involves the theft of name-brand tennis shoes from a 20-year-old man, the surrogate’s age, gender, and experience should all reflect those facts and circumstances as closely as possible. In cases involving victimized parties who are young, the surrogates should be from the same general age group, as an
The use of a community surrogate makes the experience for the party who caused the harm less immediate and is certainly not a perfect solution, but with one, the offending party can still be asked to engage in a dialogue about the specific harm caused, the effect of that harm, and a reparation plan.

Older surrogate’s story would necessarily be a very different one.

A restorative justice program in the school system in Lincoln, Nebraska, innovated surrogate practice when it began training youth who had caused harm in the past to serve as victim surrogates. Project Restore, an RJ program run in Lincoln Public Schools, began this practice when a young woman contacted the program coordinator asking how to give back to a program that had helped her at a very difficult time. The program thereafter began recruiting other young people who had gone through the program to volunteer as surrogates, which helped diversify the pool of available surrogates with real-life experience (and the added benefit of firsthand knowledge of RJ processes).

No program will ever be able to find and use a surrogate who is a perfect match for the victimized party in every case. In cases where a close-match surrogate is not possible, a surrogate can still stand in for the victimized party to allow the cases to proceed, but the surrogate should take on the role of an interested community member who can impart some thoughts on the effect of crime generally or within a given community. The use of a community surrogate makes the experience for the party who caused the harm less immediate and is certainly not a perfect solution, but with one, the offending party can still be asked to engage in a dialogue about the specific harm caused, the effect of that harm, and a reparation plan.

Conclusion

In Janie’s case, the RJ facilitator met with Janie and Alyssa separately and quickly ruled out the option of a joint conference. The facilitator learned that Alyssa was interested in receiving a written apology, as well as in Janie’s performing community service at an animal shelter, a cause close to Alyssa’s heart. Janie attended the conference, where she met Caitlin, a youth trained in RJ who had been bullied in the past. Janie and Caitlin participated in the conference, discussed the events and consequences from their own point of view, and both gained new perspectives. Ultimately, Janie agreed to write the letter of apology to Alyssa and volunteer at the local no-kill animal shelter.

The refusal of a victimized party to participate no longer need be an automatic disqualifier for RJ cases. As more RJ programs incorporate the use of surrogates, exercising care in selecting and using them, more individuals who caused harm will be able to benefit from the very real, long-lasting benefits of restorative justice.

Endnotes

3 Id. at 52-54.
4 See, e.g., Watkins v. Bd. of Ed. of Harmony-Edge School Dist. #175, 2018 WL 1358947 (App. Ct. Ill. Mar. 13, 2018) (finding that a hearing board correctly considered a restorative justice process to be problematic in a workplace sexual harassment case when the offender party refused to acknowledge any wrongdoing).
5 Blankley & Jimenez, supra note 2.
6 Margaret Reist, Project Helps Young People Find Solutions to Keep Them Out of the Court System, Lincoln Journal Star (May 19, 2017).

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What does ‘competence’ mean — and is it an ethical obligation?

"On Professional Practice" examines how professional responsibility principles apply to our work. Sharon Press, a member of the Dispute Resolution Magazine editorial board, serves as the “On Professional Practice” editor. We encourage readers to submit ideas for future columns to her at sharon.press@mitchellhamline.edu.

The success of our field, like that of any group of professionals, depends on the delivery of valuable services by skilled practitioners. We need to be knowledgeable, we need to be effective, and we need to be competent, both to serve our clients and to uphold our responsibilities as disciplined, reliable professionals. But what does “competence” mean and look like? Is being a “competent” provider of dispute resolution services an ethical obligation?

These questions are pressing enough in the abstract, but in today’s real world, where the huge Baby Boomer generation is aging and the general population of the United States is growing older, they’re especially important. According to the US Census Bureau, by 2035, this country will have nearly 2 million more people who are 65 and older than under the age of 18.

The aging of America shows up throughout society, and dispute resolution is no exception. Dispute resolution practitioners are on average older than the general population, and many volunteer and community mediation program panels include people who started mediating as they approached or entered retirement and have been on the roster for decades. Experience is an asset, and we know that many clients seek out practitioners with considerable track records. Competence might not have been an issue when these neutrals began their practices, but what about after 10, 20, or even 30 years?

Of course, age alone does not determine competence; today it’s heartening to see many people who are productive and effective decades past the once-mandatory retirement age. But as we all age and some of us cross a line, knowing what “competent” means will be increasingly crucial.

What the codes and standards say

Unfortunately, the official codes don’t offer much guidance. Canon I of the Code of Ethics for Arbitrators in Commercial Disputes states that an arbitrator should accept appointment only if “fully satisfied … that he or she is competent to serve...” The term “competent,” however, is not defined in the canon, and the ABA/College of Commercial Arbitrators annotation to the code does not include any citations to cases where competence was called into question.

The Model Standards of Conduct for Mediators includes a standard devoted to competence, standard IV. It contains three primary provisions: the first is that the mediator “shall only mediate when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.” A person who offers to serve as a mediator “creates the expectation” that she or he is competent to mediate effectively. The provision also articulates an expectation that the mediator will make available to the parties information about the mediator’s training, education, experience, and approach to conducting mediation.

The second provision states that if a mediator realizes during a mediation that he or she is not competent to mediate, the mediator should discuss this with the parties as soon as practicable and take appropriate steps, which may include withdrawing or requesting appropriate assistance.

The third provision prohibits mediators from serving as a mediator while impaired by drugs, alcohol, medication, “or otherwise.”
The standard also includes a reference to a mediator attending educational programs and related activities to maintain and enhance the mediator’s knowledge and skills.

Let’s look more closely at some of the key phrases in the competence standard.

The reasonable expectations of the parties: This phrase walks the balance between a recognition that in mediation, parties have the right to exercise self-determination (and that therefore their expectations for mediation should be honored) and the recognition that mediation is a particular process with specific norms (and that therefore mediators can push back against the unreasonable expectations of the parties). If the parties expect the mediator to be a subject-matter expert, is that a reasonable expectation? The answer probably depends on the mediator’s stated approach to conducting a mediation.

Discuss with the parties as soon as practicable if the mediator realizes during the mediation that he or she is not competent to mediate: Here there is a recognition that sometimes a mediator may not understand that he or she is not competent to mediate until after the mediation has begun. In such circumstances, the mediator needs to do something “as soon as practicable,” which we can interpret to mean as soon as time and circumstances allow. But then the standards leave flexibility as to what the mediator is required to do. The mediator must take “appropriate steps,” but because every mediation is different and context matters, the standards leave open the possibility that the mediator might withdraw, get assistance, or take other appropriate action.

Impaired: While the Model Standards do not offer a definition of competence,1 by including the catchphrase “otherwise,” competence goes beyond impairment due to drugs, alcohol, or medication and certainly could be a reference to mental capacity. I believe that an appropriate conclusion is that mediators should not serve when they lack the mental capacity to do so.

The view from Florida

I have seen firsthand how challenging the concept of “competent” can be. When I served as the Director of the Florida Dispute Resolution Center, we were fortunate to have volunteer mediators in our county mediation programs, who work on civil cases in which up to $15,000 is in dispute. These volunteers, mostly retirees, were willing to commit hundreds of hours to the mediation offices. But even then, the question of competence was a big one, and the county mediation directors had many difficult conversations with long-time volunteers whom they had to counsel out of service. For many of these volunteers, this was an incredibly painful conversation because the mediation program had become more than just a volunteer experience; it was a place where they had made close friends, developed a strong community, and felt that they were making a difference in people’s lives. While the individuals themselves often had a difficult time recognizing that they were slowing down and lacked the mental capacity to mediate, the program directors believed they owed an ethical responsibility to the litigants.

The programs whose volunteers had developed strong camaraderie had the most challenging time dealing compassionately and clearly with mediators who were no longer “competent” in the eyes of program administrators, and many who tried to counsel them to step down found that despite their best intentions, those conversations left the mediators feeling insulted and discarded. Attempts to create alternative ways for people to serve the program were often not welcome, partly, I think, out of embarrassment that others would know that they could no longer mediate.

In those days Florida’s mandatory retirement age of 70 for judges (it was increased to 75 in 2018) was hugely unpopular with the judiciary, and there was little support among members of the Supreme Court Committee on ADR Rules and Policy for a mandatory retirement age for certified mediators. The committee also resisted designation of an age limit, believing that any one number would be arbitrary. Every mediator is an individual, and some might be competent and interested in mediating well into their 90s, while others might develop cognitive or other challenges decades earlier.

Dealing with mediators involved in mediation programs is one enormous challenge, but what about mediators and arbitrators who work as private practitioners? While the conversations I heard about in Florida were difficult, they took place because someone was responsible for coordinating services who
had the perspective needed to recognize problems and feel ethical duties to clients. Who is obligated to tell a respected, private-practitioner mediator or arbitrator that she or he needs to retire? The number of jurisdictions without a mechanism or individual to address these concerns far outnumbers the jurisdictions in which a party could file a complaint that could be investigated. And even if a complaint is filed, are the ethical standards regarding competence clear enough to merit action?

As Americans age, these questions will grow in both number and urgency. The time has come to address what competence really means and who should be responsible for assuring that we deliver the high-quality services that our clients expect and deserve.

Endnote

1 Self-determination, on the other hand, is defined in Standard I; impartiality is defined in Standard II, and conflict of interest is defined in Standard III by when it arises.

Sharon Press is a Professor of Law and Director of the Dispute Resolution Institute at Mitchell Hamline School of Law. She served as a member of the Model Standards for Mediators (2005) Drafting Committee. Before joining the faculty at Mitchell Hamline School of Law, she served as Director of the Florida Dispute Resolution Center, where she was responsible for the Florida state court system’s dispute resolution programs. She can be reached at sharon.press@mitchellhamline.edu.

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New York Convention Case Update

By Lionel M. Schooler

Early in the new year, the US Supreme Court is scheduled to hear oral argument in a case that explores the scope and reach of the New York Convention. The focus this time is a controversy arising in GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, v. et al. (902 F.3d 1316, 11th Cir. 2018), and its grant of certiorari is intended to address a question that has split the circuits: whether the New York Convention permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel, even if the parties do not have a written agreement to arbitrate.

The dispute in question arose over the failure of equipment to perform as promised. GE Energy is a French company that manufactured motors for delivery to respondent Outokumpu Stainless USA, the operator of a steel plant in Alabama. Outokumpu installed the motors in its plant, but they failed. Outokumpu eventually sued GE Energy over this failure in state court. GE Energy removed the case to federal court and filed a motion to compel arbitration. While there was an arbitration agreement between Outokumpu and its customer, there was no such written agreement with GE Energy; as a subcontractor, GE Energy did not have a direct contractual relationship with Outokumpu.

GE Energy sought to support its right to compel arbitration on the arbitration clause that existed between Outokumpu and its customer, there was no such written agreement with GE Energy; as a subcontractor, GE Energy did not have a direct contractual relationship with Outokumpu.

GE Energy sought to support its right to compel arbitration on the arbitration clause that existed between Outokumpu and its general contractor. It argued that Outokumpu was “equitably estopped” from avoiding arbitration because it had signed an agreement containing an arbitration clause and because the dispute at issue was alleged to be within the scope of that clause since Outokumpu’s claim “arose out of” the agreement.

In considering the matter, the Eleventh Circuit reversed the District Court’s judgment granting the motion to compel arbitration. The court broadly stated that the convention requires that to be enforceable, an arbitration agreement must be signed by the parties before the court. It based its holding upon the wording of Article II(2) of the Convention which states that “Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”

At the Supreme Court, GE Energy has challenged the Eleventh Circuit’s holding on the basis that such a reading of the convention is illegitimate and would categorically bar enforcement of international arbitration agreements by or against non-signatories in all circumstances. GE Energy pointed out to the Court its prior ruling in Arthur Andersen LLP et al. v. Carlisle et al. (556 U.S. 624, 631), which rejected a ban on non-signatory arbitration in domestic cases. In Arthur Andersen, the Court ruled that non-signatories may enforce or be bound by domestic arbitration agreements under Chapter 1 of the Federal Arbitration Act where “traditional principles of state law allow a contract to be enforced by or against nonparties to the contract.”

The ruling in this case is expected to have significant impact on international arbitration. Companies engaged in international commercial transactions often participate in transactions that involve performance by entities that are not actual signatories to the contract, such as sureties, subcontractors, lenders, and third-party beneficiaries.

The solicitor general of the United States submitted an amicus brief supporting the position of GE Energy, contending that the New York Convention does not categorically prohibit a non-signatory to an arbitration agreement from compelling arbitration based on the application of domestic-law contract and agency principles, such as equitable estoppel. The solicitor general also requested and was granted permission to participate in oral argument. The case is set for oral argument on January 21, 2020.

Lionel M. Schooler is a partner at JacksonWalker in Houston, Texas, and a member of the Dispute Resolution Magazine editorial board. He can be reached at lschooler@jw.com.
**Case Law Update** By Lindsey Anderson and Andrew Jordan

**Gig Economy Delivery Driver Not Exempt from Arbitration**

In *Austin v. DoorDash, Inc.*, 1:17-CV-12498-IT, 2019 WL 4804781 (D. Mass. Sept. 30, 2019), the US District Court of Massachusetts considered whether a food delivery driver could be classified as exempt under the Federal Arbitration Act (FAA) as an interstate transportation worker. The plaintiff, Darnell Austin, argued that after deducting the expenses he incurred on the job, his wages for DoorDash, an app-based food delivery service, fell below Massachusetts’ minimum wage of $11.00 an hour and therefore violated the state’s wage act. In response, DoorDash moved to dismiss and compel arbitration based on the mutual arbitration provision that all parties had consented to. The district court allowed the motion, rejecting the assertion that Austin’s job constituted that of a transportation worker, which would have rendered him exempt from arbitration under the FAA.

In determining the validity of the agreement and Austin’s exemption status, the court looked to factors listed for consideration in *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348 (8th Cir. 2005). In particular, the court’s decision turned on whether the goods delivered by the plaintiff were involved in interstate commerce. The plaintiff argued that the meals he delivered were in the flow of interstate commerce because “the processing and transformation of the raw goods in the state in which they are ultimately delivered do not end their interstate journey.” The court noted that a worker does not need to actually drive across state lines to be engaged in interstate commerce but found that the plaintiff had established no commercial connection between interstate food distributors and the customers receiving his deliveries. The court noted the fact-intensive nature of the inquiry and indicated that the outcome of the case might have been different if Austin had crossed state lines in delivering goods or had delivered for a store that buys goods in interstate commerce but ultimately rejected Austin’s claim of exemption as a transportation worker under the FAA.

**Terminated Contract Clause is Not Sufficient to Compel Arbitration**

In *Hearn v. Comcast Cable Commun., LLC*, 1:19-CV-1198-TWT, 2019 WL 5305460 (N.D. Ga. Oct. 21, 2019), a US District Court considered the validity of an arbitration clause embedded in a service agreement that had been terminated two years before. The case involves a class action claim brought by Michael Hearn alleging that Comcast violated the Fair Credit Reporting Act by performing a “hard pull” on his credit without consent. Comcast filed a motion to dismiss and compel arbitration based on a 2016 service agreement containing an arbitration clause that Hearn signed when he was a Comcast customer.

Hearn terminated his contract with Comcast in 2017, which, he argued, extinguished any obligations in the service agreement’s arbitration clause. The court rejected this argument, noting that the agreement contained an unambiguous survival clause. The court treated with more sympathy, however, Hearn’s argument that the clause’s scope was impermissibly broad. The arbitration provision claimed to encompass “any claim or controversy related to Comcast.” The court found that this amounted to “no limit at all,” noting that if this language were granted its broadest construction, an individual who had been “run over by a Comcast truck” would be required to submit to arbitration. The court then rejected Comcast’s argument that “but for” the parties’ contractual relationship, the Fair Credit Reporting Act violation could not have occurred and that this “but for” relationship meant that the claim was “related” to the 2016 service agreement and “was an immediate foreseeable result of the performance of contractual duties.” The court then rejected Comcast’s argument that “but for” the parties’ contractual relationship, the Fair Credit Reporting Act violation could not have occurred and that this “but for” relationship meant that the claim was “related” to the 2016 service agreement. Instead, considering Georgia state law regarding contract formation, the court held that no reasonable customer could have understood they were signing away their right to pursue claims against Comcast in perpetuity. As a result, the court denied Comcast’s motion to compel arbitration.
Ninth Circuit Denies Motion to Compel Arbitration on Claims Seeking a Public Injunction

In Blair v. Rent-A-Ctr., Inc., 928 F.3d 819 (9th Cir. 2019), the Ninth Circuit considered the enforceability of an arbitration agreement in light of a California law state law prohibiting contractual waivers of public injunctive relief. California’s McGill rule prohibits any agreement or law that waives the right to seek public injunction, and the Ninth Circuit considered the FAA’s preemptive effect on the McGill rule in this context. In the underlying claim, the plaintiffs brought a class action alleging that Rent-A-Center structured its rent-to-own pricing in violation of California state law. The plaintiffs sought both damages under California usury laws and an injunction against future violations by Rent-A-Center. The US District Court for the Northern District of California granted Rent-a-Center’s motion to compel arbitration on the usury claims but denied the motion to compel arbitration on the plaintiff’s other claims. Citing the McGill rule, the district court held that the plaintiffs could not be compelled to arbitrate claims seeking a public injunction. Rent-A-Center appealed, arguing that the FAA preempts this application of state law.

The Ninth Circuit upheld the district court’s rejection of Rent-A-Center’s preemption argument and analogized the prohibition against waivers of public injunctions to prohibitions against interference with private attorney general actions, which the Ninth Circuit had previously held not to be preempted. Noting the California law’s applicability to all contracts, not just to arbitration contracts, the Ninth Circuit held them to fall within the scope of the savings clause of Section 2 of the FAA. The court then rejected the argument that such a ruling would frustrate the FAA’s fundamental objectives and upheld the district court’s denial of the motion to compel the public injunction aspects of the class claim.

Second Circuit “Looks Through” Dispute and Confirms Award

In Landau v. Eisenberg, 922 F.3d 495 (2019), the Second Circuit “looked through” a motion to confirm an arbitral award, finding subject matter jurisdiction over the underlying dispute. Two groups from the Bobov Hasidic Jewish community in Brooklyn convened a rabbinical tribunal to resolve a dispute over who owns the trademark for the name “Bobov,” as that term was “used in commerce to distinguish the goods and services of the Bobov community.” The rabbinical panel issued its ruling, and of the 613 potential parties, Baruch Eisenberg was the only one to file an opposition. The district court confirmed the arbitration award and Eisenberg appealed, arguing that the court lacked subject matter jurisdiction to do so.

The court noted that Vaden v. Discover Bank, 556 U.S. 49, 66 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009) held that in a motion to compel arbitration, subject matter would be determined by “looking through” to the subject matter of the underlying dispute, not at the FAA as a statutory basis for subject matter jurisdiction. The Second Circuit considered a motion to confirm as analogous to a motion to confirm an award and examined the underlying dispute in this case. As trademark disputes are clearly federal questions, the Second Circuit affirmed the district court’s finding that it had subject matter jurisdiction. The court then affirmed the limited nature of review of arbitration awards, and after assuring itself that the award was not the product of fraud or dishonesty, confirmed the award.

Employees Have No Right of Access to Mandatory Mediation Proceedings under Agricultural Labor Relations Act

In Gerawan Farming, Inc. v. Agricultural Labor Relations Board, 253 Cal. Rptr. 3d 136 (Ct. App. 2019), employees of a farming company challenged the constitutionality of barring employees from mandatory mediation proceedings concerning a collective bargaining agreement (CBA). The employees argued that the First Amendment right of public right of access to hearings and proceedings applied to mediation sessions held pursuant to California’s Agricultural Labor Relations Act (ALRA). Mediations under the ALRA include some “on the record” sessions, but...
mediators are empowered to “go off the record” at any time. Furthermore, under the ALRA statutory system, mediators serve an arbitral function in the event parties are unable to reach an agreement, holding hearings, receiving evidence, and writing a report of findings and conclusions. That report is then normally given effect through a system referred to as “mandatory mediation and conciliation,” or MMC. A Gerawan employee sought access to an “on the record” session during the MMC process, but the mediator refused.

The employees argued that the First Amendment, along with related provisions in the California Constitution, guarantees the public right of access to trials and pretrial proceedings. The California Court of Appeals noted that these ALRA sessions have historically treated MMC meetings as though they were private labor negotiations sessions, although it recognized that unlike typical labor negotiations, MMC sessions are both mandatory and may result in an imposed decision. The court considered the “qualified right of access” to “attend certain governmental proceedings.” Consistent with US Supreme Court precedent in Press-Enterprise II, the court considered the historical practice and whether public access plays “a significant positive role in the functioning of the particular process in question.” Here, the court found that there was no historical right of access to MMC sessions. The court rejected the employees’ argument that MMC sessions should be treated like court sessions and that therefore the burden is on those who sought to exclude them from the process. It then analyzed the potential effects of having public access to MMC sessions, finding ultimately that the presence of the general public or employees at the proceedings would risk “weakening the independence of the employees’ union representative.” As a result, the court rejected the employees’ claim to a constitutional right of access to MMC proceedings.

Lindsey Anderson and Andrew Jordan are law students at the University of Oregon School of Law and serve as law student editors for Dispute Resolution Magazine.

THE DISPUTE RESOLUTION SECTION IS SEEKING NEW BOOKS FOR ITS PUBLISHING PROGRAM

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- Mediation — advanced practice tips
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- The intersections of social science and dispute resolution
- Guidance for developing and managing a dispute resolution practice
- Guidance for marketing a dispute resolution practice

If you are considering writing a book, we encourage you to contact ABA Publishing Executive Editor Sarah Craig (sarah.craig@americanbar.org) to discuss your project and its potential fit with the Section’s publishing program.
ABA Section of Dispute Resolution Events

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For more information about upcoming events, visit americanbar.org/dispute

Webinar

DISPUTE RESOLUTION IN HEALTH CARE: WHAT’S WORKING?

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In this webinar, two top-notch mediators and arbitrators will describe the cases they are seeing and what they have learned – the easy way or the hard way – about how to get them resolved. This webinar is not for CLE credit.

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Stuart Widman

Moderator:
Geoffrey Drucker

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Section News

Dispute Resolution Section
Podcasts Find an Audience

Early in 2019, Section of Dispute Resolution members started a regular podcast called “Resolutions.” Since then, the podcast committee has produced more than 25 podcasts and garnered more than 5,000 downloads, covering a broad range of topics, including high-conflict divorce cases, online dispute resolution, pre-mediation statements, and cybersecurity in arbitration. Visit Ambar.org/ResPod to view the podcast archives and subscribe.

ABA Section Council
Meetings Scheduled

The next ABA Section of Dispute Resolution Council meeting will be at the ABA Midyear Meeting in Austin, Texas. The Section’s Executive Committee and Council will meet on February 15 during the meeting, which runs from February 12 through February 17, 2020.

The council will also meet during the Spring Conference on April 22 in New Orleans and at the ABA Annual Meeting in Chicago in early August 2020.

Awards to be Presented
at the Spring Conference

The 2020 Spring Conference in New Orleans will celebrate many innovators and contributors in the legal and dispute resolution profession. At the Friday awards breakfast, we will celebrate Edith Primm of the Justice Center of Atlanta and Colin Rule of Tyler Technologies, the inaugural recipients of the first annual Frank E.A. Sander Innovation in ADR Award. Other awards to be presented include the D’Alemberte-Raven award and the John Cooley Lawyer as Problem Solver award. The recipient of the Outstanding Scholarly Work award will be celebrated at the Legal Educators’ Colloquium Luncheon on Saturday, April 25.

Practice Development Library
is Off to a Good Start

The Section of Dispute Resolution is building a practice development library that will provide resources to help you build your mediation or arbitration practice and succeed in it. The library’s first stage is now complete: a list of books on dispute resolution and legal marketing, social media marketing, and legal practice development. You can access the practice development library at this URL:

https://www.americanbar.org/groups/dispute_resolution/resources/practice-development-library/

Member Benefit Webinars
Now Available Online

The ABA Section of Dispute Resolution has offered a selection of webinars over the past year as a free benefit to members. We have compiled recordings of these webinars into a resource accessible to Section of Dispute Resolution members for free.

The following webinars are available:
• ODR Grows Up: An Introduction to Intelligent Dispute Resolution
• Arbitrator Disclosure: Ignorance is Not Bliss
• Conflict Management and Legal Risk Mitigation in Healthcare
• Reducing Barriers and Raising Effectiveness: Assessing ADR Programs
• Should Court ADR Programs Evaluate Long-Term Outcomes?
• Integrating Diversity Perspectives into Our Practices
• Exploring the Crossover Between Health Law & Elder Law ADR: Mediation for Elder Care Issues
• Let’s Get Visual: Opportunities to Leverage the POWER of Visual Communication in Your Mediation Practice

ABA Representation in Mediation
Regional Competition Contests Set

Eight law schools across the country will host regional Representation in Mediation Competitions, which allow law students to hone their skills as advocates in the mediation competition. The regional host schools and dates for 2020 are: St. Mary’s University School of Law in San Antonio, Texas (February 7-8); Marquette University Law School in Milwaukee, Wisconsin (February 8-9); Georgetown University Law Center in Washington, DC (February 29-March 1); Chapman University Fowler School of Law in Orange, California (February 29-March 1); University of Oregon School of Law (February 29-March 1); University of Richmond (February 29-March 1); St. John’s University School of Law in New York (March 13-14); University of Denver Sturm College of Law (March 14-15). The winning team from each regional contest will advance to the national competition, which will be held on April 22 and April 23 in New Orleans.
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