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FROM THE CHAIR

BY JOHN BICKERMAN

It’s time to start listening to our consumers

Nothing is more relevant to mediators I have met than the desire to have demand for their services for interesting and meaningful matters. Yet, mediation has not become as prevalent as many predicted.

Sure, there have been some notable areas of success. Particularly in the area of family law it’s hard to find a court that doesn’t require spouses seeking a divorce to mediate, especially when there are children at issue. The awareness that trials are an imperfect and, at times, toxic way of managing family disputes has led to perhaps the greatest growth of our field. Small claims are also routinely sent to mediation. Every federal court—trial or appellate—and most state courts have a mediation program. However, while mediation has become commonplace, it is not so pervasive that most disputants use it.

Some of the answer to why there is not a sufficient supply of work is that lawyers and others involved in disputes have just gotten better at negotiation and may just not need a neutral to help. But I also think we have not done as good of a job of promoting the value of our practice as we are capable of doing.

The Section has worked hard to improve the quality of our practice. While the membership does not always agree on every issue, we have been the leader in promoting quality as we demonstrated in the promulgation of the Uniform Mediation Act in 2004 and the passage of the Model Standards of Conduct for Mediators by the ABA House of Delegates in 2005. This year, our Section’s Ethics Committee will be embarking on an ambitious effort to provide practical guidance on ethical issues. Work on ethical issues is important and necessary as mediation practice becomes more widespread, but it is not sufficient.

Failure to communicate

Where we have failed has been communicating with potential users the value of our services. We have done an even worse job of convincing society to create better incentives for consumers to mediate and be rewarded, if they do. Our profession needs to do a better job of asking consumers of our services what they want and what they perceive high quality to be. Then we need to meet that need, not impose our notions on the marketplace.

Earlier this year, the Section launched a Task Force on Mediation Quality. One of the preliminary lessons the task force is learning is that far too much energy has been devoted to debating the “right” mediation style. Our recent surveys of mediation consumers indicate that there is not just one style of mediation that fits all disputes. Instead, users expect the mediator’s style to adapt to the needs of the parties. Those needs may differ across disputes and over time for the same dispute.

Moreover, the mediation process begins at the moment the mediator is retained, not at the joint session. Many mediation consumers expect the mediator to start meeting with them, learning the file and working to resolve the dispute long before they meet with the other party. These findings are challenging some well-established norms of how we teach mediation. Users who participated in the task force’s focus groups want processes to bend and conform to their special circumstances—not have their dispute put into a “cookie cutter.” Instead of expending more energy debating the merits of evaluative versus facilitative styles, we need to teach a broader range of skills to meet the needs of our consumers.

Simple, elegant approach

We also need to encourage those who have the power to manage disputes to create incentives for their agents and advocates to use mediation. In the 1960s and 70s, the business community was one of the catalysts in creating diversity in law firms. Their approach was as simple as it was elegant. They asked the firms representing them to complete surveys indicating the number of minority attorneys and partners they had. The clear message was “we are going to favor those firms that have a strong commitment to diversity.” It worked. Diversity increased.

The business community could make a similar statement now with respect to ADR. If most large companies asked their law firms about their use of mediation and arbitration, it would not be long before firms got the message that use of ADR was an important determinant in continued retention.

The lesson for me is that we need to do more listening to and learning from our consumers. Instead of talking to ourselves in the profession, it’s time for us to engage the users of our services to see what they want. If we do, we might just generate ideas that will cause the demand for our services to rise.

John Bickerman, Principal of Bickerman Dispute Resolution, PLLC, is a full-time mediator and arbitrator in Washington, D.C., who specializes in resolving complex, multiparty commercial, environmental, water rights and natural resource disputes. He has worked extensively with Indian tribes. He can be reached at jbickerman@bickerman.com.
Taking the Next Step

The Master of Laws (LL.M.) in Dispute Resolution degree program provides students with the resources of a major university to design a program of study according to their particular interests in the dispute resolution field. LL.M. graduates are now working in the U.S. and abroad in a variety of positions.

I have started a firm I call Conflict Management Systems with a focus on mediation, facilitation, and organizational conflict management. The LL.M. degree has provided me with a tremendous amount of recognition and credibility in the dispute resolution field in St. Louis, both among lawyers and non-lawyers.

Jim Reeves, LL.M. '04
Conflict Management Systems
St. Louis, Missouri

My LL.M. education influenced my current job because I started a practice in mediation and arbitration, and I was able to join the Center of Arbitration and Mediation of the Chamber of Commerce of Quito, the most important center of this kind in Ecuador. I discovered a new world for my professional activities, which I expect to share with others in my country.

María Elena Jara Vasquez, LL.M. '04
Associate Lawyer, Peña, Larrea, Torres & Asociados Cia. Ltda.
Quito, Ecuador

When I enrolled in the LL.M. Program, all I wanted was a jump start on an ADR career. I found a discipline far richer than I thought, a faculty that challenged and sharpened my analytical abilities, and the opportunity to make significant contributions to a burgeoning field. My time at Missouri not only opened a new career path, it led me places I never thought possible.

Art Hinshaw, LL.M. '00
Associate Clinical Professor of Law
Director, Lodestar Dispute Resolution Program
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Looking Back, Looking Ahead

The Role and Relevance of ADR In Responses to Disasters

BY MARIA R. VOLPE

Why aren’t dispute resolution professionals more relevant when disasters happen? What role can dispute resolvers play in the aftermath of disasters? How can dispute resolvers better position themselves for future disasters? What lessons have been learned from two of the most prominent recent disasters—9/11 and Hurricane Katrina—both of which have served as wake-up calls?

Looking back: The case for post-disaster dispute resolution

A quick review of the dispute resolution landscape since the 1970s points to a tremendous proliferation of interest in and a growing acceptance of ADR processes in the United States. Over the years, thousands of people from coast to coast have been trained in a variety of dispute resolution skills, methods and processes. Concurrently, ADR has been introduced in virtually every context where people work, learn, play, worship or live. An impressive body of literature has been amassed, readily available online information has proliferated, and countless laws, policies and procedures have encouraged, reminded, and in some instances mandated that parties involved in conflicts find ways to make talk work. In short, there is ever-growing evidence that ADR has gained traction in American society.

In light of these strides, it is not surprising, then, that dispute resolvers would seek to play a role in post-disaster situations. Perhaps such interest existed in the past. If, however, it did exist, it was not prominently discussed. Since 9/11, and more recently Hurricane Katrina, dispute resolvers have vigorously begun to take stock of their field’s post-disaster response capacity and relevance. Some indication of the importance of this area of concern is the emergence of terms like “disaster mediation” and “hurricane mediation,” which have become part of the lexicon and are searchable online.

All of the widespread developments and growing visibility of the field are indicators that dispute resolvers have begun to lay the foundation for post-disaster dispute resolution work.

Disaster responses: Learning from others

For dispute resolvers to envision their response roles in post-disaster situations, it is useful to examine how others have been preparing. Central to any disaster response is planning, along with investing time, resources and energy. Response components need to be coordinated, staffed, funded and carried out. The range of response efforts can be quite varied and includes a variety of endless drills and simulations, assessment of needs, inventory of available and needed supplies, and evaluation of what works and what needs improvement.

In many instances, complex infrastructures are created to handle anticipated disaster-response efforts. It is not unusual for selected government agencies, as well as public and private entities, to play key roles or for a massive infusion of funds to support the initiatives. Additionally, many responders have acquired tremendous experience from recurrent practice in responding to other emergencies related to their work.

In contrast, the dispute resolution landscape to date presents a very different picture. Despite ADR’s widespread growth, no identifiable infrastructure currently exists to provide support, oversight or leadership to those ready, willing and able to respond in disaster situations. No overarching planning entity has emerged to handle ADR responses to disasters, locally or nationally. No entity has been the face, voice and funder of post-disaster dispute resolution response efforts. Lastly, dispute resolvers have not been integrated into others’ response efforts.

Dispute resolution is an eclectic field, widely characterized as one dominated by volunteers and pro bono practitioners, particularly mediators. In many of the best-known settings in which ADR processes are far-reaching, programs operate with very low budgets. In those instances where individuals are compensated for ADR work, many must combine it with some other means of earning a living. Moreover, there are no universally defined criteria for identifying practitioners.

When disasters occur, mechanisms must be ready for implementation, responders’ credibility and expertise must be sound, and coordination must be in place. While this may sound ideal, and disaster responses will always provide unique challenges, for dispute resolvers the obstacles are even more overwhelming than those faced by others.

The significance of 9/11 and Katrina

By the time 9/11 occurred, the dispute resolution field had come of age. Yet, given the planning, coordination, and resources needed to respond to disasters, thousands of trained dispute resolvers were challenged, particularly in New York City, the location of the most horrific of the attacks. As they witnessed professionals from many different fields responding, dispute resolvers struggled with what they could do as dispute resolvers. As in most disasters, the need was for rescue and recovery personnel. Dispute resolvers...
are not first responders. However, even in those instances when there were conflict situations, for the most part, dispute resolvers were not called upon. The opportunities available for them to provide services were limited, and no entity existed to plan for their response efforts.

Almost four years after 9/11, Hurricane Katrina served as another major opportunity to test the state of preparedness and relevance of the dispute resolution field. By 2005 many lessons had been learned from 9/11. Of particular note, communications among dispute resolvers had improved markedly. Many dispute resolvers who had come together to discuss 9/11 were re-energized to participate in post-Katrina conference calls focusing on response efforts. The American Bar Association Section of Dispute Resolution established a listserv and a website to serve as a clearinghouse to track ADR resources to help hurricane victims (www.abanet.org/dispute/katrina.html).

Because property damage was extensive after Katrina, mediators who had managed insurance claims in previous hurricanes elsewhere, especially Hurricane Andrew in Florida, were able to provide expertise. The Department of Justice Community Relations Service deployed its mediators to assist in managing the needs of the residents in local communities, focusing on race and national origins. The Federal Emergency Management Agency announced the creation of a cadre of mediators to assist in disaster responses.

Despite the greater role for dispute resolution and enhanced communications, there continued to be concerns about the actual opportunities and relevance of dispute resolvers post Katrina. For example, each of these disasters raised significant issues about the role of subject matter expertise. In response to Katrina, for instance, dispute resolvers struggled with how to address the concerns about race, class and poverty (see, e.g., http://www.thataway.org).

The challenges

History demonstrates that there will be no shortage of disasters in the future, either natural or man-made. And, with the ever-expanding use of dispute resolution, dispute resolvers will continue to seek ways they can respond to disasters as dispute resolvers.

An inventory of dispute resolution skills points to a key answer. Regardless of specific skills, techniques or processes used by the wide range of dispute resolvers, the one thing that is central to what all dispute resolvers do is make talk work. Equally important to note is that many other professionals make talk work as well. Quite simply, dispute resolvers do not have a monopoly on how to make talk work. They share it with therapists, social workers, counselors, attorneys, psychologists, psychiatrists, media folks and even talk show hosts, to name a few.

To complicate matters, because the career path to dispute resolution remains complicated and vague, dispute resolvers come from the broadest range of backgrounds and disciplines. Many of the disciplines of origin have established academic and/or professional qualifications. The legal field, for example, protects its practitioners from others doing their work by charging non-lawyers with the unauthorized practice of law. Such is not the case with the dispute resolution field. In short, the competition can be stiff for what dispute resolvers do, and the dispute resolution field has not as yet carved out its domain in clear, identifiable terms.

To be relevant when disasters occur requires that one be relevant beforehand. Disasters require that responders hit the ground running. Even though each disaster presents its own unique set of circumstances, the time to get ready for disasters is when there isn’t a disaster. The circumstances for dispute resolvers continue to be bleak. On any day those interested in becoming dispute resolvers continue to be cautioned about not leaving their day jobs. It is challenging to do disaster preparedness given the state of tentativeness that prevails.

Positioning for future post-disaster dispute resolution

There are a wide range of emerging efforts aimed at addressing the overall positioning of dispute resolvers, which will have a spillover effect on post-disaster dispute resolution responses. For instance, in June 2004 the Association for Conflict Resolution created a Task Force on the Education of the Public to address what must be done to gain greater public awareness for conflict resolution (www.acrnet.org). In New York state, the various dispute resolution organizations formed CONYSCRO (Coalition of New York State Conflict Resolution Organizations) to examine collective actions that can be taken in New York State to further awareness about dispute resolution. Since 9/11, the City University of New York Dispute Resolution Consortium has spearheaded numerous efforts as part of its Make Talk Work® initiative. Its most extensive high-profile project has been the creation of bookmarks for the general public with simple messages that present the dispute resolvers’ complex toolbox of techniques in easy-to-understand terms.
Looking ahead: lessons learned

By virtue of their magnitude, disasters like 9/11 and Hurricane Katrina help to identify where response deficiencies lie. For the dispute resolution field, these events served as a loud wake-up call, reminding dispute resolvers of their low profile and showing them what they need to pay attention to. Both disasters raised a wide range of questions about the dispute resolution field’s role and relevance. Both provided tremendous lessons about the work ahead for dispute resolvers.

With the growth of interest in dispute resolution and the likelihood of future disasters, a number of lessons are emerging. While there are no assurances that dispute resolvers will be utilized, it is important to position the field so that potential users can consider dispute resolution among their options. Like other areas of practice, post-disaster dispute resolution strives to anticipate the totally unexpected, which, of course, is impossible.

Much remains to be done to further recognition and acceptance of dispute resolution work. Among the lessons learned from the recent disasters are the following:

Creating greater public awareness

As noted above, major strides have been made in embedding dispute resolution in a wide range of contexts. Processes like mediation are no longer confused with meditation and medication as was the case several decades ago. Nonetheless, it is still too soon to know if greater public awareness will generate greater use of dispute resolution processes.

In instances where there is a major gap between potential and actual use of products and services, educating the public remains a high priority on every list. A recent evaluative study of a school-based conflict-resolution program found that when young people are exposed to conflict-resolution skills, they are less likely to engage in violence and aggressive acts. What is also abundantly clear is that trying to educate the public and decision-makers in the immediate aftermath of a disaster is not wise.

Allowing conflicts to ripen

Understanding the nature of conflict helps to adjust expectations post-disaster. Dispute resolvers may not find opportunities immediately after a disaster since rescue, recovery, relocation and rebuilding may be of utmost importance, and response efforts are consumed with a multitude of survival-related matters. Conflicts resulting from disasters may emerge and linger long after the immediate emergency needs have been dealt with. This reality may require dispute resolvers to put a different set of lens on their work vis-à-vis disasters.

Perhaps, they may have to resign themselves to the fact that there will be less for them to do in the immediate aftermath of a disaster and instead initiate plans for how to play a role in the ensuing days, weeks, months and years. For example, one of the highest profile cases after 9/11, an insurance dispute between Deutsche Bank and Allianz and Axa, its insurers, did not get mediated until more than two years after the attacks on the World Trade Center.

Creating necessary infrastructure

The dispute resolution field is highly eclectic and dispersed. For clarity and credibility in post-disaster response situations, viable structures and relevant resources need to be in place. Responses to 9/11 and Katrina showed that when structures were in place, they could be tailored to meet disaster needs.

For example, dispute resolvers were most prepared to mediate insurance cases when they had gained significant experience after previous hurricanes. On the other hand, dispute resolvers who showed up at the various disaster-service-delivery sites as individuals with dispute resolution skills were usually ignored unless they had other credentials (e.g., social work) or other affiliations with one of the entities (such as the Red Cross) that had gained entrée.

While there is always a rush to bring together requisite expertise and resources in any disaster, dispute resolvers need to address how and when they can be most effective. In New York City since 9/11 the City University of New York Dispute Resolution Consortium has established a listserv to address matters of concern to dispute resolvers in the NYC metropolitan area. As a result, communication infrastructure is now in place. Compare this to the days following 9/11 when dispute resolvers did not have a means of communicating with each other. After 9/11, in addition to electronic communication, the CUNY Dispute Resolution Consortium started convening monthly breakfast meetings to provide opportunities for dispute resolvers to get together to discuss matters of interest to them.

To support the infrastructure, there is a need for deliverables, namely tangibles that provide the public with information about the dispute resolution field. Those tangible items that are created for general everyday distribution (including brochures, handbooks, videotapes and manuals) can be readily disseminated in post-disaster situations. The public needs simple, easy-to-read-or-access messages about dispute resolution. Examples include the Make Talk Work® bookmarks designed for the public.

Central to many conflict situations is the need to access subject-matter expertise. Assembling the best thinking and resources in any area can be immensely challenging. The dispute resolution field needs to be prepared to identify ways of accessing needed expertise in urgent or sensitive situations. For example, how could concerns about race, class and poverty be addressed in the Gulf area? The next
Fostering relationships with influential others

Of paramount importance is establishing relationships with influential others, such as political officials, often achieved through networking. Meeting important decision-makers in the midst of a disaster is unlikely. Trying to influence or educate them at such difficult times is equally dubious. It is common for people to turn to people they already know for advice, guidance and assistance.

Identifying star power

In many instances, when attention is sought for a cause, celebrities or champions are asked to speak on behalf of those who cannot get prominent visibility or name recognition for their product or services.

Recruiting star power for the dispute resolution field remains an ongoing challenge. Choosing stars for the dispute resolution field may be even more daunting than for other fields because of the nature of dispute resolution work. The spokesperson would be intensely scrutinized for any conflicts of interest.

In addition to recruiting external stars, another possibility for the growing dispute resolution field is to cultivate its own star power by promoting someone from within the field, perhaps someone involved in managing a high-profile conflict. For example, for 9/11 the face of the dispute resolution field was Ken Feinberg in his role as special master of the September 11th Victim Compensation Fund that Congress created to compensate the victims and survivors of the 9/11 terror attacks. His star power carried over to post-Katrina dispute resolution when he was asked to oversee the mediation and arbitration of insurance claims by Zurich North America and Liberty Mutual.

Collecting data about what works

Sharing reliable information about dispute resolution efforts in different contexts is becoming ever more crucial. First, dispute resolution efforts have been evolving since the 1970s. There is a need to know what works, what doesn’t, and what is around. Second, because dispute resolution work often occurs behind closed doors, there can be a mystique about what goes on. Data can help to demystify the “secretive” nature of the work. For disaster situations, the databases would provide those who need to access data with ready information.

Tapping ADR’s potential

Both 9/11 and Hurricane Katrina provided lessons about what needs to be considered for the dispute resolution field to be better prepared to respond to disasters in the future. While 9/11 was the dispute resolution field’s ground zero, Hurricane Katrina showed some modest gains. Overall, the full potential of the dispute resolution field has yet to be explored and tapped.

“Build the Mediation/ADR Practice of Your Dreams and Learn How to Attract All the Clients/Referrals You’ll Ever Need Even if You Hate the Idea of Having To Market Yourself”

by Kristina Haymes, MA, JD
Founder of Mediation Marketing Institute

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Working Toward Critical Mass
FEMA, ADR & disasters

BY CYNTHIA MAZUR

Alternative dispute resolution is becoming more prevalent in the disaster context, and both the Federal Emergency Management Agency and local agencies are working to use ADR whenever possible in response to disasters.

Every federal agency has a statutory mandate to encourage the use of ADR. Pursuant to The Administrative Dispute Resolution Act, enacted by President Bush in 1990 and reauthorized by President Clinton in 1996, each federal agency is required to create an ADR office and to staff that office with a senior official to promote ADR as appropriate in all of the agency’s activities, functions and operations. As such, ADR is often used in contracting and procurement, regulatory matters, workplace/equal opportunity issues, and of course in assisting the public.

Under President Nixon, the Office for Emergency Preparedness (OEP), situated in the White House, was abolished and devolved to other parts of the government. The direct disaster assistance work was placed within the Department of Housing and Urban Development. But the almost certain occurrence of natural disasters and the regularity of even man-made disasters was becoming more apparent. Flood disasters were affecting more people annually than any other disaster. And more people were dying from fires in America than all natural disasters combined.

After the accident at Three Mile Island, the break-up of OEP was re-examined. The government needed one consolidated agency to handle national disasters and emergencies that were beyond the capability of the state. President Carter created FEMA in 1979 to alleviate loss, suffering and damage caused by disasters. The statutory mission places priority on saving lives and protecting property, and ADR helps FEMA in support of this mission.

National ADR work

The ADR office hires external ADR professionals for various programs. The flood insurance and mitigation employees participate in arbitrations as set forth in the National Flood Insurance Act when insurance companies and FEMA disagree. FEMA’s ADR office handles all of the logistics for those arbitrations and contracts with arbitrators nationally.

FEMA has been very interested in the mediation programs sponsored by the state insurance commissioners to assist disaster victims with their homeowner’s insurance claims. (See the adjacent article entitled, “Disaster Mediation: A Lesson in ‘Conflict Coordination.’”) After Hurricane Katrina, however, FEMA found it was paying the limit of most flood policies and as such mediation was not warranted. FEMA continues to advocate ADR, as does Congress.

After the Los Alamos, N.M., fires of 2000, Congress charged FEMA with administering all of the victims’ claims. In our nation’s history there has only been one other catastrophe for which our government has admitted responsibility: the Teton Dam Collapse of 1976. In both cases Congress quickly set about making the victims whole. FEMA was given 45 days to open a claims office and publish interim regulations, and 180 days to determine individual claims compensation. The law required FEMA to create an arbitration program for victims who were dissatisfied with the FEMA award, giving claimants an opportunity to present their claims to a neutral, non-governmental person.

FEMA’s ADR office had to solicit arbitrators, assess their qualifications, set a process for assigning arbitrators to each case, determine how many to assign per case, and fix fair

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compensation. Highly respected arbitrators from the ABA, the Justice Department, the state bars, the state courts, and the Chief Circuit mediator for the 10th Circuit were solicited, and ultimately 25 very fine arbitrators were selected. Their resumes were placed on FEMA’s Web site, omitting all personal contact information. This quickly drew-in people as they selected the arbitrator of their choice. FEMA’s ADR office then handled all of the logistics of setting up the arbitrations, securing rooms, and obtaining payment for arbitrators.

The arbitrators decided interesting issues. Many involved problems of lost property valuation, such as self-portraits by the artist father who was no longer living, or a dissertation, the completion of which was tied to a teaching position at one of our nation’s most prestigious schools. The dissertation was burned in the fires, and the job offer was rescinded. People asked to have 100-year-old trees valued. Native Americans asked for the value of their food as they had subsisted entirely on hunting and gathering in the now non-existent forests.

Arbitrators heard arguments about causation. Would the sharp reduction in cattle birth or the low production of grapes have any relation to the fire? And how long after the fires could low tourist trade be so attributed? The devastation of 9/11 within a year and a half would dramatically impact travel for the whole country.

After one hurricane, FEMA hired stellar mediators from JAMS. FEMA was having difficulty determining who had actually performed the work under a debris removal contract. Seven different contractors stated that they had performed the work and each submitted a similar bill. The parties were fighting among themselves as to which contractor was the proper recipient of the FEMA funds. FEMA placed the money in escrow and waited. But it became apparent that the parties were deadlocked. Contractors were blaming FEMA for ruining their companies and also their lives.

FEMA offered to hire a mediator for the dispute. All seven contractors consented, and we hired two nationally renowned mediators. The issues were very complex and involved high levels of antagonism, threats to personal safety, threats of suicide, bankruptcy, and media manipulation. The mayor of the community was arrested and went to jail for fraud. The FBI set up a sting which was detailed by the television news show 20/20. Against all odds, after three very intense days, the mediators managed to create agreement among all the parties. Each participant as well as FEMA was extremely pleased with the result. FEMA’s disaster work creates a fair amount of national ADR opportunities.

Community ADR work
State and local communities use ADR to support efficient reconstruction after a disaster. At an ACR conference I met a woman who said that she had worked as a mediator in a FEMA disaster. She explained that after devastating floods in her northwest state, her community had turned its anger on the local government. The people believed that their leaders were either inept or disgracefully apathetic. The local government and the community could not work together, and all dealings were laced with bitterness and acrimony. She said the local government asked FEMA for help. They wanted facilitation and mediation services, and they had specific local ADR professionals in mind. This seemed crucial for the community to begin its work of healing and rebuilding. FEMA agreed and paid for the services. Local municipalities are understanding to a greater extent the value of ADR in the disaster process.

In the aftermath of Hurricanes Katrina and Rita, Louisiana and Mississippi created mediation programs to resolve disputes between homeowners and their insurance carriers. The American Arbitration Association was selected to administer the mediation programs, which are voluntary for policyholders and mandatory for insurers. The programs could help speed up the resolution of these claims. In Mississippi, once a policyholder requests mediation, the insurance company has 10 days to settle the claim before going to mediation. In Louisiana, the insurance company has 21 days to settle prior to mediation.

Other areas are incorporating ADR into their emergency services planning. In California, Sacramento State University’s Center for Collaborative Policy (CCP) and the Institute for Local Government are developing collaborative problem-solving and public involvement strategies to help local governments better address the complex areas of emergency services and homeland security.

With the help of Adam Sutkus, the former Director of California’s Citizen Corps Program for community-based homeland security and a former Chief of Staff of California’s Office of Emergency Services, CCP provided strategic consultation, organizational design, and policy facilitation services to the state Office of Emergency Services. Within six months of CCP’s involvement, 13 state agencies came together and completed a strategic plan for state agency communications modernization and interoperability. The plan was submitted to the California legislature and has become a cornerstone of the state’s effort in this vital emergency response area for 2006.

Volunteer ADR work
While FEMA’s mission is to alleviate hardship for victims, people will often ask if FEMA can coordinate the public desire to help. After 9/11, the first call FEMA’s ADR office received came from a nationally organized group of massage therapists who wanted to donate services to relief workers. This group had been deeply appreciated by first responders after the Oklahoma City Bombing. ADR lawyers have a multitude of talents to contribute as well.

Congress authorized FEMA to help low-income individuals secure
adequate legal services after a disaster. FEMA works together with the state and local bar associations to assure proper representation for people who are at a disadvantage. FEMA started a program with the Young Lawyers Division (YLD) of the ABA. After a disaster, YLD often becomes the umbrella organization coordinating local lawyers who want to volunteer and work directly with the victims. FEMA helps YLD set up a hotline or a station at the disaster recovery centers. Most of the time, these volunteer lawyers give straight-forward legal advice about estates, lost documents, consumer protection and fraud, landlord/tenant issues, insurance problems, home repair/contracting issues and mortgage concerns.

FEMA’s general counsel worked very closely with the volunteer lawyers. He told us the story of one volunteer lawyer he met. He started to cry as he described how the lawyer had knocked on a judge’s front door in the middle of the night after one of our largest disasters. He urgently needed to get the judge’s signature on some guardianship documents for a child now a legal orphan because both parents had perished in the disaster.

During another disaster, an attorney told me that her volunteer disaster legal services had been the most meaningful experience of her career. She admitted that her efforts were minimal. She had lent her camera to a distraught woman and advised her about insurance requirements for documentation. This seemed to be so helpful and calming to the woman. When she returned with the camera, she hugged the lawyer and thanked her as if her life had been saved.

Another lawyer reported that he had set up a desk in one of the disaster recovery centers where people would come for individual, one-on-one help. He said as he approached the building that a long line had formed as the doors had not yet opened. Several of the lawyers put their briefcases down to wait, and he told me that a ripple went through the crowd, “The lawyers are here.” And he said there was an audible sigh of relief, and he could hear people expressing their gratitude.

The ADR professionals are so aptly suited for this work. Generally, the legal volunteers provide a listening ear and practical problem solving. Indeed, when we set up the program in one state, the bar was very clear that due to insurance liability issues, the volunteers would be providing legal “information,” not legal “advice.” ADR professionals often have the legal expertise in addition to the well-honed skills of deep listening, empathy, compassion, validation, and respect for human dignity. This breadth of skill is incredibly empowering for victims.

**ADR work within FEMA**

After Sept. 11, Congress passed the 9/11 Heroes Stamp Act of 2001 to afford the public a direct and tangible way to provide assistance to the families of emergency relief personnel killed or permanently disabled in the line of duty in connection with the 9/11 attacks. The U.S. Postal Service issued a semipostal, a stamp with a higher price than usual that allows the buyer to contribute to the cause illustrated on the stamp, and FEMA is responsible for administering the collected funds.

The 9/11 semipostal raised about $10.5 million for first responders who were killed or permanently disabled. The ADR Office has been asked to play the role of a third-party neutral on behalf of the claimants. FEMA created a right of appeal from its award decision and placed that function in the ADR office. Several attorneys were hired to help with the semipostal claims/appeals.

ADR has been used to lessen tension between divisions and to create several employee-friendly policies. Many people like serving the victims, others prefer the first responders. But for me, the greatest privilege is in assisting FEMA workers. They are brave, underpaid, and work Herculean hours. FEMA workers don’t do their jobs for the money, or for the good press. Creating order out of chaos, balancing myriad competing interests and egos, they show a commitment beyond human limit.

Last summer, FEMA decided to begin a national cadre of ADR professionals, employed by FEMA, to assist FEMA workers at disaster sites. They help employees with disaster work conflict. (See the adjacent article entitled, “Instituting ADR in a Disaster Field Office.”) This cadre is managed by Rob Scott, who has hired about 25 people who do conflict coaching, dispute resolution training, mediation, and facilitation at the disaster field offices all around the country.

Recently, a worker called and asked for ADR help. She described her entry into the disaster workforce. She said she told the person hiring her that she wanted the worst job, the job that no one else wanted. “OK,” the person said, “the job that no one else wants is working during the graveyard shift, scrubbing the dirty pots.” She valiantly performed that thankless job. It is hard to articulate how satisfying and inspiring it is to help workers who are so dedicated and humble.

ADR is a growing phenomenon in the disaster arena. FEMA has hired first-rate arbitrators and mediators throughout the United States. State and local governments are discovering that conflict, which can impede rebuilding after a disaster, can be effectively addressed by ADR professionals. Moreover, these professionals can help with community preparedness and mitigation. FEMA facilitates a Disaster Legal Services program ideally suited to the ADR attorney. Finally, FEMA is being proactive in using ADR for its own benefit in the disaster field office and in its operations. One day soon we will reach critical mass, and ADR professionals will be a routine aspect of disaster work.

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**ENDNOTE**

1 Terry Amsler, director of the Collaborative Governance Initiative of the League of California Cities’ Institute for Local Government, contributed to the section on California’s use of ADR in disaster planning.
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EMBEDDING MEDIATORS

BENEFITS AND CHALLENGES OF THE FEMA WORKPLACE MODEL

BY ROBERT W. SCOTT AND LINDA BARON

Shortly after the devastating storms of the 2005 hurricane season, the Federal Emergency Management Agency (FEMA) launched a new initiative to deploy a cadre of conflict resolution professionals to work directly within disaster field offices.

From the outset, the task of this program was to focus primarily on workplace conflict by embedding mediators in the FEMA workforce, alongside their potential clients and referral sources. A secondary focus was on non-workplace projects, such as ombuds-like activities.

This particular mediation model was unusual in North American ADR, because the mediators often had ongoing working relationships with the individuals whose disputes they handled. Because they were embedded in the workplace, the mediators also faced new challenges in the areas of confidentiality and impartiality.

Disaster zone

The cadre members who went to the Gulf Coast found communities with miles and miles of houses, churches, hotels, shopping centers and schools collapsed or covered with mud and debris. They met evacuees who were hurting from having evacuated twice in one month, whose worldly possessions were gone, and whose lives were disrupted at all levels.

They also found an army of FEMA civilian employees working 15-hour days, six and seven days a week, to bring order to a region that had none. People came from all over the United States to work side by side with people from the Gulf Coast, to infuse hope where none existed.

The amount of work accomplished in a short time period was miraculous. In 10 months, levees encircling Lake Pontchartrain, one of the largest inland lakes in the world, were repaired to hold back the water that filled the city a short time before. Enough debris was removed from the city to fill the Superdome 25 times. Thousands of trailers were set up and filled with residents.

In the first ten months of the program, FEMA deployed 16 mediators to eight field offices in New York and the four Gulf Coast states of Louisiana, Mississippi, Alabama and Florida, and mediated more than 450 cases. The cadre introduced the FEMA workforce to dispute resolution practices, provided training in conflict resolution and communications skills and helped train more than 500 managers in ADR. In the FEMA program, about 85 percent of clients reached an agreement or reported that they were satisfied with their use of ADR.

The cadre also worked with evacuees who, because of particularly challenging personal and family circumstances, needed special help moving from cruise ships, hotels and base camps to suitable long-term housing. Cadre members facilitated collaborations among federal, state and local governments and volunteer agencies to provide housing for individuals and families left homeless by the storm.

Embedding mediators

One of the unusual features of FEMA’s new alternative dispute resolution (ADR) program is that the mediators were embedded in the workforce, a program model that differs significantly from the typical North American ADR mechanism, in which the mediator typically has no significant prior relationship with the parties.

In the FEMA program, mediators work under conditions quite similar to those of their FEMA counterparts. For example, they are hired as Disaster Assistance Employees (DAEs), just like most others who respond to disasters. They work alongside their client base of DAEs, often in the same large open office. They face many of the same problems and work challenges inherent in traveling to disaster field offices on short notice and for indeterminate periods of time. They use all the same facilities and follow the same work rules.

As a result, FEMA mediators work under conditions quite different from those of their fellow mediators in traditional fee-for-service or ADR-office mediation programs. For example, embedded mediators do not have a coordinator who conducts intake and sets up mediation appointments, and formal mediation is only a small part of the service they provide. FEMA mediators often have workplace interactions with their clients before, during or after their dispute resolution process.

While embedding mediators in the workforce has some real benefits for early resolution, there are also a number of considerations and complications that make practicing conflict resolution with FEMA different from mediating in typical settings—and potentially more difficult.

Confidentiality, impartiality

In what has been called the North American model, mediators emphasize the importance of confidentiality and impartiality. Mediators assume that confidentiality and impartiality are important to the parties and that if the mediators and parties have no

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previous knowledge of each other, the parties will be more assured of the confidentiality and impartiality of the mediator and the process.

Scholars have pointed out that in other cultures, mediators not only are known by the parties, but also are often community leaders who are trusted and held in high respect because of their reputations for wisdom and fairness and because they have some position of authority in the community. In many ways, conflict resolution in the disaster field office resembles community mediation, in the sense that the mediators are of, by and for the community.

In the FEMA mediation model, being part of the community and being known in the FEMA workplace increases the likelihood that employees will seek assistance from the ADR office and provides many opportunities to provide services. As the mediators become better known, they are more likely to be asked to provide ongoing and informal assistance. Being part of the community also enables the mediators to identify and address systemic issues.

But there is a fine line between mediating and meddling, and between information-seeking and gossip, and cadre members often walk that line. The likelihood of dual relationships requires mediators to pay careful attention to their relationships and, in general, to avoid close relationships and the appearance of relationships that would lead clients to believe that the mediator’s impartiality is compromised.

In addition, talking to clients about confidentiality presents a particular problem in the embedded mediator model. Most confidentiality statutes address when testimony can be compelled through legal process. This is also true of the Administrative Dispute Resolution Act of 1996, which applies to the federal government. While it is very appropriate to have an in-depth discussion of confidentiality with clients in formal mediations, clients and mediators in the small disputes that come to the embedded mediator really do not want to get involved in reading, discussing and signing legal documents.

Mediator outreach

In disaster field offices, ADR cases do not come to mediation as an alternative to another process or as a diversion from a traditional process, such as litigation. For that reason, and because the service is new to the FEMA workplace, FEMA mediators make special efforts to become known.
They email weekly conflict resolution tips, offer short orientations in connection with mandatory training classes, provide customized training and line the office corridors with signs and posters advertising the ADR office. They try to locate their offices in high-traffic areas, arrange their offices so that they are clearly visible from the corridors, and leave dishes of candy on tables outside their offices and on their desks to encourage employees to stop by.

But the most effective outreach is probably conducted in the corridors, bathrooms and canteens where FEMA staff members gather and ADR cadre members mingle with other employees and try to become better known, and learn through informal conversations where the conflict hot spots are.

**Elements of advocacy**

Embedding mediators in the workforce may mean that the distinction between impartiality and advocacy becomes more blurred for several reasons. First, as discussed above, when an individual comes for assistance with a workplace issue, the mediator and client may have already had contact with each other.

The person who comes for assistance may be someone the cadre member sees regularly in the office. The client may be the person the mediator goes to for supplies, computer support or assistance with travel vouchers. Clients and potential clients may have concerns about “who the mediator works for” when the mediator is seen at command staff meetings, eating with administrative staff or going into the field with staff from the Equal Rights Office.

Second, because many services are initially provided one on one or through shuttle negotiations, the client may start to perceive the mediator as his or her advocate. Despite efforts to explain that the mediator is not acting as an advocate, the process of getting buy-in from the client to talk with others, then talking with others, and finally checking back in with the initial client looks just like advocacy.

More importantly, it can start to be advocacy, as the mediator shuttles between the person who has a problem and the person who can grant something to solve the problem. There is often a fine line between advocating for resolution and advocating for the initial client’s interests.

Finally, this advocacy line gets further blurred because mediators provide some ombuds-like services. Because the mediators are embedded, they are visible, available and asking for work. From a client’s perspective, there is little difference between asking the mediator for help resolving a conflict with a supervisor and asking for help with an institutional problem.

For example, although anyone could call the safety office to complain about a safety problem, employees may be concerned about raising the issue themselves and ask the embedded mediator to do it for them. And what better resource for resolving a difficult missing pay check issue or troubleshooting a promised raise that has not yet been implemented despite the employee’s repeated efforts through normal channels?

**Resistance to using ADR**

There are many reasons that FEMA employees may resist using the services of the ADR office. Emergency personnel value action over process and chain-of-command decision-making over collaboration. Many FEMA employees have firefighting or military backgrounds, or have other experiences where they have learned the value of rapid and decisive response. In addition, employees may believe that conflict is bad, that seeking assistance is a sign of weakness, that sharing personal information leaves them vulnerable, or that showing emotions is inappropriate.

When employees do push through their resistance and seek conflict coaching or participate in mediation, they may feel uncomfortable with informal encounters with the ADR office after the meeting. It is therefore particularly important for FEMA mediators to emphasize that conflict is not bad and, at the same time, to ensure that confidentiality will be preserved.

**Informal process**

Because they are embedded in the workforce, mediators are always available informally and on short notice. Employees frequently come to the mediator’s office to vent, but without a clear idea of the outcome they seek. And the mediator cannot move forward on the matter without the initial client’s permission, for confidentiality reasons.

In practice, these factors mean the client can drop in to discuss the matter without committing to a two-party mediation. And as a result, mediation is used in only about 15 percent of cases.

Frequently, these clients choose to use a one-on-one approach like conflict coaching, conciliation, shuttle negotiations, or listening and problem solving. This keeps control of the situation in the clients’ hands and gives them the tools and approaches to resolve the situation themselves.

Listening and problem solving are certainly part of the repertoire of every mediator, so doing this in the one-on-one situation is very similar to working with two parties or with one party in a caucus. Conflict coaching, on the other hand, is a different skill that is not frequently used in the typical mediator’s practice. In the end, about half the clients at FEMA choose to involve ADR only on a one-on-one basis.

Informal conciliations and shuttle negotiations are also used more than mediation because the mediator is embedded with the client workforce. For example, a supervisor might approach the mediator for a discussion of problems with a subordinate. During the discussion, they walk over to where the employee is working and bring him or her into the discussion. Then all three walk over to someone from the human resources department to get some information about policy or procedure.

The combination of informal conversation guided by the mediator with some substantive information gained from human resources may be all that is needed to get their work and their relationship back on track. Without
much time from initial upset to resolution, there is little opportunity for them to lock into positions, start saying hurtful things to each other or for secondary conflict (conflict about how they are handling the conflict) to develop.

A final note about informality: In the hierarchical organization needed for disaster operations, both employees and managers may find the one-on-one and informal approaches to be more attractive. The more they need forms, agreements, appointments, notices and approvals in order to participate, the more the process may look to them like the complications and record-keeping of official action.

Ripeness of the conflict

Another ramification of being embedded is speed. Much of the work of the mediators is conducted nearly in real-time with the development of the conflict. For example, a staffer who is having difficulty working with a supervisor can walk across the office and initiate ADR immediately. This creates the opportunity for very early intervention and resolution before relationships deteriorate or positions harden — one of the main reasons for the embedded design of the program. However, this does create a couple of difficulties as well.

For example, the mediator needs to ensure the conflict is ripe for ADR intervention. In an employee/supervisor conflict in which the process is initiated by the employee, the supervisor may well view the situation as part of the normal give and take between them, in which the supervisor makes the final decision.

Consequently, the mediator can be accused of interfering in the supervisor-employee relationship, or even in program delivery. While mediators may view the supervisor’s participation as voluntary, supervisors may be trying to cooperate with a colleague (the embedded mediator), whom they view as just trying to do his or her job. To reduce misunderstandings, mediators should advise everyone that participation is strictly voluntary.

Another consequence of real-time conflict resolution is the reduced time for intake, client preparation and process design. For example, the exigencies of the disaster response may dictate an immediate intervention, because the parties may be rotating out of the disaster in a few days.

Providing quality services means both using highly skilled conflict resolvers in these positions as well as setting accurate expectations for clients about potential risks and outcomes for the ADR process.

Job security concerns

In most cases where an external mediator is called in to mediate a workplace case, the situation between the parties has developed to the point that the employee has already decided to go forward regardless of the potential consequences for retaliation—or has already lost his or her job. By contrast, the embedded mediator is likely to be faced with many clients who are concerned that even raising a conflict might cost them their jobs.

This is especially true for DAEs, who are routinely released from disaster job assignments on short notice when no longer needed. Local hires also fear job loss, particularly in communities that have lost significant numbers of jobs due to the disaster. This situation changes the dynamic of the initial interview, makes it incumbent on the mediator to raise the issue, and increases the mediator’s responsibility to provide quality services, set expectations and ensure informed consent.

Sample conflicts

As in many workplaces, employees and managers often fail to communicate well, leaving employees without a clear understanding of managers’ actions. And FEMA managers may not be used to explaining changes to their employees. For example, one employee sought assistance after learning that her job would change significantly. After talking with a conflict resolution specialist and doing her own processing, she realized that she could accept the change. But she still needed to understand why the change was made. In the subsequent meeting with her managers, one manager said, “This isn’t how we’ve done things, but now I see that there’s a better way.”

In another case, an employee came to ADR upset because her manager had learned that she had fibromyalgia. She had kept her condition private because she did not want her manager to think that the illness would interfere with her job performance. But she was filing papers in hot, confined areas for several hours each day and was in constant pain. Over the course of several meetings with the mediator, she revised her resume. Then she applied for and received a promotion to another job that was physically less taxing and higher paying.

Unexpected benefits

The workplace conflict resolution program has been received well. In addition, the mediators have been used much more than anticipated for several additional tasks: training managers on topics such as conflict resolution, listening skills and team building; facilitating meetings within FEMA and among those receiving FEMA assistance; and resolving issues with applicants for FEMA service.

The mediators have also worked outside the FEMA workplace directly with evacuees. They have helped individuals search for long-term housing and facilitated communications between FEMA and other government and volunteer agencies in their efforts to provide direct services.

Also, one of the mediators’ tasks is to note conflict patterns and system failures that might be addressed through policy changes. For example, FEMA has a remedial action management program that seeks to capture disaster-response problems and resolve them in future disaster response operations, and mediators are encouraged to bring matters to the program’s attention.

As a result of the lessons learned through some of these interventions, FEMA is continuing to modify its program to ensure it is providing high quality conflict resolution services within the unusual and challenging environment of disaster field offices.
A

ll of us have been affected by disasters, either directly or indirectly. Although natural and man-made disasters have occurred throughout history, the size and scale of future disasters will surely reach regional, national and international proportions. Indeed, there is now and forevermore a disaster industry, in which ADR professionals can certainly play an important role facilitating decision-making among insureds, insurance carriers and government agencies.

Today, our attention is drawn to ADR’s role in disaster management not only because recent disasters such as Hurricane Katrina reminded us that such tragedies can and do happen, but also because those events highlighted the nation’s lack of preparation and coordination for addressing and resolving the conflicts and problems that inevitably follow in a disaster’s wake.

This article will focus on post-disaster ADR and its use in resolving insurance claims, both residential and commercial. Specifically, it will discuss appropriate design of a post-disaster ADR program, in which administration, costs and appropriate services are all major concerns.

Emotionally charged environment

As a person who has experienced hurricanes in South Florida since 1951, and particularly Hurricane Andrew of 1992 and the “awesome foursome” of 2004 (Charley, Frances, Jeanne and Ivan), I can bear witness not only to the physical and financial damage done, but also to the psychological and emotional impact, which can be even more devastating.

I found it incredibly sad, after a days-long evacuation, to drive home through barriers of huge banyan trees that for years had provided a beautiful shady corridor. Seeing boats and debris strewn across the streets in our effort to return home brought tears to my wife. And suffering nightmares of how our own home fared after we were forced to evacuate, then finally arriving home and finding our mango trees fallen in a way that protected the house, left an indelible imprint.

Our devastation and sadness was insignificant compared to the feelings experienced by people who returned to find no home at all. But under either experience, it is imperative that the hope of rebuilding must be immediate.

This mindset is presented here not as a sad personal reminiscence, but rather as preparation for the ADR professional who comes to assist after a disaster. An outsider who charges into a traumatized community to help may not fully appreciate the disaster’s effects on residents, whether the immediate shock or the accompanying post-traumatic-stress disorder (PTSD).

Disasters affect people differently—physically, emotionally and psychologically. While all conflict is associated with trauma and drama, each disaster is also unique, both in the details of the traumatic event and in the experiences of the individual person.

Insurance companies vulnerable

The lessons learned from Hurricane Andrew were restoration, rebuilding and resurrection (the three R’s) within the affected communities. From these lessons come the overall policy considerations that apply to any disaster recovery.

First, individual rights and interests must be balanced with collective rights and interests. The needs of the individual homeowner or insured are part of a picture that includes the larger community of homeowners, commercial owners and other users of affected property. Industries are affected not just locally, but also statewide, regionally and nationally. This balancing act among competing interests creates tension, because demanding higher insurance payouts to individual insureds is not necessarily best for the community in the longterm.

Disaster recovery must also create awareness of the limits, both financial and otherwise, that insurance companies face in these mass disasters. After Hurricane Andrew and again after the 2004 hurricane season, individual policyholders, viewed as disaster victims, were joined by insurance companies as victims.

In past disasters, insurance companies have been financially ruined by inappropriate or excessive insurance payments. As the pool of insurance companies grows smaller, the individual citizen will be faced with a less competitive marketplace, resulting in fewer choices and guaranteed higher premiums and deductibles and often more coverage exclusions.

This is not an unusual occurrence when several disaster seasons occur back to back. As the premiums continue to escalate, more homeowners choose to forego insurance altogether, leaving them exposed to the danger of catastrophic property losses, mortgage defaults and foreclosure. No ADR process or professional works in a vacuum without acknowledging this reality.

Government preparedness

In addition to the public policy dynamic between the public and private sectors, there are policy dynamics within each sector that must be taken into account. There are many government agencies from different levels of government, for example, who must coordinate their efforts. Limited resources are a basis to help and collaborate, not to compete.

These obstacles must be removed ahead of time, not during the disaster
itself. Likewise, political turf wars, overlapping efforts and other impediments need to be addressed and resolved before the next disaster strikes, not during or after the crisis.

**Designing a program**

*Early assessment.* In order to create an ADR/mediation program to assist in disaster management, early assessment of the disaster is critical. Needs and losses must be prioritized, and available resources, both immediate and longer term, must be triaged. Based on this assessment, an appropriate ADR process can be selected that is tailored to the disaster, the community and available resources.

Facilitating the obvious players must be done quickly with their full commitment to the process chosen. The responsible government bodies and agencies must be ready to step in with well-drafted emergency rules to allow the implementation of the process with the full commitment of all the stakeholders, particularly the insurance companies, their adjusters and support staff.

**Neutral administrator.** To ensure the program’s credibility, a neutral administrator must be appointed to oversee, implement and maintain the program. Funding for any ADR/mediation program will probably come from the insurance industry and the companies issuing the policies in that area.

The independent administrator must have the respect and credibility from all the stakeholders in the process. The government regulatory agency or agencies, the insurance carriers and the insureds must have confidence in the program. A competent and user-friendly staff, coupled with carefully selected and trained mediators, is crucial.

At each point of contact, whether with the public or providers, complete neutrality must be both real and perceived. Continuous monitoring will help ensure this. Even a slightly perceived prejudice by either the insured or the carrier must be examined and corrected where warranted.

The administrator will also make major logistical decisions. Physical location of offices, support staff, public outreach and technological needs must all be satisfied.

**Confidentiality.** Although confidentiality is maintained, and even acknowledged by written agreement, intrusions are constant and media scrutiny challenges the achievement of privacy. Moreover, since the insurance carriers automatically have information about their prior settlements in other cases, homeowners and other insureds commonly compare notes and recoveries.

**Local mediators.** An appropriate
group of ADR professionals must be employed. Initially, trainers and a small cadre of experienced ADR professionals may have to be imported, if the affected area does not have such resources already available. Ultimately, however, it is absolutely essential that local ADR professionals be used.

Mediation skills training. Ensuring that ADR professionals receive adequate training with the requisite experience is essential, because the mediation program will be judged by the frontline mediators. Representatives from the state’s insurance regulator and insurance carriers with policies in the affected region should be invited to attend and participate so that they are fully invested in the process. Local leaders should also be a part of the training along with FEMA and other relevant agencies.

Follow-up training is critical as well, along with periodic bulletins and updates. If at all possible, a hotline should be maintained for emergency situations.

Psychological training. The curriculum must also include the emotional component. The mediator must be alerted to post-traumatic-stress issues, both immediate and delayed.

Such training helps ADR professionals assist policyholders. Many of these people have lost homes, businesses and employment opportunities. And these losses have devastated not only the individuals themselves, but also their families and their communities. Disasters also increase the incidence of divorce, domestic violence and depression.

My own wife’s depression was immediate upon approaching the house and seeing the destruction. My personal depression was delayed. Weeks after the disaster, when I conducted mediations, flashbacks occurred.

Security. This emotional and psychological toll may also create a need for security at the mediation sites. Safety and security for program personnel cannot be overlooked. In training as well as program design, consideration should be given to security when dealing with those who have experienced the loss of homes, businesses and their own sense of security.

The Florida model

The state-sponsored insurance mediation program used in Florida in 2004 truly proved the axiom that necessity is the mother of invention. That year, four major hurricanes made landfall in Florida. The Florida state insurance commissioner recognized that the large number of unresolved homeowner’s insurance claims had the potential to inundate the judicial system, prompting creation of a highly successful insurance mediation program.

In the Florida program, the old concept of conflict resolution gave way to a broader concept of conflict collaboration. Due to the large number of cases in the Florida insurance mediation program in 2004 and the need for program credibility and neutrality, both real and perceived, an independent administrator was selected to run the program. The program for residential claims was so successful that a commercial component was added.

Funding. By emergency executive regulation, the insurance company writing the policy was required to pick up the entire cost of one mediation session. Thus, the insurer paid the administrative charges, the mediator’s fee and any other ancillary costs. Because the insurance company paid for only one session, however, the opportunity for lengthy sessions or second sessions was significantly reduced, except in the higher-value commercial claims.

Mediators usually were paid on a per-case basis rather than hourly. Consequently, mediators often worked three and four cases a day, limiting the time per case. Traditional mediator techniques and processes were trimmed to address the immediate need for homeowners to begin the rebuilding process.

Notice. In the insurance company’s response to a claim, it sent the policyholder a first notice of the right to mediation, which described the program’s rules and regulations, including preparation, session informalities and available options. Oftentimes, the notice of a request for mediation was incentive enough for the parties to resolve the claim.

Mediation format. The session, usually with no attorneys present, commenced with the usual description of the process. The parties could use either joint sessions or caucusing. The session could be brief or last two to three hours. The final agreement was executed on a form authored by the Department of Financial Services and included certain nonnegotiable rights to the insured, including a window of escape. Release language was specific rather than general.

Immediate payment. Critically, payment was made immediately if the parties reached a settlement. The insurance representative was required to appear with a blank check in hand. If not immediate, payment would have to be made within just a few days. No formal appellate process was provided, although relief was afforded in those few and rare cases where errors occurred. The Florida program had an incredibly high success rate.

Program challenges

Typical problems confronting the disaster mediator included:

Attendance, scheduling and settlement authority. Because of the exigency of the time, insurance adjusters were often unavailable to participate in the mediations. Adjusting companies were often used, allowing the specialists more time in the field to inspect and settle cases on the spot.

Incomplete information. Although the emergency regulations required full preparation and information sharing, this was often more aspirational than reality. For obvious reasons, many policyholders’ documents had been destroyed in the disaster. Adjusters often did not have the complete file. Creative mediators used the only session to forge a plan of action agreement, called a POA, to accomplish a resolution.

Increasing damage estimates. Because of significant delays between the damage and the mediation, damage estimates could change consider-
imbalance. First, a regulatory representative or volunteer attorney could be available prior to the mediation to provide information in a variety of forms, such as videos, written information and personal counseling.

Second, the ADR professional may use pre-mediation conferences with the parties, particularly the policyholder, who may be nervous. Third, the regulatory representative or attorney could be invited to participate in the mediation or be available by telephone to answer questions as they arise.

In Florida, the power-imbalance problem was addressed by including a government staff attorney in the mediation process. One wonders as to the effect on the mediation when the insurance regulator is present. How-ever, for the most part, the industry welcomed the regulator’s participation.

Of course, these approaches may not be applicable to more complex commercial claims.

Confidentiality. During the mass media blitz of a national disaster, confidentiality of mediated settlements is almost impossible to maintain. In fact, whether the participants themselves sincerely believe in confidentiality is highly questionable.

Families, neighborhoods, communities and many others are involved. Material suppliers and laborers know almost immediately what the insurer paid, as well as the mortgage company and others. Even the insurance company may want certain disclosures in order to add credibility to its payment schedules and to establish its honesty in dealing with all insureds in the same manner, without any prejudice to certain policyholders.

Impartiality, objectivity and neutrality. The integrity of the mediators and the program is critical to the success of any mediation program of the magnitude of the Florida program, which has already handled several thousand cases and still continues today. Despite the intense emotions generated by such disasters, mediators must show empathy without allowing their personal emotions to interfere with their roles.

This neutrality is particularly important where the mediator, too, suffered injuries similar to the claimant’s. Self-monitoring and program review may be helpful, but to some extent no one is sanitized of their feelings after hearing the personal stories of the claimants.

Rethinking mediation processes.

When the relevancy and practicality of enforcing confidentiality is considered in combination with the power-imbalance issues discussed above, the very foundations of mediation may need to be rethought when applied to the extreme conditions of post-disaster mediation.

Lessons learned

My personal experiences with hurricanes in Florida and involvement in large-scale post-disaster mediation programs have changed my concept of security for myself, my family and my community. ADR, and mediation in this context, will never be the same for me.

With the next disaster, the ADR community can build on this conflict-collaboration framework to meet the needs of disaster-affected individuals, businesses and communities, particularly in connection with insurance claims. Preparation by cooperating government entities, particularly regional and national, is an absolute necessity.

The loss of commitment in the rebuilding process will further diminish and weaken our already shaken confidence. Excuses and apologies are unacceptable.

We have the opportunity to make well-considered and competent contributions to our fellow citizens and to receive personal and professional fulfillment of extraordinary meaning. Our shared hope must include the restoration, rebuilding and resurrection of our way of life after any disaster.
After Disaster Strikes
Do I volunteer as a mediator?

BY ANDREA CHASEN

Days after Hurricane Katrina left the south central U.S. in ruins, volunteers in many capacities raced down to the New Orleans area to provide much needed help and relief for the people and animals left in the disaster’s wake.

Like so many of my friends and colleagues, I experienced a true sense of helplessness in trying to find ways to add to the relief efforts. And just like my need to do something after the attacks on the World Trade Center on Sept. 11, 2001, I struggled to find ways to help. In the aftermath of 9-11, I volunteered to serve as a facilitator in the America Speaks effort to bring together thousands of participants to create a vision for the recovery and use of the World Trade Center site.

Unlike my colleagues trained in the medical and emergency relief fields, my expertise in dispute resolution doesn’t seem to have an immediate place in the disaster relief efforts. After Hurricane Katrina, there was much discussion among mediators about how to help those in need. One possibility was that mediators flock to the area and work with insurance companies and their clients to help settle the individual disputes.

I drew the line here. Insurance companies are profit-making businesses and can pay for the dispute resolution services. I would find other ways to volunteer.

Seen as volunteers

In my view, at this point in the development of our field, mediators are too often seen as volunteers. When I started my practice 15 years ago, I did so in part because my full-time job did not allow me the flexibility to respond to the many requests for mediation services I received. At that time, I was volunteering for court-supported and governmental agencies, providing mediation services at no cost. Meanwhile, the administrators of these agencies were salaried employees and fully compensated for their work.

When I later opened my office, I was surprised to learn that the same agencies that seemed happy with my mediation work when it was free would not refer cases to me or use my services now that I had to charge for the work. They continued to expect the service at no cost.

Professional mediator’s dilemma

One striking anecdote from this time truly highlights the professional mediator’s dilemma. I was selected to serve as a mediator with the local regional office of the Equal Employment Opportunity Commission. The EEOC’s flat fee included case administration—contacting the parties and finding a convenient site—as well as the actual mediation, regardless of how much time the session or sessions required. But it was income and I had my bills to pay, so I agreed to all the terms and conditions.

Yet within a short time of starting, panel mediators received the unwelcome news that the EEOC had run out of money and could no longer pay for our services. So even though the EEOC administrator and the parties’ attorneys were all compensated for their services, we, the mediators, were asked to continue and work for free. The EEOC’s reasoning was that charges for our services might discourage the parties from using mediation.

An institutional problem

Doing some pro bono work in one’s field can be a good thing, and within my practice I periodically choose to either reduce my fee significantly or mediate pro bono. This issue of expecting mediators to be the only professional providing services at no cost to the recipient seems to be built into the system and appears to be national in scope. A recent writer noted that the uncompensated mediation service is not just expected, it has become a norm—to be viewed as an investment in marketing.

“In effect, it is a ‘pay to play’ system with respect to cases mediated through the court system. Los Angeles mediators personally pay for 97% of court mediations, giving away thousands of hours and millions in fees each year.... If Mary Mediator spends on average five hours per mediation including preparation and paperwork, her opportunity cost is $1,250 per mediation at $250 hourly. If she handles five court-referred mediations a month, the annual opportunity cost is $75,000 excluding office costs.

“What does she get for this investment? According to the Institute for Conflict Management, the average ‘pro bono’ mediator generates an average of eight paid cases per year based on these volunteer efforts, making the cost of acquisition per case $9,375.”

As someone who actively earns her income from providing mediation services, I know that I can’t afford to give my services away for nothing, and have come to conclude that at this point in our profession’s development, mediators should not be encouraging our colleagues to work for free.

So in the aftermath of disasters like Hurricane Katrina, I will continue to be ready to volunteer to help clean up, help rebuild and fundraise to support such activities. However, I will not volunteer to mediate the inevitable disputes between insured and insurance company. That is something I believe that I should be paid to do. After all, mediation is my profession, not my hobby.

ENDNOTES


2. Id. (emphasis added)
Classroom Conversations
About Race, Poverty and Social Status
In the Aftermath of Katrina

I

In the wake of the New Orleans hurricanes and the ensuing dislocations and hardships for countless people, the disparate impact of the disaster highlighted issues of race, poverty and social inequalities.

The different experiences of rich and poor, black and white, resulting from the catastrophe created fissures in relationships among different groups—fissures that were felt in classrooms around the country and in society generally. To generate constructive dialogue on these issues, we set out to lead a discussion on race, poverty and social status in a law school classroom. We believed that such an effort would contribute to a more tolerant and sensitive school environment (and indirectly to a better race, poverty and social statuses in a law school classroom. We believed that such an effort would contribute to a more tolerant and sensitive school environment (and indirectly to a better society and a stronger democracy), and we wanted to experiment with how to raise difficult issues thoughtfully. What follows is a description of what we did and what we learned.

What we did at Howard Law School

Immediately after Katrina, Homer La Rue conducted a conversation at Howard University School of Law in his first-year Civil Procedure course. The dialogue took place during one 75-minute class period on the Monday immediately following the initial weekend news reports. Of the 53 students, 85 percent were African American. The others included four Caucasians, three Latinos, and one international student from Ghana. Approximately 60 percent were female. A number of students had family members or friends in the storm area.

The goal was to give students, at the beginning stages of becoming lawyers, an opportunity to talk together about what being a lawyer has to do with race, class, poverty, and our society’s relationship to these seemingly intractable questions. The objective, however, was not to have an abstract dialogue about politics, but to help students develop a personal understanding of each student’s connection or lack of connection to the issues of race, class and poverty and their own choices about becoming lawyers. We hoped this dialogue would motivate each student to engage in a longer and deeper discussion as he or she moved through legal training and into the profession of the practice of law.

Because the explicit message of law school is that what we discuss in the classroom is what competent lawyers need to know, it is important to discuss the often unspoken issues of race, class and poverty. These issues must not be subordinated by omission. For many African American (and other) students, such an omission makes it more difficult to understand the connection between their becoming lawyers and issues of great significance.

Format for the dialogue. To encourage students to reflect before class, on Sunday we sent each an email that included six questions:

1. What is my role as an individual citizen in responding to the crisis in the aftermath of Katrina?
2. What role can/should law play in any of what has happened this past weekend? What role can/should lawyers play?
3. What was the impact on you of the early pictures predominantly of African Americans trapped in New Orleans during and after the storm and the media’s reference to “Third World” conditions? Later, the term used by the media has come to be “refugees.” How does that term impact you?
4. What do you believe is the impact of the images of the displaced on others in the U.S.? Outside of the U.S.?
5. What is the implicit (if not explicit) role of race and class in planning for the storm, the response following the storm, and the living conditions that made the lives of some people more vulnerable than others to the storm?
6. Some have insisted that the city of New Orleans will be rebuilt, while others have suggested that it should not be, given the high-risk location of the city. What are the underlying interests of those who support the rebuilding? Of those opposed to the rebuilding?

Students also received this description of the class plan. (1) A 5- to 8-minute introduction by the instructor. (2) A 3- to 5-minute video clip of the weekend news scenes of people (mostly African Americans) fleeing the flood waters and heading for the Super Dome accompanied by the song City of New Orleans by Willie Nelson. (3) Students’ small-group discussions of the questions emailed. (4) General class discussion of those questions. (5) An invitation to those
who choose to speak to express their feelings as well as their thoughts and to do so from their personal experiences by using the words “I think...” or “I feel....” (6) A request to be brief so that others may speak as well.

Making dialogue work. Civil Procedure is one of the important first-year courses in which students become acculturated to the role of thinking like a lawyer. Early in the semester, most Civil Procedure instructors begin to correct students’ use of language, discouraging, for example, the statement “I feel...” in response to a question. Consequently, for this dialogue, the instructor must explicitly state that feelings are an integral part of the conversation.

The use of music as well as the news scenes at the outset of the class further suggested that students were about to engage in a dialogue different from that of the typical law school class. The news clips, together with the song City of New Orleans, also provided an effective means by which to quiet the room. Finally, the use of these simple media reinforced the instructor’s statement that the discussion should include the students’ personal feelings about Katrina and its implications for them as future lawyers.

Second, if the instructor tries to summarize the students’ discussion during the large-group dialogue, it is important to tell students that they are experiencing a unique stage in their personal and professional development. During their first semester of law school, students are learning a new role (that of a lawyer) but can still easily recognize their non-lawyer selves. We should remind students to reflect on how they are making that transition from non-lawyer to lawyer—what values they are retaining from their non-lawyer selves, what values they are subordinating and how they feel about this transition.

What we did at the Benjamin Cardozo School of Law

In the spring of 2006, months after the hurricanes, Homer La Rue and Lela Love collaborated in leading a dialogue at Benjamin Cardozo School of Law of 15 second- and third-year law students studying mediation. The racial mix of the class was 20 percent minority (two African-American and one Latino) with the balance Caucasian. The class lasted three hours. One goal was to uncover unspoken differences and provide a bridge to understanding diverse perspectives. Another goal was to explore the art of facilitation and its component skills.

We began by discussing facilitation skills and the purpose of the exercise. We explicitly wanted to enhance understanding and generate perspective-shifting, enabling us all to see the disaster events from the point of view of others. We highlighted the goal of facilitated dialogue and laid out typical guidelines for a conversation.

First, by way of introduction, we asked students to relate their own experiences connected with Katrina, inviting them to share any personal knowledge or thoughts they had. This provided the warm-up to a more structured exercise.

If students in law school classrooms do not discuss the often unspoken issues of race, class and poverty, these issues will be subordinated by omission.

We asked students to mark their positions on their grids depending on how strongly they agreed or disagreed with the statement and whether their position was based on their feelings or their belief about facts. We then asked students to position themselves at their chosen places on a grid we had marked with masking tape on the classroom floor. After students complied, all quadrants of the grid were occupied. We then invited students to talk about why they were standing where they were.

Finally, we asked students to respond to another statement—this time placing themselves on a continuum with “supportive” at the top and “racist” at the bottom. We projected this statement: “The mayor of New Orleans’ statement that New Orleans would be a ‘chocolate’ city again was supportive (of special efforts that would be required to restore the poorer neighborhoods) or racist.” Again, students positioned themselves along the entire length of the continuum, and we invited them to talk about their choices.

We designed both exercises to convey information visually as well as verbally. Even before anyone spoke, the differences in perspectives were powerful.
What we learned

The facilitators. Raising difficult topics is difficult. The difficulty is lessened by having a diverse team of facilitators—in this case male and female, black and white. Ideally, the team would also mirror other aspects of diversity, such as class and age. The diversity of leaders made participants feel safer and more comfortable. Even stating the mayor of New Orleans’ provocative statement was uncomfortable for the white facilitator, until her partner verified that it was ok—that is, “chocolate” was not pejorative in that context.

We also recognized the potential impact of seemingly innocuous facilitation techniques. For example, the facilitator of a discussion group should be careful about speaking after students express their opinions or feelings. First, commenting on each student’s statement may unwisely use up precious time. Second, the power role of the instructor as facilitator in the classroom context can tilt the discussion—causing some students to be hesitant about speaking if they sense that their opinions are different from that of the instructor.

The participants. Many of African American students at Howard did their undergraduate work at majority-white institutions. The setting for the Katrina discussion (i.e., a classroom in which the majority was African American) was one of the rare moments in academia when they did not experience being the “other” in a discussion about race and class. Some expressed a sense of freedom in not having to be the representative spokesperson for all other African Americans.

The facilitator must be conscious of the experience of being the “other” if the large classroom discussion is to be a safe space to express varying ideas and feelings. The ability of persons from different races to discuss racial issues varies. The facilitator can assist in developing this ability by encouraging speakers to speak from their personal experience, and by encouraging listeners to hear what is said as coming from the speaker’s life experience, that may be different from that of the listener.

At Howard University, black students far outnumbered white students. The opposite was true at Cardozo. Being a minority makes speaking up difficult. On one occasion, when a white student at Howard voiced an opinion not acceptable to many of her classmates, Professor La Rue consciously moved next to her in an effort to make her feel safe and validated. Body language and placement are important.

Facilitators must be keenly aware of stresses the participants may feel. Allowing students to “pass” instead of speak is one safety valve. To balance the conversation as much as possible, it would be good to invite additional members of the underrepresented group if that is feasible.

The setting. Every setting carries with it expectations about behavior. A law school is no different. Professors and students have well-established roles. It was hard to get away from professors as the “authorities” and students as the “learners” despite good intentions. Law students are accustomed to presenting strong views and arguing with one another. Here they were asked to speak from experience, speak from their hearts, and listen to their colleagues. We didn’t do enough to get “out of setting.” For example, students raised their hands to speak, particularly when they wanted to disagree with a statement.

In the final exercise, to counter this ingrained habit, we introduced a “speaking stick.” Only the holder of the stick could speak, and the holder could choose the next holder. This technique not only took power away from the facilitators (professors), but literally gave the conversation to the students. It worked well. Finding another environment in a school—the lounge, an outdoor courtyard—might also contribute to the conversation.

The dangers. Just as the Chinese characters for “crisis” mean both “danger” and “opportunity,” we do not want to overstate the opportunities of dialogue and omit the dangers. One student pointed out that “hearing the opinions of some of my classmates, especially close friends, made me question my relationships.” Another student noted that our request that students physically position themselves around the room could be “dangerous.”

How we began. We began with an academic introduction to facilitation by defining it and displaying ground rules that various texts recommended.

<table>
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<tr>
<th>GOALS AND SPIRIT</th>
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<tbody>
<tr>
<td>• Respect for speakers.</td>
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<tr>
<td>• Opportunity to listen and to be heard.</td>
</tr>
<tr>
<td>• Learning about perspectives of others and reflection on one’s own view.</td>
</tr>
<tr>
<td>• Deepening of mutual understanding.</td>
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<tr>
<td>• Not a search for agreement or solutions.</td>
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<table>
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<tr>
<th>GUIDELINES</th>
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<tr>
<td>• No interruptions.</td>
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<td>• Share the floor.</td>
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<tr>
<td>• Observe time frames.</td>
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<tr>
<td>• Can “pass” if you don’t want to speak.</td>
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<tr>
<td>• Speak from experience and from the heart.</td>
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<tr>
<td>• Use “I” statements.</td>
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<td>• No “cross-talk.”</td>
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Students then elected to adopt the suggested guidelines. In retrospect, more discussion about students’ fears about difficult conversations and the development of our group’s own guidelines might have simultaneously prevented some of the difficulties we experienced and provided practice in responding to anticipated or actual dysfunctions in the process. As in the mediation process, to the extent the parties successfully negotiate and “own” the process, they model (and perhaps foreshadow) a similar result with respect to substance.

At one point, when students were standing in various quadrants of the grid, one student said to another in the extreme opposite corner: “I
can’t believe you’re standing there. You’re the problem—and people like you.” This statement and its tone clearly violated both the spirit of the conversation (“respect others”) and the guidelines that were adopted treated, the discussions are a far cry from frank conversations about the feelings and experiences of students regarding these sensitive topics.

Wearing academic spectacles makes it easy to distance oneself from

The facilitators might have paid greater attention to the ‘no cross talk’ rule to allow participants to share ideas and feelings without fear of being attacked or judged.

(“use ‘I’ statements”). More time on the spirit and guidelines would have paid off!

The facilitators might have paid greater attention to reinforcing the “No Cross-Talk” rule drawn from the conversational practices traditionally used in many meetings. When the group adopts this norm, members can share their ideas and feelings without fear of being attacked or judged.

How we (should have) ended. Even with three hours for the dialogue at Cardozo, we ran out of time. We were unable to process reflections on the dialogue from the perspective of various participants. This was a mistake. Dialogues on sensitive topics raise strong feelings. Because it is unlikely that classes could exceed three hours, it is important to carve out the last portion of class time for closure. With hindsight, we would have reserved at least 20 minutes for wrapping up. We could have asked participants to comment on what the dialogue was like for them or on one idea or feeling they would take away from the conversation. We also should have left five to 10 minutes for written feedback.

Frank dialogues about sensitive topics

Most instructors of alternative dispute resolution methods discuss power imbalance, stereotypes and prejudice, and they examine the consequences of racial, gender and economic disparities. Unfortunately, too few instructors of traditional law school courses examine such issues as they are often implicitly expressed in the law. Even when the issues are

ENDNOTES

1 CONSTRUCTIVE CONVERSATIONS ABOUT CHALLENGING TIMES: A GUIDE TO COMMUNITY DIALOGUE, PUBLIC CONVERSATIONS PROJECT (2003) (the “Guide”), available at website noted in the box below.

2 Id.


SELECTED RESOURCES FOR FACILITATORS

• Public Conversations Project. Web: www.publicconversations.org/pcp/index.asp.


• The Program on Intergroup Relations, University of Michigan. Web: www.umich.edu/~igrc/.


Students at Cardozo described the exercise as ‘very’ and ‘absolutely’ worthwhile.

Similarly, students at Howard found the classroom discussion to be an effective way to process feelings of anguish and rage.
Unauthorized Practice of Law Charges

A risk for lawyers representing clients in mediation and arbitration in a multijurisdictional practice environment

BY SARAH RUDOLPH COLE

The increasing prevalence of ADR processes and multijurisdictional practice raises the risk that lawyers may face unauthorized practice of law (UPL) charges when they represent clients in arbitration or mediation. UPL statutes, which exist to prohibit lawyers from practicing in jurisdictions where they are not licensed, are designed to protect the public from substandard service offered by unregulated lawyers. Moreover, UPL statutes regulate the legal profession and protect the integrity of the judicial system. As dispute resolution has grown, more and more lawyers represent clients in dispute resolution processes outside the jurisdiction that licensed them. Not surprisingly, opposing counsel in some of these processes allege that an unlicensed lawyer’s participation in the ADR process constitutes the unauthorized practice of law. Courts have struggled to come up with a uniform response to such allegations.¹

Whether representation of a client in a dispute resolution process might be the unauthorized practice of law first arose in the context of arbitration. In a seminal case from California, Birbrower v. Superior Court, the California Supreme Court held that two New York lawyers engaged in the unauthorized practice of law when they prepared a California client for an arbitration that would take place in California.² Reasoning that negotiation and preparation for arbitration involve strategizing and providing legal advice about California law, the court concluded that preparation for arbitration was the practice of law. The California legislature repealed the Birbrower holding by enacting legislation that permits a lawyer not licensed in California to represent a client in a California arbitration if she submits credentials to the parties and the arbitrator and maintains local counsel.³

Despite the passage of this reform legislation, other jurisdictions followed the original Birbrower holding. In Ohio, for example, the Supreme Court held that out-of-state lawyers representing clients in arbitration engage in the unauthorized practice of law.⁴ In Alexi-cole, the lawyer was charged with the unauthorized practice of law when he provided legal advice to an Ohio client about filing a claim in arbitration for a securities law violation. The court found that an unlicensed attorney who offers such advice or provides “legal services, including the representation on another’s behalf during discovery, settlement negotiations, and pretrial conferences to resolve claims of legal liability” engages in the unauthorized practice of law. Moreover, the court stated, prohibitions against representation extend not only to arbitration, but also to any “other legal or quasi-legal proceeding, including any terms and conditions of a settlement of any dispute.”

Similarly, in Florida Bar v. Rapoport,⁵ a securities arbitration lawyer, who was not a member of the Florida bar, was held liable for engaging in the unauthorized practice of law because he gave legal advice, prepared and submitted claims, represented clients and advertised his ability to represent clients in arbitral proceedings in Florida. The court found that he was engaged in the “traditional tasks of a lawyer” and, therefore, was liable, even though his representation of clients occurred solely in arbitral proceedings.

Yet courts have failed to address UPL questions in dispute resolution proceedings in a uniform way. At least two courts have found that an out-of-state lawyer’s representation of a party in an arbitration is not a UPL violation.⁶ In Williamson, P.A. v. Quinn Constr. Corp., a federal district court applying New York law rejected the UPL charge, stating that because arbitration is “not a court of record; its rules of evidence and procedure differ from those of courts of record; its fact finding process is not equivalent to judicial fact-finding; it has no provision for the admission pro hac vice of local or out-of-state attorneys,” representing a client during arbitration is not a UPL.⁷ An Illinois court of appeals offered a more fulsome explanation for its finding that representing a client in arbitration is not the unauthorized practice of law in Colmar, Ltd. v. Fremantlemedia North America, Inc.⁸ First, the arbitration was connected to the lawyer’s regular representation of the client in the lawyer’s home state. Second, the arbitration did not involve questions of Illinois law. Third, the applicable arbitration rules permitted non-attorneys to represent parties in arbitration. Ultimately, the court held focusing on the underlying problem of representation in out-of-state dispute resolution proceedings—existing UPL laws do not fit well when the process is not litigation.

Only two courts have considered whether client representation during a mediation could constitute the unauthorized practice of law. In Fought & Co. v. Steel Engineering, an out-of-state lawyer worked with a Hawaii lawyer to prepare his client’s mediation position statement.⁹ In addition,
the out-of-state lawyer conducted legal research, analyzed opponents’ briefs and planned an appeal strategy. Unfortunately, in analyzing the UPL claim, the Hawaii Supreme Court failed to discuss separately whether preparation for mediation was a UPL. The court’s ultimate holding that the lawyer’s combined activities did not constitute the unauthorized practice of law under the Hawaii statute suggests that the Hawaii court would not have found that mediation preparation alone was the unauthorized practice of law.

The Indiana Supreme Court also addressed the question, albeit indirectly. In In the Matter of John M. Hughes, the court found that a lawyer engaged in the unauthorized practice of law when, in addition to appearing for and representing clients in mediation, an out-of-state lawyer represented clients in depositions, was listed on an Indiana law firm’s letterhead as “Attorney at Law” without a jurisdictional limitation, and the law firm’s answering machine identified the lawyer as a member of the firm.  

It is unclear from this opinion whether the Indiana court would have found the lawyer liable if the only activities he engaged in were the representation of clients during mediation.

Because the opinions considering whether out-of-state attorneys engage in the unauthorized practice of law when they prepare for or represent clients during mediation offer little guidance, a court confronted with the question would likely turn to the various arbitration decisions for assistance. While the processes differ, the underlying analysis, preparation and participation in both mediation and arbitration rely on the lawyer’s legal understanding of the merits of the underlying dispute. Moreover, courts have looked to arbitration precedent in mediation cases for guidance in the past. However, in light of the conflict among courts considering this issue in the arbitration context, examination of existing arbitration precedent seems unlikely to yield a clear answer.

Policy efforts to resolve this problem have been helpful. The popularity of multijurisdictional practice, together with the increased use of ADR and a growing number of cases involving UPL charges, led the ABA to develop a clearer definition of what practices constitute the unauthorized practice of law. The ABA addressed the question in its August 2000 ABA Report of the Commission on Multijurisdictional Practice, concluding that representing clients in ADR in a foreign jurisdiction is permissible. Model Rule 5.5 states:

a. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

... A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

2. are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

3. are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

4. are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

In drafting a rule that permits lawyers to represent clients in ADR proceedings, the commission reasoned that knowledge of jurisdictional law is less important in ADR proceedings because state and local law play a lesser role in arbitration and mediation than in litigation. Moreover, the commission believed, conducting the ADR process in a particular jurisdiction may have nothing to do with a desire to apply that jurisdiction’s law. Instead, it may be the most convenient location for multiple parties from different states or it may be the location of the parties’ chosen arbitrator or mediator. In those circumstances, the ABA concluded, the state’s need to control who practices law in a particular jurisdiction in order to protect citizens from counsel unfamiliar with the jurisdiction’s laws is not very strong and should yield to the parties’ interests in choosing their own counsel and/or neutral.

The ABA Report has been influential. Since the ABA Report was issued, 25 state supreme courts have adopted a rule either identical or similar to Model Rule of Professional Conduct 5.5. Although this is a promising development, lawyers must nevertheless be careful when engaging in multijurisdictional practice because half the states have not yet adopted legislation like Rule 5.5. Rule 5.5 is also limited in its scope. It does not protect, for example, some activities that an out-of-state lawyer might wish to engage in, such as an advertising campaign like the one at issue in Rapoport. Moreover, lawyers engaged in arbitration practice in states that have yet to adopt Rule 5.5 expose themselves to a significant risk of a UPL finding. In the absence of state efforts to enact legislation overturning these court rulings or amend existing pro hac vice rules to include representation in dispute resolution processes, the risk-averse lawyer should refrain from representing parties in jurisdictions where he or she
is not licensed. If the attorney wishes to go forward with representation in a state that has not adopted rule 5.5, she should first contact the state bar of ethics and/or the state commission on dispute resolution to obtain an opinion about whether such representation will be viewed as the unauthorized practice of law. While it would seem that mediation deserves different treatment than arbitration in this context because knowledge of legal rules is even less important in the typical mediation, the Hawaii and Indiana Supreme Court decisions suggest that a cautious approach to this issue would nevertheless be appropriate.

ENDNOTES

1 Williamson v. John D. Quinn Const. Corp., 537 F. Supp. 613 (S.D.N.Y. 1982) (unlicensed attorney could recover fees for representing client in arbitration because arbitration is not the practice of law); Disciplinary Counsel v. Brown, 61 Ohio Misc. 2d 792, 584 N.E.2d 1391 (Ohio Bd. Comm’rs on Unauthorized Practice of Law 1992) (New York attorney engaged in UPL when acting as arbitrator in Ohio cases in violation of local rule that required arbitrators to be members of the Ohio Bar; Missouri Bar Ethics Op. 970042 and 980042 (lawyer offering mediation services is not engaging in UPL).


3 Cal. Code Civ. Proc. § 1282.4. Although this provision will expire on January 1, 2007, the California legislature will likely consider legislation to make the law permanent. See Justin Kelly, Work Resumes to Protect Lawyers in California Arbitration, ADRWorld.com, February 8, 2006.


5 845 So. 2d 874 (Fla. 2003).


10 In the Matter of John M. Hughes, 833 N.E.2d 459 (Ind. 2005).


12 Other efforts are also ongoing. For example, the Florida Supreme Court recently adopted new regulations to govern the multi-jurisdictional practice of mediation. According to the regulations, an out-of-state attorney is not required to file for pro hac vice admission if representing a client in a private mediation, because such a mediation does not contemplate going to court. Fla. Bar R. 4-5.5 and Opinion. However, pro hac vice admission is required in the case of court-annexed mediations. See Fla. Bar R. 1-3.10 (appearance by non-Florida lawyer in a Florida court) or Fla. R. Jud. Admin. § 2.061 (foreign attorneys). Florida seems to be the first state to so explicitly deal with mediation and the unauthorized practice of law.

13 Model Rules of Prof’l Conduct R. 5.5

14 See Chart, State Implementation of ABA Model Rule 5.5 (October 4, 2005), www.abanet.org/cpr/lcr/5_5_quick_guide.pdf. Arkansas, Delaware, Indiana, Iowa, Maryland, Nebraska, Oregon and Utah adopted Rule 5.5. Arizona, California, Colorado, Florida, Georgia, Idaho, Louisiana, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Carolina and South Dakota have adopted a rule similar to Rule 5.5. Washington, Illinois, Mississippi, and Montana have recommendation pending in their respective highest courts to adopt a rule identical to rule 5.5 and New Hampshire and New York have recommendations pending in their highest courts to adopt a rule similar to rule 5.5. A number of states have committees formed to study the ABA’s recommendation to adopt rule 5.5. Washington, D.C.’s committee recommended adoption of the rule and Connecticut rejected rule 5.5.
NEUTRAL EXPERTS, STANDING NEUTRALS
Facilitating resolutions when parties rely on conflicting experts

BY ROBERT S. GLENN JR. AND C. ALLEN GIBSON JR.

MOST MEDIATORS, BY TRAINING, experience, intuition or a combination of all three, learn to identify the points of conflict within a dispute and focus on the resolution of those conflicts in order to achieve a settlement. Frequently, however, the major point of conflict in a dispute is not between the parties, but between the parties’ experts.

Too often, the experts’ opinions are diametrically opposed, and because each party is confident in its expert, one or both parties refuse to move toward a settlement that departs significantly from their own expert’s recommendation. To resolve this impasse, mediators are beginning to work directly with experts to facilitate resolution of these disputes.

In one method, the mediator recognizes that it is the experts, not the parties, who must be convinced to compromise. The mediator therefore hosts a mediation session directly with the parties’ experts. In the second method, the mediator attempts to find common ground by seeking the assistance of a neutral expert who will either serve as co-mediator, or who will review the evidence and submit a neutral recommendation to both parties. In the construction industry, parties are successfully retaining a standing neutral or board of neutral experts to help resolve disputes on an ongoing basis.

Types of expert conflicts
Conflicts between experts arise in many types of cases. In the construction context, engineers will be in conflict about the cause of damage or the scope of repair of construction defects, and contractors will be in conflict over the cost of repair. Particularly where these disputes involve homeowners and residential construction, the different positions taken by experts can be very problematic, because the parties tend to rely heavily on the opinions of the experts they have hired.

The same dilemma is presented in personal injury litigation. One physician will state that the injured party will need to have a certain kind of surgery, and another physician will opine that the surgery is not required. Likewise, in the medical malpractice context, the conflict of the parties’ experts can be the main battleground of the dispute.

In a myriad of other kinds of cases, experts are in conflict over causation, liability, standard of care, damages and future damages. The conflicts between experts are sometimes so fundamental that they are the primary inhibiting factor to resolution.

Mediate directly with experts
When it appears that the parties are intransigent because they are relying on the opinions of experts whose recommendations are significantly far apart, it can be useful for the mediator to work directly with the experts, rather than with the parties. If the parties and their counsel will consent, the mediator can conduct a session with just the experts to see whether there might be more common ground than would otherwise appear.

In a Georgia construction case involving two engineer antagonists, for example, the mediator invited the engineers to his office without counsel for the parties present and analyzed with them in depth their differing views on the scope of repair of the construction defects in issue. One of the ground rules of this session was that it was without prejudice to the parties’ arguments about causation, mitigation of damages and relative fault.

When working face-to-face with one another and speaking each other’s language, with the mediator as facilitator, these civil engineers were able to set forth a common scope of repair. They thereby eliminated a major point of conflict between the homeowner and the contractor whom he had sued.

Of course, the mediator will not always be familiar enough with the dispute ahead of time to recognize that this technique would be possible or even useful—perhaps not until he or she is involved directly in a mediation session with the parties that does not result in settlement. We suggest, therefore, that mediators think of this technique as another arrow in the mediator’s quiver, to be used when the circumstances present themselves, the parties are willing, and the experts are receptive.

Neutral third opinion
The second method of addressing conflicts between experts retained by the parties is to incorporate the services of an additional, neutral expert. There are at least two ways this can be done: (1) by using a neutral expert at the mediation session as a co-mediator, and (2) by referring a particular issue in dispute to a neutral expert for his or her views outside of the mediation session.

Neutral expert as co-mediator
Several years ago, a mediation occurred in Atlanta between the Internal Revenue Service (IRS) and
a corporate taxpayer. There were three mediators: a private mediator with process expertise, a law professor who taught taxation and an IRS staff mediator.

While the parties were caucusing privately, the mediators consulted with one another and suggested ideas and solutions to discuss with the parties. The private mediator, who was not a tax lawyer, kept the negotiations on track. The two tax experts proposed specific solutions, the combination of which ultimately led to a resolution of the dispute. In this manner, the tax professor and the IRS mediator supplied neutral substantive expertise to complement the experience and skill of the mediator.

There are numerous other instances in which an expert could be retained as a co-mediator to assist the mediator and to supply substantive expertise which, to the greatest extent possible, would be unbiased. In a construction case, for example, the mediator could retain a neutral engineer or a neutral expert on delay damages. In a business divorce, the mediator could retain a CPA to assist with the tax implications of proposed resolutions. In a divorce case, the mediator could retain a family therapist or a child psychologist to assist the parties in dealing with issues involving their children.

The list is endless. The only concerns would be the extra cost involved in retaining a neutral expert and the mediator’s need to have an adequate opportunity to prepare the neutral expert and advise him or her of the nature of the mediation process.

Hire independent expert. Neutral experts can also be employed for use outside of the mediation session. Opportunities to use a neutral expert frequently occur in personal injury litigation when the parties dispute some aspect of the plaintiff’s injuries.

The need for surgery can often be a source of dispute between conflicting experts. We know of an instance where a mediator was mediating a case involving a cervical disk injury. The plaintiff’s neurologist opined that the plaintiff would need surgery, and the defendant’s neurologist believed that he would not. Since the physicians were firm in their beliefs and each party credited his own physician, the mediation did not appear to be headed toward settlement.

The mediator suggested that he be authorized to retain a third opinion from a truly independent and neutral neurologist. When the parties agreed, the mediator set up the appointment with a neurologist and supplied her with the medical records agreed to by the parties. In that manner, the neurologist was not aware of the identity of either counsel.

After the neutral examination, the neurologist supplied her report to the mediator, who forwarded the report to counsel. Based on the report, the parties were able to settle the case. The use of neutral experts in this way can help settle difficult cases where the differing views of the retained experts are the main basis for an impasse.

Methods flexible, combinable

The techniques for mediating with the experts and using a neutral expert can be employed in combination. For example, in the construction mediation referred to above between a homeowner and a general contractor, the mediator invited the expert engineers to his office and mediated with them to establish a single scope of repair.

That single scope of repair was reduced to writing by the mediator, approved by both of the experts, and then submitted to a neutral contractor retained by the mediator for a repair estimate. The neutral contractor agreed that he would do the repair work for the amount of his estimate.

Using this technique avoided two levels of conflict that would otherwise have been present at the mediation: the conflict between expert engineers about the scope of repair and the conflict between expert contractors about the cost of repair.

Subject-matter experts on retainer

There are many other opportunities for a thoughtful, diligent mediator to utilize the substantive expertise of others to help parties resolve their dispute. The longstanding use of neutral experts in the construction industry is instructive.

Dispute review boards. Dispute review boards are one of the latest innovative techniques utilized by the construction industry to address project disputes in a timely manner. Construction projects are frequently prone to costly disputes that can arise during the course of a project and often disrupt progress of the work. Working relationships on a job can be adversely affected by contentious litigation while the parties are also trying to get a project built.

The first use of a formal dispute review board did not occur until the Eisenhower Tunnel project in 1975. The use of boards on large construction projects has grown dramatically since that beginning. A closer understanding of the structure and functioning of dispute review boards will provide a better foundation for exporting this very successful process to other industries.

The parties control the parameters for the board that will govern their business arrangement through their contract documents. Since the decision of the board is typically nonbinding, it is only one step in the dispute resolution continuum and must fit into the total dispute resolution process. In their contract, the parties can define how they want the board to function.

The number and specific qualifications required for each of the board members should be specified. Since the success of the process depends upon the weight the parties give to the board’s decisions, the substantive expertise of the board members will add credibility to their decisions. Therefore, it is important that any particular substantive requirements be specified in advance.

Typically, the most effective boards will operate with three members. Each party selects one member. Then, the third member is selected by the two party-selected members. In an effort to assure the true neutrality of the board members,
each party is usually given the right to object to a member proposed by the other party so that both parties have confidence in the expertise and neutrality of all members of the board.

In order to perform effectively, the board should start meeting at the very beginning of the project to give the members an opportunity to review the construction while it is in progress long before any dispute may arise. This advance knowledge of the process and procedures specific to the project is critical so the board can review any dispute in the context of the actual conditions on the project.

Regular meetings should be at the site so the board can review the progress of construction on a routine basis even if there are no apparent disputes. This allows the board to act much more quickly when a disputed issue is raised.

One of the great advantages of the board and its regular meetings is that it has the ability to informally address and assist in the resolution of issues before they become more significant problems. However, there should also be a more formal procedure established for the submission of disputes for board decision. Formal disputes should be submitted in writing with an opportunity for the opposing party to respond.

The parties with the most knowledge of the dispute are therefore presenting the issue to a board which also has substantive knowledge and experience with the project. The focus is on problem-solving, not blame assessment.

A dispute review board will generally issue written, reasoned decisions that are nonbinding. The parties may continue their negotiations with an understanding of the board’s analysis if the decision is not immediately accepted. This is consistent with the concept that the board exists to assist the parties in achieving their own resolution of the dispute.

Even though the decision is nonbinding, it is usually admissible in any subsequent proceeding. A well-reasoned, written decision by experts in the field that is admissible in subsequent proceedings will certainly encourage an unsuccessful party to negotiate a reasonable resolution before proceeding further with the dispute resolution process.

Since the board process is even less formal than an arbitration, it is also less threatening to the relationship between the parties. Attorneys are not necessary, which not only reduces the cost but may also help reduce the level of conflict between the parties.

Since disputes are dealt with at very early stages, the parties have not yet had time to harden their positions and they are more willing and able to continue negotiations to resolve the issues. Even highly technical issues can be quickly addressed by a knowledgeable, experienced board.

One of the great advantages of a dispute review board is that it can act in a pre-ADR role. If it is properly set up by the parties, it provides the opportunity for real-time resolution of issues on a project even before they become a “dispute.”

Although there is a cost associated with a properly functioning board, frequently the mere existence of the board encourages parties to resolve their disputes before reaching the stage of a formal submission. When compared to the cost of lengthy, time-consuming arbitration or litigation, the costs of a dispute review board are small and a project with no litigation is a huge success.

Standing neutrals. An alternative to the board is a standing neutral, an individual with substantive expertise particular to the specific type of project. Like the board, the standing neutral can provide practical suggestions to help resolve technical disputes and can be vested with the power to make decisions that resolve any disputes between the parties.

As with boards, the standing neutral structure and services should be defined in the contract. These will include the frequency of meetings, requirements for submission of disputes, the degree of formality for any meetings, the effect of any decision and the neutral’s compensation.

One significant advantage to using a standing neutral is the cost savings associated with using a single person rather than a multiperson panel. In addition, if the standing neutral is not required to make regular visits to the project, the parties are only paying for services as they are required for any particular issue. Also, it is much easier to schedule one person for a hearing than it is to schedule a panel of three.

Finally, as with dispute review boards, the mere existence of a standing neutral will often help the parties come to a speedy resolution of an issue even before the dispute is presented for a decision.

Facilitate long-term contracts

The successful use of dispute review boards and standing neutrals in the construction industry provide great examples for other industries to capitalize on these innovative dispute resolution procedures. Any contractual arrangement that involves an ongoing relationship between parties over a period of time could profit from the use of a dispute review board or a standing neutral.

If the specific performance of one party is an issue, the speedy resolution of any dispute is critical to preservation of the relationship between the parties. It is not in either party’s best interest to defer resolution of the dispute until the conclusion of the long-term contract.

A long-term supply contract is an excellent example. Issues may arise regarding the timeliness of performance, changes in specifications, quality control issues, appropriateness of billings or payments, etc.

If the parties become embroiled in lengthy negotiations or, far worse, litigation, that can affect the manner in which the parties continue to address the contract. However, a standing neutral or board can provide an independent, neutral evaluation from people with specific expertise in the industry to help the parties achieve a speedy resolution.

In the marine industry, there are
frequently long-term relationships between parties involved in the transportation of goods across the sea or in the unloading and storage of goods at the destination port. The insurance for ships and their owners is usually obtained through a limited number of P&I Clubs which are mostly based in London.

These various business relationships are sometimes affected by the different nationalities and customs of the parties involved in the contracts. Parties in the marine industry would be well served to have a standing neutral or dispute review board make a nonbinding recommendation to help resolve a pending dispute.

Long-term charter arrangements involving the leasing of marine vessels is another relationship that could benefit from these procedures. Issues may arise regarding maintenance, seaworthiness or damages, for example, and the parties should consider the use of an independent neutral with substantive expertise to assist them in resolution of any such disputes. Fair and efficient resolution of those disputes can only tend to help the long-term business relationship.

The vast proliferation of information technology and the desire of businesses and the education system to maintain their technology systems at the highest levels has led that industry segment to adopt long-term contracts for the installation and maintenance of information technology systems. These contracts often require performance over a significant period of time, during which the technology can, and often does, change.

Disputes may arise regarding the integration of systems, need for upgrades, timeliness of implementing technology changes, costs of such changes, immediate need for revisions and improvements. These are all issues that can be addressed cost effectively by neutrals with substantive expertise in the field and are best addressed as they arise rather than waiting for the problem to become entrenched.

Another area where dispute review boards or a standing neutral could be put to good use is in tort litigation areas involving mass torts or catastrophic losses. Although these are noncontractual disputes, if the victims are well defined and the potentially responsible parties are easily identified, establishment of a board or standing neutral to evaluate claims and make recommendations may help all parties achieve fair and speedy settlements while avoiding significant costs of litigation. While this process may be more difficult to implement, parties or counsel involved in these catastrophic loss situations should look for creative ways to resolve these disputes.

Mediators who are asked the question: “Do you need substantive knowledge as well as procedural expertise?” now have an answer—“No.” Using the techniques discussed above, an effective mediator can access the substantive knowledge of neutral, subject-matter experts to help resolve the impasse created when the parties are relying on experts whose opinions are too far apart to facilitate settlement.
BOOK REVIEW

Integration, Not Fractionation
BY MICHAEL WHEELER


This is an ambitious and impressive book. Ambitious because it strives to do nothing less than define and integrate the essential elements of negotiation. Impressive because even though that goal is likely beyond anyone’s reach, The Negotiator’s Fieldbook is a significant advance in that direction.

Andrea Kupfer Schneider, who teaches law at Marquette University Law School, and Christopher Honeyman, a mediator and arbitrator, are credited as the volume’s editors, though that label does not do them justice. Their book’s 80 chapters are largely original. (That number, incidentally, is not a misprint. It is indeed four score, a figure that reflects the scope of a wide range of disciplines and contexts including law, psychology, behavioral economics, and ethics.

The “second-generation” contributors stimulate a fresh look at negotiation, one that draws on the latest insights from a wide range of disciplines including law, psychology, behavioral economics, and ethics.

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chapters in hand, where should the book begin, with theory or with practice? And if with theory, should economics be given primacy or psychology? Or if with practice, should transactional negotiation come first or dispute resolution? Any starting point implies a point of view that inevitably colors all that follows.

Schneider and Honeyman address the sequencing issue explicitly in their introduction and invite their readers to consider different paths through their book. You could follow the table of contents (the one printed in the book) from beginning to end, by starting with a series of conceptual essays on frames and ethics, and then move on to selections on identity, mindfulness, and culture. With that under your belt, you would then move on to psychological issues, multiparty dynamics, and finally, on-going learning.

But the editors have also posted alternate tables of contents on the web (http://www.abanet.org/dispute/publications/negotiatorsfieldbook.html), tailored to the interests of different sorts of readers. There are sequences for litigation, public policy, employment disputes, international negotiation, and interpersonal negotiation. One suggested route is designated as a primer while another is for those who have “Seen it All.”

In short, although the book is conventionally printed and bound, readers are invited to delve into it as if it were hypertext, finding their own way and making appropriate connections across disciplines and topics. As a further navigational aid, the hard-bound version of the book includes a useful annotated table of contents that identifies broad themes in each chapter and suggests links across different selections. Each module, in turn, is “scaled” (to use the editors’ term) so that conceptual chapters appear early, and more specific applications follow, though many of the more theoretical pieces also include case illustrations.

The sheer breadth of the volume means that some material will be unfamiliar even to experienced negotiators and scholars. Rather poignantly, the editors include this caution:

“Some will find one chapter too academic, some will find another too practical. Certain chapters may seem difficult, or strange. We hope you will try them out anyway—they may be the ones that years from now you most remember, as having provided you with a whole new way of looking at an issue.”

For example, rather than reproducing well-known findings on decision biases like anchoring, the editors instead give attention to the emerging field of positive psychology. A chapter called “Miswanting,” by Chris Guthrie and David Sally, distills current research on so-called impact bias, our natural tendency to overestimate how much joy success will bring us (and correspondingly, how much misery will accompany failure). People are thrilled when they win the lottery or earn a job promotion, of course, but the feeling of elation proves more transitory than expected.

This research has unsettling implications for negotiation theory. How can we rationally plan for negotiation if our priorities before getting to the table do not necessarily match our preferences when the deal is done? Guthrie and Sally note that this impact-bias problem is compounded for lawyers negotiating on behalf of others. On one hand, an attorney is obliged professionally to respect her client’s interests, but on the other, she cannot “turn a blind eye to the very real possibility that her client is mistaken about what he really wants.”

Material in some other chapters is more compatible with conventional negotiation theory. For example, the classic text Getting to Yes advises negotiators to “invent options for mutual gain,” but offers little detailed guidance on brainstorming beyond the important advice to temporarily suspend judgment while ideas are generated. Jennifer Gerard Brown’s chapter on “Creativity and Problem-Solving” fills this void by drawing on work outside the field of negotiation. She notes, for example, how simple wordplay techniques such as shifting emphasis within a sentence can reframe a problem and how humor can stimulate creativity. Some techniques for sparking creativity may seem counter-intuitive, but when disputants get stuck, it can be helpful to ask them to generate bad ideas for resolving the conflict. Whatever the obvious shortcomings of wild proposals, they may also contain the kernel of a good solution.

Fieldbook readers who venture beyond their usual territory will be rewarded. It would be a mistake, for example, to skip over Sanda Kaufman’s chapter “The Interpreter as Intervener” simply because you do not do international work. While she cites diplomatic examples of important issues getting lost or contorted in translation, at its core, her essay exposes the inherently slippery nature of language. Even when we try to say what we mean, others may hear something quite different. And in negotiation, of course, words often mask real meaning. Like most of the other chapters in the book, Kaufman’s essay is rich with references to both academic and practitioner literature, including Ambrose Bierce’s definition of language: “The music with which we charm the serpents guarding another’s treasure.”

These few examples reflect the broad topical and disciplinary range of the book. It also includes chapters on persuasion, power and powerlessness, avoidance, lawyer advocacy, and negotiating through email just to name other areas not typically covered in standard texts. There is especially good relational material on identity and ethics.
In their introduction, Schneider and Honeyman sought to address three different audiences. For readers engaged in everyday negotiation, they hoped the book would be “a working tool that can help you figure out quickly what went wrong in yesterday’s meeting, and how to fix it in tomorrow’s follow-up.” To others more broadly interested in peacemaking in communities and the world at large, they suggested that the Fieldbook could serve as a handy reference book. And to their colleagues studying and teaching negotiation, they offered the volume as a challenge, “an assertion that in the future, all relevant disciplines must be included in negotiation textbooks and courses . . .”

Even with the helpful annotations and cross-references within the many chapters, however, readers of any stripe must ultimately put the pieces together to construct their own comprehensive model of negotiation. That is no easy task. It is one thing to broaden our awareness, to take into account insights and techniques from fields beyond our own. On this score the Fieldbook makes a valuable contribution.

It is still another to integrate concepts, especially when some of them seem contradictory. For example, Guthrie and Sally’s essay on miswanting concludes with the advice that lawyers need to eschew “extreme paternalism on one hand and extreme anti-paternalism on the other in favor of a more balanced approach to legal counseling,” but exactly where should that balance be struck?

Peter Adler’s provocative essay, “Protean Negotiation,” (after Proteus, the shape-changing son of Poseidon) addresses the paradoxical nature of negotiation: “[S]killed negotiators seem to be able to reconcile the tensions of inconsistent and confusing impulses that may attend cooperative, competitive, moral or pragmatic approaches to negotiation. They have agile minds and ecumenical temperaments. In an instant, they can undertake some kind of emotional and intellectual diagnostics, calibrate expectations, and reflexively adjust to their approach. Paradox is neither distasteful nor uncomfortable for these people.”

Adler’s observation recalls F. Scott Fitzgerald’s comment that “[t]he test of a first-rate intelligence is the ability to hold two opposed ideas in mind, and still retain the ability to function.” As Fitzgerald’s own troubled life testifies, he was on the outside looking in. It is one thing to recognize in others the ability to move beyond either-or dichotomies, but quite another to achieve this competence ourselves.

Some selections in the Fieldbook do grapple with the challenge of applying theory to practice. In particular, the essay by Scott Peppet and Michael Moffitt, “Learning How to Learn to Negotiate,” should be valuable both to classroom teachers and to practitioners seeking to learn from experience. They cite extensively the pioneering work of Chris Argyris, who distinguished single- and double-loop learning. The former is a process of trial and error. When something does not work, we try a succession of other things until something else does.

Double-loop learning is more sophisticated. It requires stepping back and critiquing the assumptions, habits and modes of thought that led us to choose our initially unsuccessful strategy. Single-loop learning can produce incremental adjustments, but real mastery requires double-loop learning. As Peppet and Moffitt note, however, many of us are reluctant to examine our own thinking and behavior. Much of what we espouse in principle (collaboration, for example), we do not always do in practice.

True learning in negotiation is all the more difficult since we get such poor feedback. At best we know only our own interests and options and have but a glimmer of other parties’ priorities. As a result, we can seldom know if we maximized potential value or got a fair share of whatever pie was created. Likewise, we can judge the relationship only from our point of view. When our counterpart smiles as we shake hands, is that out of the pleasure of doing business with us or from relief at finally being able to escape our company?

Admitting that it is hard to know when we have been smart at the bargaining table, however, is not an excuse for just winging it in negotiation. If anything, the complexity of the process argues for the importance of knowledge. Even if a unified field theory is not within our grasp, awareness of the territory newly illuminated by the Fieldbook of Negotiation can make us all better practitioners, students and teachers.

ENDNOTES

1 The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator 3 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

2 Id. at 281-282.

3 Id. at 540.

4 Id. at 1.

5 Id. at 2.

6 Id. at 282.

7 Id. at 24.
U.S. Supreme Court asked to review “manifest disregard,” “essence” tests

The U.S. Supreme Court has been asked to consider whether “manifest disregard of the law” by an arbitrator is an appropriate ground to overturn an award under the Federal Arbitration Act.

John Hancock Life Insurance Co. petitioned the court for a writ of certiorari in July to review the Fourth Circuit’s opinion in Patten v. Signator Ins. Agency (441 F.3d 230, 4th Circ. 2006). In March, the federal appeals court vacated an arbitrator’s award that had dismissed the claims of a former insurance agent on grounds that they were barred by falling outside an implied one-year time limit in the employment contract.

John Hancock is appealing to the Supreme Court on grounds that the Fourth Circuit’s reliance on an arbitrator’s “manifest disregard of the law” and failure to draw an award from the “essence of the agreement” fall outside of the scope of review allowable under the FAA. “This Court has never squarely addressed the appropriateness of the ‘manifest disregard’ doctrine, nor has it ever decided whether the ‘essence’ doctrine constitutes grounds to vacate an award under the FAA,” the petition says.

The “manifest disregard” standard came from dicta in the Supreme Court’s ruling in Wilko v. Swan, 346 U.S. 27 (1953). John Hancock says application of the standard is “in complete disarray” and asks the court to resolve the conflict between circuit courts “by reviewing whether such nonstatutory merits review is permitted at all under the FAA, and if so, what standards should govern such reviews.”

Further, John Hancock suggests that the “essence of the agreement” standard, created by the court in the Steelworkers trilogy in 1960, has wrongfully been extended from the Labor Management Relations Act context to disputes governed by the FAA.

Florida Supreme Court creates point-based system to certify mediators

The Florida Supreme Court in May established two ways that mediators may be certified in the state, including a point-based system that will be the only way to become certified after Aug. 1, 2007.

The first option, available only until Aug. 1, 2007, is a degree-based system. Requirements include mediation training programs, observation of mediations, conducting mediations and good moral character. For mediators seeking certification in circuit court, in family cases or in dependency cases, the requirements include either a law degree or a relevant master’s or doctorate as well as professional experience.

The point-based option requires that mediators accumulate 100 points over a number of areas. For example, a J.D. is worth 30 points in the education area. In the mentorship category, observation of mediation is worth five points per session, and supervised mediation is worth 10 points per session. Points are also awarded for participation in certified mediator training sessions.

The new system was proposed by the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy, which said the system was proposed “to provide applicants with more flexibility in obtaining certification and to increase the diversity of the mediation profession in Florida.”

Order AOSC06-9 of the Florida Supreme Court formally enacted the changes in May, which went into effect on Aug. 1. For more details on becoming a certified mediator under the revised standards issued by the Florida Supreme Court, go to www.mediationtrainingcenter.com/certification.html.

Section creates Standing Committee to advise on Revised Model Standards for Conduct of Mediators

The American Bar Association Section on Dispute Resolution has created a Standing Committee on Ethical Guidance to issue advisory opinions on the Revised Model Standards for Conduct of Mediators that the section adopted last year.

Michael Young and Geetha Ravindra, the co-chairs of the section’s Standing Committee on Ethics, will also serve as co-chairs of the Committee on Ethical Guidance. The 12-member committee, which includes academic members, commercial practitioners and state ADR program administrators, plans to start issuing opinions as early as this Fall.

A subcommittee of the Section’s Ethics Committee has also been created to create a database of ethics advisory opinions relating to mediation from the states. Paula Young, a professor at Appalachian School of Law, will co-chair the subcommittee.

“It is extremely easy, especially for new mediators, to find themselves trying to resolve a host of ethical dilemmas relating to the mediator’s impartiality, party self-determination and confidentiality of the process,” Young said. “We hope the work product of these committees will enhance professionalism in the field and provide much needed resources for all mediators who face ethical dilemmas in practice.”
Class arbitration ban is unconscionable in lending case, NJ High Court says

The New Jersey Supreme Court overturned bars on class arbitrations and class-action lawsuits in August, finding that such bars were unconscionable and acted as in a way that would effectively exculpate the lenders from scrutiny under state consumer protection laws.

In Muhammad v. County Bank of Rehoboth Beach, Delaware, 2006 WL 2273448, the court overturned trial and appeal court holdings that had found the class bars enforceable. The appellant, who took out a $200 loan in 2003, was charged 608.33% annual interest and soon owed $180 in finance charges. She claimed the lenders’ actions violated New Jersey’s Consumer Fraud Act and civil usury laws.

The loan agreement, however, included a clause that required all disputes to be “resolved by binding individual (and not class) arbitration.” The contract also included an “agreement not to bring, join or participate in class actions.”

Justice Jaynee LaVecchia, writing on behalf of five of the court’s seven judges, said that such a waiver was “unconscionable whether applied in a lawsuit or in an arbitration.” The court said that class actions provide a remedy to litigants who are seeking small amounts of damages, and that bars on class actions create “incentive problems” for individual litigants.

“The difficulty lies in the fact that her individual consumer-fraud case involves a small amount of damages, rendering individual enforcement of her rights, and the rights of her fellow consumers, difficult if not impossible,” LaVecchia wrote. “In such circumstances a class-action waiver can act effectively as an exculpatory clause.”

Because clauses that could exculpate a party from duties imposed by statute are void and against public policy, the court found that the class bar could not stand. As a remedy, the court said the offending clauses should be severed and the otherwise valid arbitration agreement should be enforced.

The court noted that nothing in New Jersey’s arbitration law requires that claims only be brought by individuals, and it suggested that parties and arbitration forums can create rules to govern class arbitrations in the future.

“What class arbitration is in its infancy and may provide a fertile ground for establishing flexible class-action procedures,” LaVecchia wrote.

No nationwide service or enforcement of arbitrators’ summons, 2nd Circuit rules

The Federal Arbitration Act does not call for nationwide service of process and enforcement of arbitrators’ summons, according to a ruling by the 2nd U.S. Circuit Court of Appeals in June.

Section 7 of the FAA gives arbitrators the power to issue summons to people to testify as witnesses, and summons can be enforced by the district court in which the arbitrator sits. In Dynegy Midstream Services v. Trammochem, 451 F.3d 89 (2006), the court considered whether the Southern District of New York court could compel a witness in Houston, Texas, to testify in an arbitration.

Because arbitrators’ summons under the FAA are supposed to be administered in the same manner as subpoenas, the 2nd Circuit looked to Federal Rule of Civil Procedure 45. The court found that the rules have “clear territorial limitations” and thus overturned the enforcement order of the district court, finding no personal jurisdiction over the Houston company.

“The parties to the arbitration here chose to arbitrate in New York even though the underlying contract and all of the activities giving rise to the arbitration had nothing to do with New York; they easily could have chosen to arbitrate in Texas,” Circuit Judge Rosemary S. Pooler wrote. “Having made one choice for their own convenience, the parties should not be permitted to stretch the law beyond the text of Section 7 and Rule 45 to inconvenience witnesses.”

Kansas Appeals Court says failure to mediate can be grounds for summary judgment

Failure to mediate contract disputes until after homebuyers filed a lawsuit against the seller is grounds for summary judgment, the Kansas Court of Appeals ruled in July.

The contract in question in Crandall v. Grbic, 138 P.3d 365 (2006), contained a clause that said all disputes must be submitted to mediation under the Homesellers/Homebuyers Dispute Resolution System. The homebuyers, seeking damages under the Kansas Consumer Protection Act, brought suit against the seller, but later attempted to mediate after the seller filed a motion for summary judgment.

“To allow the plaintiffs to attempt mediation to avoid summary judgment after defendant had devoted time and money defending their suit is unreasonable,” Chief Judge Gary Rulon wrote for the court.
Several state bar associations have joined the American Bar Association in opposing legislation that would discourage settlement of lawsuits by permitting state and local governments to challenge existing consent decrees to which they are a party.

S. 489, introduced by Sen. Lamar Alexander, R-Tenn., and H.R. 1229, introduced by House Majority Whip Roy Blunt, R-Mo., would authorize state or local governments to file a motion to modify or vacate a consent decree four years after the consent decree was originally entered or once the highest elected state or local government official authorizing the consent decree leaves office, whichever occurs first. Once a motion is filed, the burden of proof would shift to the party that originally sought the decree to demonstrate that continued enforcement is necessary to uphold a federal right. The legislation would also nullify consent decrees pending a ruling on a motion to modify or vacate if the court fails to rule on the motion within 90 days.

On April 25, the Pennsylvania Bar Association sent a letter Senate Judiciary Committee Chairman Arlen Specter, R-Penn., expressing opposition to S. 489 and H.R. 1229. The Illinois State Bar Association sent similar correspondence in April to Sen. Richard Durbin, D-Ill., who also sits on the Judiciary Committee. The views expressed by these state bars are consistent with those that the ABA conveyed to the Committee in March. The ABA and the Pennsylvania and Illinois bars strongly oppose the legislation on the grounds that it would discourage settlements, encourage unnecessary litigation, and overburden the federal courts.

On June 21, 2005, the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property held a hearing on H.R. 1229. Although the Senate Judiciary Committee planned to mark up S. 489 on several separate occasions, the bill was recently removed from the committee’s agenda and no further action is currently scheduled.

In response to concerns raised by the U.S. Justice Department, Alexander has prepared a revised version of S. 489, but that bill has not yet been formally introduced.

### House bill requires FEMA to use state mediation programs

In June, the House overwhelmingly passed broad national flood insurance reform legislation, H.R. 4973, containing provisions that would expand the use of mediation to resolve certain disputes involving flood claims.

H.R. 4973, sponsored by Rep. Richard Baker, R-La., would require the Federal Emergency Management Agency (FEMA), upon request of a state insurance regulator, to participate in state mediation programs designed to resolve flood disaster claims. The bill would also require FEMA to coordinate its activities with state insurance officials and insurers for the purpose of consolidating and expediting the settlement of claims under the national flood insurance program. In addition, the bill would protect the confidentiality of all documents produced during the mediation.

S. 3589, a companion measure sponsored by Sen. Richard Shelby, R-Ala., was approved by the Senate Banking, Housing, and Urban Affairs Committee on June 28. Although the mediation provisions in S. 3589 and H.R. 4973 are similar, the Senate bill also contains provisions not found in the House measure that require the mediators to be either an active member of the relevant state bar or a retired trial judge and to meet other specific criteria.

### Senate gives postal ADR bill stamp of approval

The Senate passed broad postal reform legislation in February that would expand the use of mediation to resolve labor disputes within the United States Postal Service while limiting the type of mediators eligible to conduct the proceedings.

H.R. 22, sponsored by Rep. John McHugh, R-N.Y., would modify existing law by requiring the Federal Mediation and Conciliation Service (FMCS) to appoint a mediator instead of a fact-finding panel as the first step in seeking a resolution of labor disputes. The bill would also require the parties to mediate the dispute and negotiate in good faith, and it specifies that the mediator must be “of nationwide reputation and professional stature” and a member of the National Academy of Arbitrators. In the event that mediation does not resolve the dispute, the bill would still require the use of arbitration boards to reach a binding resolution, but the bill would make several changes to the manner in which the members of the arbitration board are selected.

The House approved its own version of H.R. 22 last year. Now that the House and Senate have passed different versions of the legislation, a conference committee will attempt to reconcile the two measures. Although both bills enjoy strong bipartisan support in Congress, the prospects for final passage remain unclear due to President Bush’s opposition to several provisions unrelated to ADR.

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*R. Larson Frisby* is a lobbyist working in the ABA Governmental Affairs Office. Copies of the legislation described above, or any other federal legislation involving ADR issues, can be obtained directly from the U.S. Congress’ website at [http://thomas.loc.gov](http://thomas.loc.gov), or by contacting the ABA’s Governmental Affairs Office at (202) 662-1098.
<table>
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<th>Location</th>
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<tr>
<td>Oct. 25-28</td>
<td>Philadelphia, Pa.</td>
<td>Association for Conflict Resolution Annual Conference</td>
<td>Association for Conflict Resolution 1015 18th St., NW Suite 1150 Washington, D.C. 20036 Telephone: (202) 464-9700, ext. 210 E-mail: <a href="mailto:cherold@acrnet.org">cherold@acrnet.org</a> Website: <a href="http://www.acrnet.org/conferences/ac06">www.acrnet.org/conferences/ac06</a></td>
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<tr>
<td>Nov. 3-4</td>
<td>Malibu, Calif.</td>
<td>Southern California Mediation Association's 18th Annual Conference</td>
<td>Southern California Mediation Association 1430 S. Grand Ave., Suite 256 Glendora, CA 91740 Telephone: (714) 258-8363 E-mail: <a href="mailto:scma@scmediation.org">scma@scmediation.org</a> Website: <a href="http://www.scmediation.org">www.scmediation.org</a></td>
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<tr>
<td>Nov. 3-4</td>
<td>Portland, Ore.</td>
<td>The Oregon Mediation Association Fall Conference</td>
<td>Oregon Mediation Association P.O. Box 2952 Portland, OR 97208 Telephone: (503) 872-9775 E-mail: <a href="mailto:omediate@teleport.com">omediate@teleport.com</a> Website: <a href="http://www.mediate.com/oma">www.mediate.com/oma</a></td>
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<tr>
<td>Nov. 15-17</td>
<td>Madison, Wisc.</td>
<td>Wisconsin Association of Mediators Emerging Issues in Mediation</td>
<td>Kris Bruns PDAS, Mediation Conference 313 Lowell Center 610 Langdon St. Madison, WI 53703 Telephone: (800) 442-4617 E-mail: <a href="mailto:kbruns@dsc.wisc.edu">kbruns@dsc.wisc.edu</a> Website: <a href="http://www.dcs.wisc.edu/pda/hhi/mediation/conference.htm">www.dcs.wisc.edu/pda/hhi/mediation/conference.htm</a></td>
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<tr>
<td>Nov. 30–Dec. 3</td>
<td>Boston, Mass.</td>
<td>Harvard Negotiation Insight Initiative Winter Wisdom Workshop</td>
<td>Cristin Martineau 1563 Massachusetts Ave. Cambridge, MA 02138 Telephone: (617) 495-7711 E-mail: <a href="mailto:cmartin@law.harvard.edu">cmartin@law.harvard.edu</a> Website: <a href="http://www.pon.harvard.edu/research/projects/hnii/workshops.php">www.pon.harvard.edu/research/projects/hnii/workshops.php</a></td>
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<td>Feb. 21-24, 2007</td>
<td>New York City, N.Y.</td>
<td>3rd Annual ABA Section of Dispute Resolution Program Arbitration Training Institute</td>
<td>ABA Section of Dispute Resolution 740 15th St. NW Washington, D.C. 20005 Telephone: (202) 662-1680 Website: <a href="http://www.abanet.org/dch/committee.cfm?com=DR011000">http://www.abanet.org/dch/committee.cfm?com=DR011000</a></td>
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<td>Feb. 23, 2007</td>
<td>New York City, N.Y.</td>
<td>ABA Section of Dispute Resolution Program Construction Mediation Training</td>
<td>ABA Section of Dispute Resolution 740 15th St. NW Washington, D.C. 20005 Telephone: (202) 662-1680 Website: <a href="http://www.abanet.org/dch/committee.cfm?com=DR010500">http://www.abanet.org/dch/committee.cfm?com=DR010500</a></td>
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Because most agree that creativity and humor are effective in resolving disputes, we test our readers’ mettle with an occasional cartoon captioning contest. Submit as many captions for the above illustration as you wish. All entries are judged by Professor John Barkai of the University of Hawaii School of Law, and the winners will be published in the next edition of Dispute Resolution Magazine.

Mail, fax or e-mail your entries to:

Professor John Barkai  
University of Hawaii Law School  
2515 Dole Street  
Honolulu, HI 96822  
Fax: 808-956-5569  
E-mail: barkai@hawaii.edu

"If you reject my offer, I’ll go ape."  
—Charles Craver

"In the future, when bidding for our vacation rental online, if the seller promises, “Guaranteed isolation and ocean-front views in paradise,” you might want to clarify some terms.”  
—Robert Sherman

"... and then, in jest, I said, “Judge, the only way this case is going to settle will be to put us on a desert island until we come overcome our differences.”  
—Jay G. Taylor

"I’ve started a great new business - Message in a bottle Dispute Resolution."  
—Jason Kaneyuki

“When I said I wanted to negotiate on neutral ground I didn’t mean this neutral.”  
—Jamie Sheu

“Don’t you think this is a bit extreme for breaking an impasse in a two-arbitrator panel?”  
—George Friedman

“How long can we keep going without a neutral?”  
—David M. Sobel

“See what happens when you give up control over the outcome?”  
—Ed Shapiro

“Do you think they would consider meeting us half-way?”  
—Brian Tierney

Chortles Welcome Here  
Have a funny ADR anecdote?  
The Lighter Side welcomes submissions.  
Send them to drmagazine@abanet.org.