From Dr. Strangelove to Mahatma Gandhi: Understanding Mediation through Film
By Susan Hackley

Using Video to Teach Negotiation and Mediation
By Dwight Golann

Tort Reform Renews Debate Over Mandatory Mediation
By Richard C. Reuben

Another View of Mandatory Mediation
By Frank E.A. Sander

From the Chair

Illustrations (p. 5, 9): Bob Schuchman
(p. 40): Jeff Dionise

The Lighter Side

Index of Articles
By Authors, Spring 1994-Summer 2006 (Volume 1-20)
Courage. One rarely associates courage with alternative dispute resolution. But it takes courage to settle cases. Many negotiators find it so much easier to accept an adverse ruling from a judge or arbitrator than to take personal responsibility and justify a reasonable settlement that they voluntarily negotiated. As the old adage in business goes, “No one ever got fired for buying a Xerox.”

Courage was on display in a highly publicized case in Washington, D.C. In Cobell v. Kempthorne, 455 F.3d 301 (D.C. Cir. 2006), a class of individual Indian beneficiaries of a trust managed by the United States since 1887 sued the Interior Department for an accounting. They asserted a potential claim in excess of $100 billion. Acrimony has been redefined by the litigants. Civil and criminal contempt have been alleged against the defendants, including the past two Secretaries of Interior, their subordinates and numerous Justice Department officials. Last year, the D.C. Circuit reassigned the judge. The parties could not even agree on a mediation process agreement.

At the insistence of Congress, the parties were forced to accept mediation. Per the rules of engagement in this shotgun wedding, the mediators were charged not only with trying to help the parties reach a deal but also with reporting back to Congress if they did not. More than two years ago, they did, reporting that direct negotiations between the parties were hopeless. Ironically, despite the deeply divided fissures between Democrats and Republicans throughout Congress, the level of cooperation by the leadership of the relevant House and Senate committees put the litigants to shame. Subsequently, the mediators testified before a rare joint House and Senate hearing last year urging congressional action.

Now, that’s when the real negotiations began, where courage has been on display. Congress shares responsibility with the administration for managing the trust relationship that was established by statute in 1887 and by treaty throughout the 19th century. The legislators could have received the mediators’ report and left it to the courts to decide. Instead, last August they jumped in, demanded a meeting with the Attorney General and Secretary of the Interior, and all involved directed their staffs to craft legislation to resolve the dispute. While the draft legislation died in the last Congress, it was a serious attempt to deal with a very difficult problem without any promise of political gain. Despite changes in leadership after the election, the principals will be back when the new Congress reconvenes.

So why try to reach a settlement when there would be no personal gain for the congressional negotiators, who are notoriously shy from alienating key constituencies, especially during an election year? The answer was simple: they saw that settlement would be far superior to continued conflict in court. In the most public way, they demonstrated the courage to strive for settlement, even in the face of substantial political cost to themselves. It’s too early to know whether their legislation will ever be enacted, but the courage they demonstrated has lessons for those of us who advance settlement as a profession.

As mediators we perform many functions, but none may be more important than helping parties muster the courage to make the difficult decision to settle. Effective mediators have many tools to overcome these psychological barriers, the most effective of which may be just listening and allowing the disputants to express their fears and concerns about what resolution of the dispute will mean to them. While party autonomy must always be respected, a mediator who reality tests the parties’ positions as an honest broker of relevant information and who reminds parties of the consequences and alternatives of not reaching an agreement, can provide effective motivators toward settlement. Similarly, reframing potential outcomes from perceived “losses” to “gains” is another way we give disputants courage to make decisions. Controlling the process by setting reasonable deadlines can force a decision. And as we are learning from the Section’s Task Force on Improving the Quality of Mediation (more on that in another column), many parties expect mediators to adjust their style as the circumstances evolve and become more directive in their behavior over time. No one seems to want a mediator who just carries messages back and forth in a bucket.

In the final analysis, I am always reminded that mediation is a process that involves people who have fears and concerns that have to be addressed if they are to find the courage to settle their disputes. As mediators, we help them find their courage.
The MU School of Law’s Center for the Study of Dispute Resolution continues to be a leader in dispute resolution efforts across the country and around the world. The center repeatedly has won national recognition and attracted foundation grants and awards to support its efforts.

Our faculty features one of the largest groups of full-time law faculty who concentrate on dispute resolution, including nationally recognized experts in the field.

The Master of Laws (LLM) in Dispute Resolution degree program provides deep understanding and practical skills in dispute resolution. Students study with leading scholars who influence dispute resolution theory and practice around the world. The small classes, limited to students with law degrees, create a close feeling of community. LLM alumni now work in the U.S. and abroad in a variety of positions.

The Journal of Dispute Resolution — the oldest law school journal dedicated to dispute resolution — publishes an annual symposium issue focusing on critical issues in the field. Marc Galanter, Deborah Hensler, Carrie Menkel-Meadow, and Frank E.A. Sander have written lead articles for these symposia.

Since 1984, the University of Missouri-Columbia School of Law has led the way in fostering new approaches to lawyering and teaching efficient and fair methods to resolve disputes.
Diploma in International Commercial Arbitration
16 – 24 April 2007
Pepperdine University, California, USA

“Eclectic class - excellent content and stimulating subject matter.
Vastly impressed with the generosity of all the tutors. Excellent content and materials”
Peter Pether (Australia)

Professor Phillip Capper, Course Director, partner in Lovells international law firm and former Chairman of the Faculty of Law, University of Oxford with be assisted by a faculty of experienced international lawyers and arbitrators.

We are delighted to announce that Prof. Jack Coe, Straus Institute for Dispute Resolution, Pepperdine University School of Law and Tom Stipanowich, formerly of CPR New York will join the faculty in Pepperdine.

Further details are available on our website: http://www.arbitrators.org/Courses/DiplomaIntArb.asp
or from: Linda Austin - Email: laustin@arbitrators.org

ABSA Section of Dispute Resolution Presents
GOLIATH VS. GOLIATH
ORGANIZING THE CONSTRUCTION CASE FOR MEDIATION
February 23, 2007 | New York, New York

Designed for mediators at all levels and lawyers who represent clients in mediation, this program covers the issues relevant to construction mediation today: choosing the right mediator, advocacy during the mediation, dealing with insurance issues which form a key role in construction mediation and ethical considerations during the mediation process.

See www.abanet.org/dispute or call 202-662-1680 for more information.

Intercontinental The Barclay New York Hotel
111 East 48th Street
New York, NY 10017
212-755-5900
Everyday “dealmaking”

From the sublime to the silly, films let us sit in a darkened theatre with a wide screen and immerse ourselves in a situation of conflict. Well-produced films have excellent production values and high drama, and a surprisingly wide range of films can be used to highlight negotiation lessons. When I look at films through the lens of negotiation, I can analyze how people do—or don’t—handle conflict productively. Films also provide excellent material for teaching about negotiation in a wide range of contexts, including executive education, in-house trainings, graduate student courses, and seminars at conferences.

Many people think of negotiation—too narrowly in my view—as what happens when diplomats hammer out agreements or businesspeople put a deal together. In fact, a whole host of problem-solving strategies, including mediation, conflict assessment, consensus building, and dispute system design, all live under the umbrella term of negotiation.

Moreover, negotiation is part of the “dealmaking” of everyday life, and films are rich with illustrations. When someone asks for a promotion, starts a family discussion on how to care for an elderly parent, or gathers support for a community project, he or she can employ the same skills that are helpful when diplomats negotiate a ceasefire or businesspeople negotiate a merger. Staying above the fray, digging for underlying interests, seeking creative ways to satisfy both parties—these and many other strategies can help us negotiate better.

Negotiation is part of the “dealmaking” of everyday life, and films are rich with illustrations. Someone who asks for a promotion can employ the same skills that help diplomats negotiate a ceasefire.

Films retelling historic events are particularly powerful. *Joyeux Noel* is an Oscar-nominated foreign film that relates a real-life event in World War I, when French, German and Scottish soldiers in the trenches on Christmas Eve lay down their rifles and connected as human beings. Sharing music, photos, stories and food, and playing soccer, the soldiers effected an informal truce. From a negotiation perspective, it is fascinating to observe how soldiers—in the midst of a war—signaled their intentions and willing-

**From Dr. Strangefellow to Mahatma Gandhi: Understanding Negotiation through Film**

BY SUSAN HACKLEY

We are involved in negotiations all day long whether we like it or not, so we can do ourselves a favor by learning how to prepare for and manage them. One reason I love to go to the movies is that I can watch and learn from how others deal with conflict. How did a guy taken hostage in a bank robbery, about to be shot, manage to talk his way free and escape? How did the mother with the surly teenage son get him to take his little sister trick or treating on Halloween? What could the whistleblower have done to salvage his job while still telling the truth about what was happening in his organization?

Susan Hackley is managing director of the Program on Negotiation at Harvard Law School (PON). She oversees all operations, including PON’s interdisciplinary activities, research projects, education programs, and public events. She can be reached at shackley@law.harvard.edu.
ness to cooperate and through these acts were able to turn from violence to armistice, at least for a short time.

When I hear complaints that it’s impossible to stand up to seemingly overwhelming forces, I think of the film Gandhi, which transported viewers into the life of one of the iconic figures of the 20th century. Mohandas Gandhi (played by Ben Kingsley) is a lawyer in South Africa who confronts racism by developing a philosophy of satyagraha, a negotiation strategy of fighting oppression with nonviolent means.

Gandhi helped people reframe their situation, which seemed hopeless, into a “peaceful struggle,” saying, “We will not fight, and we will not comply.” Speaking of their oppressors, who held political power, Gandhi said, “They are not in control. We are. That is the strength of civil resistance.” Gandhi’s savvy and principled negotiation strategy inspired Martin Luther King, Jr., and Nelson Mandela. As Albert Einstein famously said, “Generations to come . . . will scarce believe that such a one as this, ever in flesh and blood walked upon this earth.”

Another true story inspired the film Remember the Titans, in which a high school football coach (played by Denzel Washington) in Alexandria, Va., has to figure out how to integrate his team when the two local high schools—one black and one white—are forced to merge. The coach skillfully uses a variety of negotiation techniques to get buy-in from his players, their parents and the community. He takes the anger and racial tensions on both sides and channels this potentially negative energy into a shared desire to win the championship.

Yet another true story, Hotel Rwanda, tells how hotel manager Paul Rusesabagina (played by Don Cheadle) managed to save hundreds of Tutsis from genocide as they sought refuge in his hotel. Nearly every scene is a lesson in intense negotiating under fire. Dealing with corrupt generals, warlords, the Belgian firm that owns his hotel, United Nations peacekeepers, hotel staff, and his own family, Rusesabagina desperately and skillfully adapts to changing circumstances, making deals to keep people alive one more hour through persuasion, threats, bribery and stealth. This film is a master class in negotiation.

The negotiation scene between the father and the wedding planner in Father of the Bride is wonderful to use when talking about cross-cultural negotiations.

**The Fire Next Time** is a documentary film chronicling two years in the life of a dangerously divided town in northwest Montana where hate and intolerance manifest themselves in a community polarized by rapid change, economic displacement, and environmental controversy. I used this film recently at the Program on Negotiation to open up a discussion with a group of young women from the Middle East, who were visiting the United States for a week of seminars organized by Empower Peace. The young visitors from the Middle East connected with the dilemma of the young people from Flathead Valley, Mt., who also lived in the midst of dangerous conflict and who found their own ways of coping and helping.

In *Dr. Strangelove: Or How I Learned to Stop Worrying and Love the Bomb*, the United States and Soviets are faced with imminent mutual destruction. With black humor, director Stanley Kubrick runs through cold war scenarios and shows how “failsafe” mechanisms could ultimately fail. Faced with war, a U.S. president scolds his general and a Soviet diplomat who are quarreling, saying, memorably, “Gentlemen, you can’t fight in here; it’s the war room.” The president even proposes shooting down his own military planes as a way to signal to the Soviets that he is committed to avoiding war. Commitment strategies are an important arrow in the skilled negotiator’s quiver.

A favorite negotiation scene of mine comes from *Father of the Bride*. In the scene, the father, a prosperous, confident business owner played by Steve Martin, accompanies his wife and daughter to their first meeting with the wedding planner. He cautions them, “Let me do the talking, I negotiate better than you.” He hadn’t confronted the likes of Franck, however, a hilarious character played by Martin Short. Franck quickly out-negotiates the father through a variety of tactics, which include speaking a “language” that only the mother and daughter fully understand, dividing and conquering by building a coalition against the dad, making the dad feel ridiculous for expressing his concerns, and presenting the components of the wedding as separate big-ticket items the dad can’t say no to, even though his overriding concern is to “keep costs down.” This scene is wonderful to use when talking about cross-cultural negotiations.

**Various uses of film**

We have used film clips at the Program on Negotiation at Harvard Law School (PON) to tune up graduate students in negotiation trainings as they prepared to begin a two-day exercise of advising “clients” who were going through a divorce. We wanted the students to take their role seriously, keeping in mind that divorce is a painful experience, particularly when the divorcing couple has children. Clips from such films as *Mrs. Doubtfire*, *Boyz N the Hood*, and *Ordinary People* showed
parents handling their divorces both poorly and well. Empathy is an essential quality for a good negotiator.

Similarly, when teaching negotiation theory and skills to Chinese business people, government officials, and other professionals during a series of workshops in Hong Kong and on mainland China, I included a segment on negotiating within an organization—how to feel heard when expressing a minority opinion.

I showed a 17-minute excerpt of a made-for-TV movie that re-enacted a meeting held the night before the ill-fated launch of the Challenger in 1986. The meeting shows NASA and Morton Thiokol managers wrestling with the decision of whether to launch, given the cold temperatures predicted for the next day. Though they had different pressures weighing on them, all shared a common goal: to have a safe and successful space shuttle mission. How they came to make the wrong decision illustrates many key points relating to negotiation.

For example, the person presenting the non-conforming view—not to launch—was not prepared to make an effective argument and had not gathered support ahead of time. In addition, the participants had not agreed on a good process for how to make the decision of whether to launch. People at the meeting had trouble dealing with their strong emotions, the intense time constraints, and the institutional pressure to go forward with the launch.

Showing this film clip and then inviting comments opened up the Chinese negotiation workshops in intriguing and unexpected ways. I alluded to a news story about a train in Japan that had crashed, killing more than 100 people, because the engineer had been afraid to be late, even by only 90 seconds, and so chose to travel at unsafe speeds. Some Chinese participants related similar pressures in their own organizations and talked about the trauma and learning that occurred in 2003 during the SARS epidemic in Hong Kong, when decisions were made to cover up the outbreak and try to control the media.

Discussion led to talk about whistle-blowers and how to create an organization where people with different views can feel safe expressing them. What could the man with the dissenting view at the NASA meeting have done? He could have prepared more extensively, found allies, collected better data, spoken more persuasively, and, finally, been willing to walk away.

Author Walker Percy suggests in his novel, The Moviegoer, that a place becomes real or “certified” only when perceived on the wide screen in a dark movie theatre. Certainly films can bring conflicts into sharp focus and help us engage viscerally. And that can help us think more deeply about how we would negotiate in highly-charged and complex situations.

The PON Film Series

At the Program on Negotiation at Harvard Law School (PON), we use film to engage students, faculty and the public in discussions about a broad range of negotiation and conflict issues. We show documentary and feature films, and even short films and clips from television shows, to dramatically illustrate particular teaching points or to broaden a discussion. We’ve used FBI hostage training films and the Marx Brothers film A Night at the Opera to talk about the importance of effective communication.

We’ve shown films that prompted lively exchanges about coming out as a gay person to one’s parents, being persuasive as a member of a jury, and effectively advocating for a mentally impaired client. The film February One showed how “four college freshmen changed the course of American history” by sitting in at lunch counters in the South in 1960 and re-galvanizing the civil rights movement.

The PON Film Series has over the past five years showed nearly 40 full-length films on campus and occasionally at the Harvard Film Archive and other public venues. Following each film, a PON associate leads a discussion, drawing out lessons—often not obvious—relating to negotiation.

In addition to showing films, the PON Film Series also acknowledges filmmakers whose works increase understanding of negotiation and conflict transformation.

Danis Tanovic is a Bosnian film director who won an Oscar for best foreign film in 2001. He spoke at PON about his film No Man’s Land, which shows the harrowing predicament of two soldiers—a Bosnian and a Serb—trapped in a trench between enemy lines. When UN peacemakers, journalists and others try to help, the soldier’s impasse becomes a riveting international spectacle. Like Kubrick’s Dr. Strangelove, No Man’s Land artfully illustrates the absurdity of war.

Another filmmaker, Don Mullan, visited PON to talk about the film, Bloody Sunday, made as a result of his account of the day in 1972 in Derry/Londonderry, Northern Ireland, when British paratroopers fired on a civil rights march, killing 13 protesters and wounding many more. This haunting film recreates the day’s events—shown from both sides. The film had an historic impact, resulting in the decision of the British government to reopen the investigation into what happened on Bloody Sunday 30 years earlier. Another film, An Unreliable Witness, follows a British journalist who returns to Derry/Londonderry to give testimony at the reopened inquiry.

Films echo life, and life is illuminated by film. Looking at movies through a negotiation lens is a powerful tool for understanding negotiation.
Practice and critique are the keys to acquiring any skill, including the ability to bargain and mediate. Before trying something new, however, most of us find it helpful to watch an experienced person do it. This article looks at how teachers can use video and commercial films to enhance their instruction of ADR skills.

Video vs. role playing

A teacher can demonstrate ADR techniques effectively through a live demonstration. Why then take on the complication of video? First, video is more efficient—the trainer needn’t worry about managing an improvisational skit, and can concentrate on teaching goals. In addition, video allows a trainer to focus on a specific behavior—if the topic is how to handle a first offer, there is no need to role play from the start of the process. Video also has no nasty surprises, as when an actor misses the point of the exercise or a session drags on, chewing up scarce class time. In sum, video allows a teacher to cut to the chase, and to know how the chase will turn out.

Video has other advantages. Gen Xers reared on the web find it very natural to learn from viewing video. Also most people cannot remember more than a few minutes of an intense interaction, and as a result, most of a long demonstration is usually wasted. With video, the trainer can present a lengthy segment in short, digestible bites and interrupt repeatedly for reflection or discussion. Although role plays can also be stopped and started, doing this can disorient amateur actors.

However, role playing also has advantages. Done well, a live role play has the spontaneity and reality of improvisational theater, and students usually enjoy seeing how well classmates can pull off a role. By comparison, some older ADR videos have wooden acting, although newer, less scripted videos tend to be much more realistic. Another advantage is that role plays can be customized to match teaching needs; doing this with video requires a large library of selections. One downside to role play is that participants occasionally fail to appear, throwing a teacher’s plans into disarray, but videos are susceptible to equipment glitches.

Whichever medium you use, keep in mind that it is a way to enhance teaching, not the teaching itself. To be effective, both video and role playing must be integrated with good substantive instruction.

Using video effectively

Teachers use video for several purposes.

Examples of good practice. Most videos are created to explain a professional skill such as integrative bargaining, or to display a process such as family mediation.1

Comparisons. Some videos show different professionals performing the same role, which allows students to compare approaches. A DVD might, for example, show neutrals using different strategies, or transactional lawyers and litigators negotiating the same case.2

Another option is to compare excerpts from different videos. I introduce students to the issue of mediator style, for example, by showing brief scenes of different mediators at work. After each excerpt I ask students to classify the neutral’s style on Leonard Riskin’s well-known grid. To make the comparisons run more smoothly, I have copied the excerpts onto a single tape.3 (I should note that this article is not intended to give advice about copyright law, and that my own practice is limited to copying short excerpts from tapes I own.)

Discussion launcher. Video can be used to stimulate discussion of practice or legal issues. James Coben, for example, tapes skits based on recent court decisions concerning ADR issues. The videos are used to prompt discussions among lawyers at an annual bar meeting, then placed on the web for downloading.4 Similarly a recent DVD presents a series of vi-
gnettes of practice situations, prompting viewers to discuss what the players should do. I have produced an ABA video that shows lawyers attempting to “spin” mediators, which I use to stimulate discussion of representation in mediation.

Role-play launcher. Video can also be used to launch a live role-play exercise. A trainer might, for instance, want students to practice listening to disputants. It is hard, however, for trainees suddenly to step into the role of an angry party. Showing a few minutes of a bitter quarrel on video makes it easier for students to play an emotional litigant. Viewing an upset person enables students to extrapolate from what they see, and it seems to give them license to act unreasonably themselves.

Aid to memory and morale. Movie clips can generate emotional reactions that help fix substantive points in viewers’ minds. To make film effective for this purpose, says Steven Rosenberg, the excerpt must make the substantive point well, must be inherently interesting, and must fit smoothly into the flow of teaching. A trainer might also show a movie excerpt to revive a tired group, much as a neutral will put out cookies in the midst of a long mediation.

Student practice. Students can also videotape their performances. Marjorie Corman Aaron has students tape themselves mediating both effectively and poorly, and then prepare a memo analyzing what they have demonstrated. Gerald Williams has developed a system that allows students to film themselves negotiating with borrowed cameras, then analyze the video with software that allows them to “tag” interesting excerpts and post the results on the web. A teacher or assistant can then review and comment on the excerpts. Alternatively, teachers can simply have students tape and review their own performances. With participants’ permission, I also show videotaped student performances in my teaching.

Assessment. Videos can also be used for testing and self-assessment. Marjorie Aaron sometimes tests competence by asking students to analyze video excerpts outside of class. Peter Robinson shows videos mid-way through a training to build confidence, finding that students often react to filmed examples by saying, “I can do that.”

Using commercial films

Some trainers prefer to use commercial films rather than professional videos. Films’ greatest advantage is that they have good production values and acting (albeit with a bias toward drama and aggression). Using movies can also generate a spark of excitement, as students recognize a familiar scene, and what had been mere entertainment suddenly takes on new meaning. But don’t assume that students will recognize your favorite film from the 1970s—or even the 1990s.

Commercial films can also serve to illustrate cultural views and myths about the nature of conflict. Robert Benjamin sees movies as both reflecting and perpetuating cultural attitudes. He and Peter Adler use film to help people observe conventional wisdom about bargaining, conflict management, and approaches to problem solving.

Some have raised the concern that commercial films provide more bad examples than good ones. The quality of movie negotiators varies greatly, and scenes of mediators working effectively with legal disputes are especially difficult to find. An example is the awful mediation session that leads off The Wedding Crashers. Richard Reuben deliberately shows bad examples and then teaches against them, asking students what they think of what they have seen, what they would do differently, and how they might coach the character to do better.

Movies can also convey lessons in a lighthearted way. If students are unwilling to engage in step-bargaining over money because they see making an “insincere” offer as inconsistent with being an honest person, I show a brief excerpt from a Monty Python film, The Life of Brian. In that episode a fugitive being hunted through a bazaar by Roman soldiers tries to buy a disguise quickly at full price, only to be forced by a merchant to engage in comical haggling as the soldiers close in. My purpose is to suggest that one can see distributive bargaining not as an expression of one’s inner soul, but rather as a cultural necessity or even a game.

Challenges of implementation

The first challenge in using video is selecting which portions to use. Most videos last for 30 to 60 minutes. Few viewers can watch that much footage and remember the details of what they have seen. In addition, long stints of watching may encourage passivity, leading students to think that the goal is simply to copy an expert’s technique. To avoid this, a teacher needs to think hard about what to show. The comment attributed to a famous writer, that if he had had more time he would have written a shorter letter, applies here as well: Less is more. I rarely show more than five minutes of video without a break.

By stopping videos for discussion, I try to convey the message that professionals should constantly assess what they are observing. I ask students what they have seen, whether they agree with the approach taken by a bargainer or neutral, and what they would do next in the situation. Students can then observe what professionals in the video did, and the outcome of the tactic.

There is one important caveat, however. My temptation, both in making and using video, is to show people doing something. As a result, I risk shortchanging an important quality of mediation, which is slow exploration and careful listening, often with a great deal of repetition. The same problem can occur with depictions of negotiation, especially in fast-paced commercial films. Learning to listen at length—not intervening but remembering what you have observed—is an important skill. Although recent ADR videos have become longer, most are too short to show this key aspect of good practice.

Many ADR videos also interrupt themselves repeatedly to present mini-lectures (“What you just saw was
A Website for Using Videos to Teach ADR

A special website has been created for this article, www.law.suffolk.edu/pubs/VideoTeaching. It contains the following items:

General Resources:
- Law Teachers’ Suggestions of Videos to Use to Teach ADR Skills
- Information about the Videos Mentioned in the Article Endnotes

Individual Recommendations:
- R. Benjamin and P. Adler, Reel Negotiation: The Good, the Bad, and the Ugly: Reflections of Negotiation and Mediation in Film
- J. Coben, 2006 Script for Video Production
- Hamline University List of ADR Training Videos
- L. Malley, Movies and Mediation
- S. Rosenberg, Classroom Use of Movie Clips or Banishing Boredom: How Hollywood Can Help
- P. Young, Film Clips Illustrating ADR Concepts and Syllabus with Film Clips
- G. Williams, Summary of Filming Project

Avoiding technical glitches

To use video effectively you will need to keep in mind some technical issues.

What viewer will you use? A VCR or DVD player with a TV, a laptop with a projector, or web-based media? TVs are simplest and most reliable, but large audiences cannot watch a single ordinary-sized TV. Projectors are capable of showing a much larger image, but are also more vulnerable to technical glitches.

What form of storage? You can load hours of video into an ordinary laptop, eliminating the need to juggle tapes or DVDs, but then must carry the laptop with you.

Will the DVD actually play? As explained below, inexpensively produced DVDs will not work in all players. This problem rarely occurs with commercial films, but it can be an issue with videos created by nonprofit organizations.

How do the projector and/or player work? Remember to become comfortable with them before stepping in front of an audience. Will you need a remote? If so, where is it and does it work? Don’t assume that a device controls the piece of equipment on which it happens to be lying.

Does the projector have a speaker? Some suppliers, thinking in terms of PowerPoint presentations, omit them. Is there a power cord that reaches from your optimal teaching spot to an outlet?

Are you in a foreign country? If so, get a plug converter. Laptops do not need transformers to deal with 220 voltage, but they do need to match the room outlet.

Will you be switching between media? For instance, will you move from PowerPoint to video and back? What buttons on the projector accomplish this?

Can you move quickly to the part of the video you want to show? VHS players can fast forward deep into a video very quickly, but many DVD players will jump only to designated “chapters” and from that point must be played at fast-forward speed. A DVD player’s fast forward may not be very fast, however, forcing a teacher to halt for several minutes to advance a DVD. Be sure to test for this ahead of time. Transferring video material from a DVD onto a laptop’s hard drive can allow you to jump to a desired spot almost instantly.

Creating your own video

Another option is to create your own video, which is not as difficult as it seems. It can be done for two basic purposes. One is to develop customized teaching content, such as a demonstration of a person negotiating the same dispute that the class is role playing. Video good enough to show at large conferences can be created by filming with a home video camera mounted on a tripod and editing on two VCRs. You can achieve a much more professional result by editing on a computer. However, unless you have a hidden yen to explore a new field, it’s probably best to hire a local techie or media-savvy student to do this work.

To hold down costs, I generally use amateur actors. I find that they can perform roles quite realistically if they are allowed to improvise from experience rather than recite from a script. It is wise to talk with the actors about what you want to demonstrate, or to give the actors a “shooting outline” in advance. (A sample outline created by Jim Coben appears on the article website.)

Negotiators and mediators, to a greater extent than persons playing parties, are often concerned that they will make an embarrassing mistake. To deal with this I give players the right to delete any footage they find embarrassing—although no one has ever asked to do so. It is also useful to insert a disclaimer at the start of the video: “The actors in this video are playing roles intended to demonstrate....” One other suggestion: Resist the temptation to use cute names, inject jokes, or overplay emotions. The goal should be to make the viewer believe that he is witnessing a real interaction. Exaggeration sabotages that effort.
By making liberal use of university equipment and operators, relying on amateur actors, and paying moonlighting rates for editing, a teacher can create a professional-quality video for a few thousand dollars. I was able to create a two-hour DVD requiring hundreds of video edits for less than $1,500. Using commercial services from start to finish, however, can cost $25,000 to $50,000. One area in which you should not take a bargain-basement approach is in the final production, or “burning,” of a DVD. The cost can vary from less than $100 to nearly $1,000, but cheaply-burned DVDs will not play on all players, making the video unreliable to use. It is prudent to pay more to be assured of wide compatibility.

In conclusion, video enriches instruction, energizes students, and contributes to learning. With only a little practice, you can integrate it seamlessly into your teaching.

ENDNOTES

1 For example, Mediators at Work: Breach of Warranty? and Mediators at Work: A Case of Discrimination? shows David Hoffman and Margaret Shaw, respectively, conducting caucus-based mediation. Saving the Last Dance presents Gary Friedman using non-caucus techniques. Information about acquiring the videos mentioned in this and other endnotes may be found on the website created for this article at www.law.suffolk.edu/pubs/VideoTeaching.

2 Negotiation of a Commercial Lease, for example, juxtaposes short clips of positional and integrative bargainers. Representing Clients in Mediation: How Advocates Can Share a Mediator’s Powers shows different neutrals mediating the same commercial dispute, and The Case of Willy shows three mediators dealing with a divorce case.

3 The only video I have seen that combines excerpts from other tapes is The Teaching DVD. It presently is available only to teachers who adopt the Folberg, Golann, Kloppenberg and Stipanowich text Resolving Disputes. The tape excerpts on the DVD are listed on the article website.


5 The video is Mediating a Sexual Harassment Case: What Would You Do?

6 The video is Representing Clients in Mediation. The ABA also distributes Advanced Arbitration Insight 20/20, which presents procedural issues that arise in arbitration.

7 An excellent fight between business partners leads off the The Hackerstar Negotiation. Another good example appears in Mediation: Techniques for Positive Solutions.

8 Prof. Rosenberg’s description of how he uses film clips appears on the website for this article.

9 For more information, see Prof. Williams’ memo on the website for this article.

10 Robert Benjamin finds Hotel Rwanda, Thirteen Days and Apollo 13 especially useful for demonstrating effective bargaining concepts. An article on this topic by Benjamin and Peter Adler appears on the website.

11 Mediators at Work: A Case of Discrimination? contains 90 minutes of footage of a commercial mediator in an employment discrimination case. The Purple House presents 75 minutes of footage of transformative technique in a housing association dispute, interspersed with an equal amount of discussion by commentators.

12 The video Representing Clients in Mediation is offered both in an original and a Teacher’s Cut version that eliminates commentary.

13 The video is The Teaching DVD.
3rd Annual ABA Section of Dispute Resolution Program

ARBITRATION TRAINING INSTITUTE
A COMPREHENSIVE TRAINING IN COMMERCIAL ARBITRATION

FEBRUARY 21-24, 2007 | INTERCONTINENTAL THE BARCLAY NEW YORK | NEW YORK, NEW YORK

WHO SHOULD ATTEND?

Attend this training if you are planning a career move to arbitration
Attend this training if you are an experienced arbitrator or advocate wanting to better understand recent issues in arbitration
Attend if you are a litigator wanting to better utilize arbitration

WHY SHOULD I ATTEND?

Learn from top arbitration academics, advocates and practitioners who will share their experience, insight, expert advice and best practice tips
Network with seasoned practitioners about the finer points of arbitration
Stay current with the ever changing world of arbitration

WHAT PAST PARTICIPANTS SAID . . .

“The materials and speakers were as much as any attendee could hope for.”
“Best course of this nature I’ve attended. Great balance of theory and practice.”
“Enjoyed camaraderie with other attendees, I would highly recommend this program to other ADR professionals.”

PLANNING COMMITTEE

Co-Chairs
Richard Chernick, Los Angeles, CA
Paul Dubow, San Francisco, CA

Committee
Mary A. Bedikian, East Lansing, MI
Ruth V. Glick, Burlington, CA
June Lehrman, Los Angeles, CA
John R. Phillips, Kansas City, MO
Stephen G. Yusem, Philadelphia, PA

COOPERATING ORGANIZATIONS

The Association of the Bar of the City of New York
Brooklyn Law School (pending)
Federal and Commercial Litigation
Section of the New York State Bar Association
CPR: International Institute
for Conflict Prevention and Resolution
Benjamin Cardozo School of Law
Kukin Program for Conflict Resolution
John Jay College of Criminal Justice
ABA Section of Tort Trial
& Insurance Practice
ABA Section of Litigation

SPONSORS

JAMS
College of Commercial Arbitrators
National Arbitration Forum

For more information go to the ABA Section of Dispute Resolution web site at: www.abanet.org/dispute
Despite the rise of the Democrats during the midterm elections, tort reform can be expected to continue to be an important topic at both the state and federal levels. This is significant for dispute resolution, because a number of the reform measures being discussed include mandatory mediation requirements for many, if not most, civil cases.

I see this possibility as both salutary and troubling. It is salutary in that it acknowledges the important place ADR has come to have in our system of justice. Just think about it: 25 years ago, few legislators had even heard of mediation, or if they had, they might have thought it was some kind of California fad, nothing to be taken seriously. Now often conservative legislators are including mediation in measures intended to fix what they perceive to be wrong with the civil justice system. This is good. More importantly, mediation is bringing to disputants the capacity to have their legal problems solved in ways that produce potentially better outcomes and are more satisfying for participants.

These legislative measures are troubling, however, because they often include mediation not as an option for disputants to consider, but as a mandatory requirement or condition for proceeding to trial. To me this approach is less desirable and has the capacity to threaten the integrity and utility of mediation as a truly alternative dispute resolution process.

Arguments for mandatory mediation

Mandatory mediation has been a part of the dispute resolution landscape for many years. Under it, parties who file claims with the courts are required (either by legislative command or court rule) to use mediation to attempt to resolve the dispute before they will be permitted to proceed to trial. Without question, mandatory mediation has contributed mightily to the institutionalization of ADR in the United States today, and a number of arguments have been advanced to justify it.

1. Mandatory mediation is efficient because it reduces judicial caseloads. It has long been argued that the civil courts are overburdened, and that many of the cases that are filed in courts are not worth judicial resolution either because they are essentially private matters that provide little guidance to others, or because these disputes are better addressed in other processes that can bring more flexibility in decision-making than rule-bound courts. Mandatory mediation helps courts by diverting these cases to alternative forums while still preserving the right of the parties to return to the judicial forum if they are dissatisfied with the results of mediation.

2. Mandatory mediation encourages lawyers to use mediation. The central idea of this argument can be summed up by the punch line of a fast-food commercial of the 1970s: “Try it, you’ll like it.” Indeed, there is some empirical research to suggest that experience with mediation is the best predictor of the willingness of lawyers to recommend mediation to their clients.1 In this sense, mandatory mediation serves an educational, even remedial, purpose, and has been particularly important in the institutionalization of ADR because the private bar has historically been much more reluctant than the bench to use alternative, nonjudicial processes to resolve legal disputes.

3. Mandatory mediation provides shelter for lawyers with unreasonable clients. One of the biggest contributions of the ADR movement during the last 30 years has been to help disputants get over the idea that to settle is a sign of weakness. This notion is particularly challenging when dealing with clients, who rightly expect their attorneys to represent them zealously. Many clients confuse zealousness with contentiousness, however, and a mandatory mediation program gives their lawyers a reason to get their clients into the room without giving the appearance of weakness and undermining their clients’ confidence in them.

4. Mandatory mediation brings the parties into the legal negotiation process. Negotiation has long been the backbone of legal dispute resolution, but this is negotiation that often has been between the attorneys, with clients ultimately approving or disapproving the results of the negotiation. Mandatory mediation furthers procedural justice values by bringing parties into the actual negotiation of legal disputes by permitting the clients to tell their stories (or hear their attorneys tell them), and by providing an environment for the consideration of the parties’ interests that is at least theoretically even-handed and dignified.

All of these are significant reasons to support mandatory mediation. There are, however, a number of arguments against mandatory mediation, which I divide into two categories: the standard arguments, and my additional concerns.

Standard arguments

1. Mandatory mediation interferes with trial access rights and denies due process. Courts have generally not been receptive to these arguments, on the theory that these important rights are only delayed, not denied.2

2. Mandatory mediation contradicts the consensual nature of the process. For many, part of the strength of the mediation process, and a crucial element of its enforcement power, is the desire of people to be there to begin with, to resolve their problems according to what best suits their interests, needs and concerns rather than according to the dictates of law or the likelihood that a given position will prevail. Party self-determination is the prime directive

Richard C. Reuben is an associate professor at the University of Missouri-Columbia School of Law, and the Editor of Dispute Resolution Magazine. He can be reached at ReubenR@missouri.edu.
in mediation, and in this view, forcing people to be in a dispute resolution process that they don’t want to be in is simply antithetical to the concept of self-determination.

3. Mandatory mediation allows for the exploitation of power imbalances. While trainings routinely include instruction on techniques to promote participation and self-determination by low-power parties, critics may reasonably raise questions about their effectiveness. We can say more confidently that unless power imbalances are skillfully handled, mediation can make them worse, with mediators actually, and perhaps unwittingly, reinforcing power imbalances. The classic example is the mediation of divorce cases involving domestic abuse or violence, in which the higher-power spouse sometimes can dictate the terms of the divorce in an environment that can be not only intimidating, but dangerous or even life-threatening. Under this argument, public courts should not be putting people in this position.

4. Mandatory mediation improperly pushes cases outside the public realm. There has been much discussion about the “vanishing trial” in recent years, a notion based on Marc Galanter’s highly publicized recent research indicating that trial rates are only about 1.6 percent of all filed claims. While this finding is probably good news for those of us in dispute resolution, we need to remember that this decrease in trials comes at a price. That price includes the diminished application of public law norms to past conduct and the loss of precedent to guide future behavior, as well as the limitation of opportunities for citizens to participate in the administration of justice. In my view, it’s important that we route away from trial only the cases that are more appropriately resolved by other methods of dispute resolution, not just “cases.”

Additional concerns

Several states have already taken significant steps in requiring the mediation of certain cases as a condition for proceeding to trial. In my view, that experience has not always been good. Here are some additional concerns.

1. Mandatory mediation undermines direct negotiation between the parties and their representatives. With mandatory mediation, parties have little incentive to engage in serious negotiation prior to the mediation. This situation is unfortunate because as salutary as the mediation process is as a vehicle for settling disputes, it still has to be viewed as a second-best alternative to the parties working things out themselves. That is real self-determination.

Mandatory mediation undermines this kind of self-determination at two levels. First, it preempts systemic efforts to teach people the skills they need to resolve disputes themselves. For example, many schools have enacted peer mediation programs to teach students how to serve as mediators in disputes among their peers. These programs are all to the good, but where are the programs that will provide training in the fundamentals of conflict and the basics of negotiation, training that would enable students to address disputes constructively themselves?

Similarly, mandatory mediation can also encourage weak lawyering because lawyers know that mediators can save them from having to press the more difficult issues themselves, either with opposing counsel or, worse yet, with their own clients (potentially raising questions about the lawyer’s commitment to the client’s cause).

2. Mandatory mediation creates collateral problems, such as the need for good-faith participation requirements and all the problems they create. When mediation is mandatory, attorneys who don’t want to be there have an incentive to use the process for strategic advantage in litigation rather than for true settlement. This opportunity can lead to the cynical use of mediation as a fishing expedition for discovery. It can also lead attorneys to see mediation as a procedural formality, which, like fishing expeditions, inspire both cynicism and resentment toward the mediation process and undermine its legitimacy.

Good-faith requirements are intended to reach this problem, but they also raise problems of their own, not the least of which is how to define good faith. It is said that in Florida, the informal rule is that you have to be in the room for 15 minutes to satisfy the obligation. Is this really good faith? As a result, we see things like the one-hour divorce mediation. We have to ask ourselves, is this really mediation?

3. Mandatory mediation can shift practice away from being a broader, interest-based alternative, and toward a narrower, more evaluative and more directive style of mediation.

Narrower, more evaluative mediation may be what some parties in fact want, and certainly has its place in the field. But it is a far cry from the effort by the movement’s pioneers to establish a truly alternative process—one that allows parties to use disputes to satisfy deeper interests, needs and concerns. It was this goal that gave the mediation movement its force and moral authority. It would be a shame to see mediation co-opted in this way.

4. Finally, mandatory mediation undermines the democratic character of governmental dispute resolution. In my view, when the government is involved in a dispute resolution process, that process ought to reaffirm and foster democratic values rather than undermine them. Mandatory mediation may be efficient, but especially when it operates without effective quality control, it can undermine the fundamental, transcendent democratic value of personal autonomy and potentially other democratic values.

Professor Frank Sander offers one response to these concerns about mandatory mediation, saying that one can be compelled into mediation but cannot be compelled to settle in mediation. This may be true, but a failed mediation can leave a lot of sensitive information on the table that can be harmful to the parties in subsequent litigation. Let us remember that part of the mediator’s job is to encourage hesitant parties to reveal this type of information. Moreover, some jurisdictions have at least informal reporting requirements that compel the mediator to tell the judge when parties are dragging their heels.
Such consequences do not inspire public confidence and trust in the mediation process, or in the courts and the rule of law more generally.

In my view, the benefits of mandatory mediation are not worth these costs, especially since voluntary programs can be constructed with sufficient incentives to ensure their use and to achieve the efficiency, educational and other benefits I have discussed. Mandatory mediation may have been appropriate, even necessary, as a remedial measure to get the ADR ball rolling when ADR was first introduced in the 1970s and 1980s. But the process is more mature now and capable of standing on its own two feet, without the crutch of court compulsion. In my view, the mediation community should resist the mandatory mediation tide and push the legislative embrace of mediation toward an incentive-based voluntary model rather than continuing with an involuntary model.

This of course raises the question of what to do if the mandatory tide can’t be turned. Being pragmatic, I think we should continue to take advantage of the momentum by being more purposeful about it and thinking through the design questions sooner rather than later. During the drafting process we should let legislators know the cons as well as the pros of mandatory mediation, and encourage them to consider the following questions:

1. What is the real goal of mandatory mediation? If it’s merely efficiency, then a one-hour divorce mediation makes sense. But is that what the dispute resolution community would want? Clarification of this question would provide crucial guidance for program designers charged with implementing the programs enacted by the legislatures.

2. How will mandatory mediation programs be funded, and will the mediators be paid? All too often these programs rely on volunteer mediators, who work for free for the experience, prestige or proximity to the court. This staffing model hardly inspires confidence in the system, and can distort the process. The use of mandatory mediation should not be just another justification for cutting judicial budgets. Program design, implementation and evaluation all have to be paid for, and the legislature should be prepared to do so if it going to compel people into mediation.

3. Should there be categorical exceptions for some cases, and if so, which cases?

4. Should parties be able to opt out? Most mandatory mediation programs have at least some basis under which parties may be relieved of the obligation to mediate, although standards vary widely. The concerns I have raised should counsel in favor of a more permissive standard.

5. What standards, if any, should there be for such participation? Nearly half of the states now have good faith requirements, although there is considerable variety in their structure. Is licensing more costly and is viewed by some as ultimately toothless? Is licensing more appropriate? For programs, given the important rights at stake in mediation and the dynamics of judicial self-interest in the efficiency of such programs, traditional principles of checks and balances counsel in favor of legislative or executive oversight of court-ordered mediation programs, in addition to internal oversight by the court.

6. What remedies should be available for misrepresentation, coercion and other defects in the mediation process? Professor Nancy Welsh has suggested a “cooling off” period. Are there other possibilities?

7. Should parties be given some autonomy over critical issues, such as who the mediator will be, the style the mediator will use, and whether caucuses will be permitted?

8. At what level should mediators and programs be accountable? For mediators, one possibility is to establish a government structure, like Florida’s, to consider ethical complaints against mediators. But Florida’s system is costly and is viewed by some as ultimately toothless. Is licensing more appropriate? For programs, given the important rights at stake in mediation and the dynamics of judicial self-interest in the efficiency of such programs, traditional principles of checks and balances counsel in favor of legislative or executive oversight of court-ordered mediation programs, in addition to internal oversight by the court.

9. What remedies should be available for misrepresentation, coercion and other defects in the mediation process? Professor Nancy Welsh has suggested a “cooling off” period. Are there other possibilities?

10. How will mandatory mediation programs be evaluated to assure they are meeting their objectives, and are not creating incidental problems? Even the best of programs can fail to meet critical objectives and may produce unintended consequences. Regular and public program monitoring and evaluation are essential to assure the effectiveness and legitimacy of mandatory mediation programs.

The forthcoming legislative consideration of mandatory mediation (as a part of the larger issue of tort reform) is important, and presents an opportunity for those who care about dispute resolution to educate legislators about it. We should take advantage of that opportunity, lest the opportunity take advantage of us.

ENDNOTES

1 See Nancy H. Rogers & Craig A. McEwen, Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations, 13 Ohio St. J. on Disp. Resol. 831, 845 (1998).


3 The complicated, contentious and long-unresolved debate over whether mediators should strive to ensure “fair” results in mediation is but one example of the field’s inchoate response to this issue.


6 For a discussion, see John Lande, Using Dispute Systems Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69 (2002). In 2004, the ABA Section of Dispute Resolution adopted a policy on good-faith requirements that can be found on the section’s web site at www.abanet.org/dispute/webpolicy.html#9.


What is mandatory mediation?

As is so often true in evaluating complex programs, much depends on their implementation. One needs to distinguish between giving judges or other court officials the power to order parties in appropriate cases into mediation, and a legislative mandate that certain categories of cases (such as all child custody disputes) ought first to go to mediation because of the belief that those kinds of cases would particularly benefit from an interest-based, collaborative resolution.

The distinction between these two approaches has important cost and administrative implications. The second approach (sometimes referred to as “categorical” referral) is all-encompassing and self-enforcing. For that reason such a statute should have an opt-out provision to allow a party to petition the court for good cause shown to be exempt from the referral to mediation, as might be appropriate, for example, in a case raising novel statutory or constitutional issues that should be heard by a court. The discretionary judicial referral to mediation is more labor-intensive but arguably is a fairer, customized use of mediation. To limit the burden on judges, the initial referral decision could be made by a magistrate or screening clerk.

What exactly is required?

Some statutes require the parties to mediate “in good faith.” Such provisions, though perhaps conceptually appealing, have proved to be difficult to apply, and hence productive of ancillary litigation. A better approach is to specify what is expected of mediation participants. For example, each party could be required to meet with the mediator and the opposing party, to be prepared to present its position and the reason for it, and then to react to the opponent’s demand. Parties could also be required to participate in the mediation for a specified minimum period of, say, one hour.

In addition, the statute should specify the consequences of failing to meet these requirements. It should also make clear that its thrust is to require the parties to meet and confer with the aid of the mediator, but not necessarily to settle the case.

What is the best case?

One conclusion that clearly emerges from the mediation research literature, is that parties find the mediation process satisfying, regardless of whether they reached an agreement. Yet, for reasons not entirely clear, parties do not yet in large numbers voluntarily choose to go to mediation. This finding supports the argument for compulsory mediation as a kind of temporary expedient, à la affirmative action.

One might think that if parties are compelled to mediate, there would be fewer settlements. The research suggests the contrary, perhaps because once the parties get into the process they are swept along by its power and forget how they got there initially.

Needless to say, a program of mandatory mediation should not be seen as a panacea for an ailing, overcrowded court system. Rather it should be viewed as one alternative procedure for appropriate cases (e.g., cases that hold promise for an interest-based approach).

Compared to what?

In light of the very small percentage of cases that are disposed of by trial, in most cases the alternative to mediation is unassisted negotiation, not adjudication. Which alternative is more likely to address serious power imbalances—unassisted negotiation or mediation? Far from discouraging direct negotiation, as Professor Reuben suggests, mediation helps parties to arrive at a better result.

Creating successful programs

In addition to the precise specification of the requirements discussed above, a key question is, “Who are the mediators in such a program?” Unless there is a cadre of well-trained and well-qualified mediators to staff the program—preferably at public expense—it is not likely to succeed. In addition, lawyers must be trained to effectively represent clients in mediation. Finally, as with most experiments, starting with a small pilot program and then gradually modifying it to correct for demonstrated defects holds the greatest promise of success.

ENDNOTES


2 See, e.g., J. Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69 (2002).

3 It is far from clear whether the principle of self-determination that Professor Reuben invokes speaks only to the parties’ control over the outcome (which they clearly have in mandatory mediation) or also to their control of the process. The court and legislature, not litigants and their attorneys, should have the prerogative to allocate judicial resources.

4 See S. Goldberg, F. Sander, N. Rogers and S. Colt, Dispute Resolution 162 (4th ed. 2003). Even if there was no agreement at the mediation session, one sometimes emerges later as a result of the ideas explored at the mediation session. Or, at a minimum, the mediation session may help to clarify the issues for trial.

5 Among the reasons might be our litigation-oriented culture and the absence of public places where disputants can go to get free mediation assistance.

6 See Goldberg et al., supra note 4, at 395.
Concerned mediators urge world leaders to use more mediation, negotiation

Seeing a world rife with inadequate use of meaningful negotiation to address international crises, a group of mediators in October initiated a call to action advocating conflict resolution processes.

The statement, which was drafted by William Lincoln and Polly Davis of the Conflict Resolution, Research and Resource Institute in Tacoma, Wash., was intended to be a nonacausatory, nonpartisan way for mediators to assert the benefits of conflict resolution techniques as an alternative to war and violence.

“We thought, when will our profession ever be able to speak out in ways that maintain our professionalism and credibility and perception of objectivity and neutrality? When will we speak out about something that is really wrong?” Lincoln said. “We should be advocating the use of these skills.”

The Mediators’ Call to Action was revealed at the Consolidating Our Collective Wisdom conference in Keystone, Colo., where 76 of the 90 attendees present signed the statement. As of early December, more than 800 mediators from 39 countries had expressed their support. The statement reads:

“Given that the world is confronted with real and perceived threats from several international arenas we, the undersigned, urge that citizens of our nations insist their elected and appointed government officials immediately engage in honest, direct and unconditional negotiations with all authorities and powers who can resolve these pending crises in ways that are equitable and practical for all concerned without sacrifice to national sovereignty or security. As citizens of the world and as professional negotiators and mediators we urge that proven conflict resolution processes be employed now.”

Jim Melamed, co-founder of Mediate.com, said the statement is profound because it allows mediators, who historically have not asserted themselves in public debate, to assert themselves as an advocacy group supporting meaningful dialogue.

“We’re saying that no-negotiation is not acceptable,” Melamed said. “As taxpayers, we are an advocacy group, asking for meaningful engagement. The only antidote to fear and terror in the long run is discussion. We may not agree, but we can understand.”

Melamed said the group, which calls itself the International Coalition of Concerned Mediators, is considering a one-year initiative to improve mediation’s visibility around the world. The concerned mediators have formed a steering committee and have been working to identify what the group can do to encourage better conflict management and prevention. Lincoln said the group is now seeking more individual endorsements and is hoping to gather as many signatures as possible in the next year before seeking more formal support from conflict resolution organizations.

To sign the statement or contact the organization on the Web, go to www.concernedmediators.org.

---

Supreme Court denies certiorari in “manifest disregard” case

A request for the U.S. Supreme Court to clarify the “manifest disregard of the law” standard for vacating an arbitrator’s award was refused in October.

The court denied certiorari in Patten v. Signator Insurance Agency, 441 F.3d 230 (4th Cir. 2006) in which the court of appeals had vacated an arbitrator’s award that ruled an employment contract contained an implied one-year statute of limitations.

John Hancock Life Insurance Co. had asked the high court to determine when and whether an arbitrator’s “manifest disregard of the law,” a rarely-attained standard of review first suggested in Supreme Court dicta more than 50 years ago, would be proper grounds for vacatur under the Federal Arbitration Act.

IRS formalizes arbitration appeals process

The arbitration appeals process started by the Internal Revenue Service as a pilot program in 2000 was made permanent in October, allowing taxpayers and the IRS to jointly request binding arbitration on some issues.

“Generally, this program is available for cases in which a limited number of factual issues remain unsolved following settlement discussions in Appeals,” says the language of Revenue Procedure 2006-44, which formalizes the program.

The arbitration program is only intended to resolve factual disputes between a taxpayer and the IRS. The program is not available in a number of situations, including disputed legal issues, issues in litigation or collection cases.

Clarification: In last quarter’s edition, ADR News included outdated information about the ABA Section on Dispute Resolution’s Standing Committee on Ethical Guidance. The 12-member committee, co-chaired by Michael Young and Geetha Ravindra, has been considering various procedural matters, such as what kinds of questions the committee should answer, how opinions should be written, and what level of anonymity should be provided to people seeking the committee’s guidance.

As of early December, the committee was considering a draft of a protocol addressing these and other matters, Ravindra said.
Illinois Supreme Court strikes down class-action waiver in arbitration agreement

Illinois law requires that arbitration agreements provide a cost-effective forum for customers to obtain remedies, the Illinois Supreme Court ruled in October, severing a provision in an arbitration agreement that barred class actions.

In Kinkel v. Cingular Wireless, 2006 WL 2828664 (Ill. 2006), the court said class action waivers are not per se unconscionable under Illinois contract law. Instead, the court, after a detailed review of how other states have analyzed such waivers, concluded that unconscionability must be determined case by case, based on the totality of the circumstances.

Cingular’s contract required customers to arbitrate all claims but did not disclose arbitration costs. It also contained a liquidated damages clause that the court said may serve as an unlawful penalty. Under the contract, Kinkel would have had to pay $125 in arbitration fees in order to resolve a claim for $150.

“These provisions operate together to create a situation where the cost of vindicating the claim is so high that the plaintiff’s only reasonable, cost-effective means of obtaining a complete remedy is as either the representative or a member of a class,” Justice Rita Garman wrote for a unanimous court.

Express rejection of arbitration policy ineffective where Oklahoma employee worked past mandatory acceptance date

In spite of an employee’s express rejection of an employer’s revised dispute resolution policy that required arbitration of all claims, the U.S. Court of Appeals for the Tenth Circuit has held that under Oklahoma law, the employee’s return to work constituted acceptance of the new policy terms.

In Hardin v. First Cash Financial Services, Inc., 465 F.3d 470 (10th Cir. 2006), Circuit Judge Timothy Tymkovich reversed the district court’s finding that First Cash’s continued employment of Shelle Hardin after she rejected the new policy constituted acceptance of her counteroffer.

Instead, the court held that Hardin accepted First Cash’s original offer when she continued to work past the March 1, 2003, mandatory acceptance date, because First Cash made clear its “contrary intention not to permit a counteroffer to terminate the employee’s power of acceptance.”

In addition, the court rejected Hardin’s claim that First Cash’s unilateral right to alter the dispute resolution policy made the contract illusory, holding that “reasonable restrictions,” including a requirement for ten-day notice to employees, were placed upon First Cash’s right to modify.

Federal Circuit creates two-part arbitrability test for district courts

In October, the U.S. Court of Appeals for the Federal Circuit held that district courts should determine arbitrability in two steps, first finding whether the parties “clearly and unmistakably” intended for an arbitrator to determine arbitrability, and if so, whether the arbitrability issue raised is “wholly groundless.”

California appeals court bars use of mediation confidentiality statute after party revoked consent to settle

A doctor who revoked her consent to settle a claim while the mediator was drawing up a settlement agreement was estopped from using the mediation confidentiality provisions of the California Evidence Code to bar admission of documents and mediator testimony, after she had already stipulated to some mediation-related facts in multiple post-mediation hearings, according to a California appeals court.

In Simmons v. Ghaderi, 143 Cal. App. 4th 410 (Cal. Ct. App. 2006), Judge H. Walter Croskey said the defendant’s attempt to withdraw her consent to settle a claim for $125,000 was “irrelevant and ineffectual,” where she had orally consented to the agreement.

“Recognition of mediation confidentiality in this case would not help to ensure open communication in mediation,” Croskey wrote, “but it would allow a disgruntled litigant to use the shield of mediation confidentiality as a convenient place behind which to hide facts, although indisputably true, she no longer believes are favorable.”

In his dissent, Judge Richard Aldrich said the majority ignored “the pivotal and dispositive law” on mediation confidentiality in California, which led “inescapably to the conclusion that there was no admissible evidence of an oral contract.”
California adopts collaborative law process for family law

PARTIES TO DISSOLUTION, NULLIFICATION OF MARRIAGE, and legal separation proceedings in California may now utilize a collaborative law process rather than an adversarial judicial proceeding to resolve those disputes after Gov. Arnold Schwarzenegger signed California Assembly Bill 402 into law in September.

“The very nature of divorce puts added strain on all parties, especially the children of the marriage,” bill sponsor Mervyn M. Dymally said. He added that the collaborative law process in the new law seeks to “maximize settlement options for the benefit of both parties and children and to minimize or eliminate the negative economic, social and emotional consequences of litigation.”

The bill had the backing of the Family Law Section of the California State Bar, which issued a statement saying that with the passage of this bill, “more practitioners will look to the collaborative model and the judiciary will put their weight of approval behind the process.”

Several other states are considering ADR programs for family law matters and are largely placing the discretion to order ADR on judges. Alabama H.B. 779 would permit judges to order mediation where the parties cannot agree on a shared custody plan. New York S.B. 1399 seeks to create a unified procedure for resolving custody and parenting disputes by requiring initial planning conferences at which judges would refer cases to mediation. South Carolina S.B. 1319 would permit judges to order mediation in post-divorce disputes. New Hampshire H.B. 1419, signed into law in May, permits the court to order mediation in divorce proceedings upon request by either party or at the court’s own discretion.
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

WINTER 2007 CAPTIONING CONTEST
by John Barkai

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

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

FALL 2006 WINNERS

“As a lawyer Frank was always a shark, but as a mediator he is just learning how to swim…”
— Nicole Malinko

“The mediator will never believe we’re incompatible if we go to the session wearing matching outfits!”
— Ken Andrichik

“Do you think your mediation skills will keep you afloat?”
— Timothy W. Stewart

“Either your BATNA is flying south for the winter or you have some explaining to do.”
— Will Kiser

“No, Bob, the fact that we’re wearing the same pattern does not dovetail our divergent interests.”
— John Thompson

“When I asked you to “fashion” a settlement offer similar to mine and to “float” it by me, I think you took me too literally!”
— Richard Lieberman

“I think you’d better go get that Master’s degree in conflict resolution because your natural style leaves a lot to be desired.”
— Anonymous

“If this is your idea of “Dress for success in ADR,” you need to spend more time in the shallow end of the pool.”
— Anonymous

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


Alfini, James. Section leads collaborative initiatives among ABA entities. Spring 2000, 6/3, 2.

Alfini, James. The ADR field and collaboration. Winter 2000, 6/2, 3.

Alfini, James. Risk of coercion too great: judges should not mediate cases assigned to them for trial. Fall 1999, 6/1, 11.

Alfini, James and Clay, Gerald. Should lawyer-mediators be prohibited from providing legal advice or evaluations? Spring 1994, 1/1, 8.

Allen, Tracy L. Book review: A message of love and hope to all of us, from one of us. Summer 2005. 11/4, 10.


The Section delivers technical assistance and develops public service and awareness projects that expand the use, availability and understanding of dispute resolution skills, approaches and systems in a variety of arenas. Our projects have supported courts, legal services and pro bono programs, international agencies, other governments and corporate boards. This year, we launched an annual giving campaign to support these efforts. The following members generously contributed to support this work. Thank you for your contributions.

John Bickerman
Richard Chernick
Jack Cooley
Roger Deitz
Pamela Enslen

David Hoffman
Margaret Huff
John Lande
Homer La Rue
Lela Love

Deborah Masucci
Lawrence Mills
Robyn Mitchell
Gerald Phillips
Suzanne Whitaker

We apologize if your donation is not reflected on this list; we appreciate your contribution and will acknowledge it accordingly in future publications.

Bader, W. Reece. ADR is fine, but not always welcome as alternative to battle in court. Spring 2000, 6/3, 21.


Baron, Linda and Scott, Robert W. Embedding mediators. Fall 2006. 13/1, 13.


Berger, Vivian. Easing tensions: Mediation helps build understanding between cops and citizens. Fall 2000, 7/1, 18.


Berzon, Marsha. Beyond altruism: How I learned to be a better lawyer by being a pro bono neutral. Summer 2004. 10/4, 27.

Bickerman, John. Great potential: New federal law provides the vehicle if local courts have the will. Fall 1999, 6/1, 3.


Birkhofer, Kathleen. Arbitration to heat up in state legislatures. Fall 2005. 12/1, 32.


Bltman, Bruce A. Mediator ethics: Florida’s ethics advisory committee breaks new ground. Spring 2001, 7/3, 10.


Brazil, Wayne and Smith, Jennifer. Choices of structures: Critical values and concerns should guide format of court ADR programs. Fall 1999, 6/1, 8.


Brodesky, Joshua. Turning 10: From pioneering to policy making in dispute resolution. Fall 2003. 10/1, 11.


Butler, Linda and Mills, Lawrence R. Violence in our schools: Conflict resolution and peer mediation as a preventive remedy. 1996, 3/1, 8.

Carlson, Christine. Using facilitated negotiation to enhance political decision making. Fall 1997, 4/1, 14.

Carlson, Christine. Great progress has been made, but there is still much to do. Summer 2001, 7/4, 4.


Chasen, Andrea. After disaster strikes. Fall 2006. 13/1, 21.


Chernick, Richard. From the Chair: The dispute resolution section comes of age. Fall 2003. 10/1, 3.


Chernick, Richard. Imposed-arbitration reforms threaten to stifle strengths of commercial arbitration. Fall 2002. 9/1. 16.


Cialdini, Robert; Wissler, Roselle L. and Schweitzer, Nicholas J. The Science of influence: Using six principles of persuasion to negotiate and mediate more effectively. Fall 2002. 9/1. 20.

Clay, Gerald S. Complex disputes: Outside experts can simplify and focus mediations. Fall 2003. 10/1, 19.


Cohen, Jonathan. Apologizing for errors: Ethical corporate conduct can also be good for business. Summer 2000, 6/4, 16.


Cohen, Judy. ADA guidelines raise the ethics bar. Winter 2004. 10/2, 3.

Cohn, Lynn and Shaw, Margaret. Employment class action settlements provide unique context for ADR. Summer 1999, 5/4, 10.


Cooper, Christopher. Police mediators: Rethinking the role of law enforcement in the new millennium. Fall 2000, 7/1, 17.

Costantino, Cathy and Schragr, Lewis. Physicians, heal thyself: Negotiations and conflict management are key skills for today’s health care professional. Spring 1999, 5/3, 12.


DISPUTE RESOLUTION MAGAZINE
WINTER 2007
23


Davidson, Robert B. and Haude, Deborah Gage. Shadowing: The key to developing strong mediation skills. Fall 2005, 12/1, 13.

Davis, Benjamin G. Book Review: A pioneer’s vision of the promise of online dispute resolution. Fall 2003, 10/1, 24.


Dionne, Jr., E. J. Could the Florida 2000 election dispute have been mediated? No: armed with the lead, Bush team had no incentive to mediate dispute. Winter 2002, 8/2, 8.


Drabozl, Christopher R. Revisiting Southland: Supreme Court’s reasoning weak, but conclusion correct. Spring 2004, 10/3, 23.


Dunlap Jr., Charles and McCaron, Paula B. Negotiation in the trenches: In war zones, military attorneys use negotiation to resolve a wide variety of disputes. Fall 2003, 10/1, 4.


Eoannou, Carol L. ADR News: Ellen Miller takes over as new section director. Fall 2004, 11/1, 36.


Eoannou, Carol L. State and Federal Cases: 9th Circuit changes course, allows mandatory arbitration of bias claims. Winter 2004, 10/2, 29.

Eoannou, Carol L. ADR News: D.C. criminal mediation program funding woes resolved by DOJ. Fall 2003, 10/1, 28.

Eoannou, Carol L. State and Federal Case Updates: Kyocera reversed: 9th circuit clarifies proper scope of review under FAA. Fall 2003, 10/1, 29.
Frisby, Carol L. ADR News: FMCS expanded roster to neutrals to exclude advocates. Summer 2003. 9/4, 36.
Frisby, Carol L. State and Federal Case Updates: U.S. Supreme Court holds arbitrators should decide applicability of NASD limitations rules. Fall 2002. 9/1. 30.
Esher, Jacob Aaron. ADR Comes to Bankruptcy: Claims resolution facilities in reorganization cases. Summer 2003. 9/4, 29.
Evans, Frank and Butler, Linda. Violence in our schools: Conflict resolution and peer mediation as a preventive remedy. 1996, 3/1, 8.

Fass, Tara. Cues from psychology: 10 tips for getting into the minds of their matters. Fall 2003. 10/1, 16.
Feliciano, José. From the chair: Welcoming scrutiny of ADR. Summer 1997, 3/4, 2.
Fraser, Bruce. The neutral as lie detector: You can’t judge participants by their demeanor. Winter 2001, 7/2, 12.
Friedman, Gary and Himmelstein, Jack. Deal killer or deal saver: The consulting lawyer’s dilemma. Winter 1997, 4/2, 7.
Galanter, Marc. The vanishing trial: What the numbers tell us, what they may mean. Summer 2004, 10/4, 3.

Golann, Dwight and Sturdevant, Patricia. Should binding arbitration clauses be prohibited in consumer contracts? Summer 1994, 1/2, 4.
Goldberg, Stephen B. Let’s arbitrate a deal: Arbitration as an alternative to walking away when contract negotiations break down. Fall 2004. 11/1, 27.


Guidotti, Tee and Rosenbaum, Sara. Expanding ADR in health care: Need for consensus on emergency preparedness may increase ADR use in public-health arena. Fall 2004. 11/1, 19.

Hoffman, David A. From committee to section: Jack Hanna reflects on the Section’s growth and achievements. Fall 2004, 11/1, 29.


Hoffman, David A. Lawyers march for school peace: The attorney’s role in peer mediation. Winter 1998, 5/2, 27.

Hanson, Roger. Lessons from the field: Courts have surprising success mediating workers’ comp cases. Winter 2001, 7/2, 25.

Harris, Resa. Dispute resolution and children. 1996, 3/1, 2.

Harris, Resa. From the chair: Children, courts and dispute resolution. Fall 1995, 2/3, 2.


Haude, Deborah Gage and Davidson, Robert B. Shadowing: The key to developing strong mediation skills. Fall 2005, 12/1, 13.


Hedin, Douglas A. ‘Gimme a demand’ or the cliches we live by. Winter 2001, 7/2, 38.

Heen, Sheila and Stone, Douglas. Talking about Sept. 11: Sometimes even dispute resolution professionals may need help. Fall 2001, 8/1, 30.


Heinsz, Timothy J. Revised Uniform Arbitration Act: Discovery, punitive damages, review, attorney fee all get tentative OK by NCCUSL Drafting Committee. Fall 1998, 5/1, 15.


Hensler, Deborah. A research agenda: What we need to know about court-connected ADR. Fall 1999, 6/1, 15.


Herman, Howard and Twomey, Jeannette P. Training outside the classroom: peer consultation groups. Fall 2005, 12/1, 15.

Hermann, Michele. New Mexico research examines impact of gender and ethnicity in mediation. Fall 1994, 2/2, 10.

Herzog, Margaret. Starting a new conversation: When debate is fruitless, shifting to dialogue can create a climate for resolution. Summer 1998, 4/4, 10.


Hillebrand, Gail. Should California’s ethics rules be adopted nationwide? Yes! They represent thoughtful solutions to real problems. Fall 2002, 9/1, 10.


Hinshaw, Art and Wissler, Roselle L. How do we know that mediation training works? Fall 2005, 12/1, 21.

Hirshman, Nancy. Mediating misdemeanors: As Maryland experience shows, pre-trial mediation can mean big success in small cases. Fall 2000, 7/1, 12.


Hoffman, David A. From the Chair: Why do we care about diversity? Winter 2005 11/2, 3.

Hoffman, David A. From the Chair: Walking the talk. Fall 2004, 11/1, 3.

Hoffman, David A. Paradoxes of Mediation Part II of II. Winter 2003, 9/2, 30.


Hoffman, Eileen. Video review: Saving the Last Dance advances ‘understanding’ model of mediation. Fall 2001, 8/1, 33.

Honeyman, Christopher. Confidential, more or less. Winter 1998, 5/2, 12.

Hoover, Lawrence. While government decisions should be made in public, mediation calls for a special consideration. Winter 1998, 5/2, 20.

Hughes, Scott. A closer look: The case for a mediation confidentiality privilege still has not been made. Winter 1998, 5/2, 14.


Janis, Melissa. The Lighter Side: We are what we eat. Summer 2000, 6/4, 35.


Kant, Deborah Ruth and Shapiro, Stephen A. Guide to confidentiality under the federal administrative dispute resolution act. Summer 2006. 12/4, 23.


Kichaven, Jeff. ADR does not save time or money? Great news! Summer 1997, 3/4, 15.


Kirtley, Alan. A mediation privilege should be both absolute and qualified. Winter 1998, 5/2, 5.

Kirtley, Jane. No place for secrecy: The public’s interest can only be served when the press has access to mediations involving a public body. Winter 1998, 5/2, 21.


Kovach, Kimberlee. From the Chair: New ethics for the new lawyer: Fitting the standards to the process. Winter 1997, 4/2, 2.


Krivis, Jeffrey. Examining EDR: E-mail dispute resolution. Winter 2001, 7/2, 36.


La Rue, Homer C. and Love, Lela. Classroom conversation about race, poverty, and social status in the aftermath of Katrina. Fall 2006. 13/1, 22.


Lawrence, James K. L. Retooling the practice of law through ‘collaborative law.’ Spring 2002, 8/3, 27.


Lipton, Ron and Matz, David. Choosing between a training program and a graduate program. Fall 2005. 12/1, 17.


Love, Lela and La Rue, Homer C. Classroom conversation about race, poverty, and social status in the aftermath of Katrina. Fall 2006. 13/1, 22.


Maida, Peter R. Rosters and mediator quality: What questions should be asked? Fall 2001, 8/1, 17.


Masucci, Deborah. Parties, counsel share duty with arbitrators to ensure integrity of arbitration process. Fall 1998, 5/1, 22.


Matz, David and Lipton, Ron. Choosing between a training program and a graduate program. Fall 2005. 12/1, 17.

Mayer, Bernard and MacFarlane, Julie. What’s the Use of Theory? Integrating theory and research into training. Fall 2005. 12/1, 5.


Mazadoorian, Harry. At a crossroad: Will the corporate ADR movement be a revolution, or just rhetoric? Summer 2000, 6/4, 4.


Mazur, Cynthia. Working toward critical mass. Fall 2006. 13/1, 9.


McCarron, Paula B. and Dunlap, Charles Jr. Negotiation in the trenches: In war zones, military attorneys use negotiation to resolve a wide variety of disputes. Fall 2003. 10/1, 4.


McCoy, Martha and McDonald, Catherine Flavin. What’s so bad about conflict: Study circles move public discourse from acrimony to democracy building. Summer 1998, 4/4, 14.

McDermott, Stanley. Contracting for judicial review: Expanded judicial review of arbitration awards is a mixed blessing that raises serious questions. Fall 1998, 5/1, 18.

McDonald, Catherine Flavin and McCoy, Martha. What’s so bad about conflict: Study circles move public discourse from acrimony to democracy building. Summer 1998, 4/4, 14.


McEwen, Craig. Mediation in equal employment cases. Spring 1996, 2/4, 16.

McEwen, Craig and Rogers, Nancy. Bring the lawyers into divorce mediation. Summer 1994, 1/2, 8.

McEwen, Craig. State justice institute conference examines research on court-connected ADR. Spring 1994, 1/1, 7.


McGovern, Francis. Multiparty disputes: Managing variables key to successful arbitration. Fall 2002. 9/1. 3.


McGuire, James. Mediation mandate: Refusing to mediate becoming more difficult on both sides of Atlantic. Fall 2002. 9/1. 17.

McGuire, James. Book review: So many lost lawyers, and now a way back. Fall 2001, 8/1, 32.


McGuire, James. Mediation mandate: Refusing to mediate becoming more difficult on both sides of Atlantic. Fall 2002. 9/1. 17.


Meyerson, Bruce. From the Chair: The long arm of ADR. Summer 2003. 9/4, 3.

Meyerson, Bruce. From the Chair: Moving court ADR to the next level. Winter 2003. 9/2. 3.


Mitchell, Robyn C. From the Chair: Bringing quality and ethics to the forefront. Summer 2006. 12/4, 3.

Mitchell, Robyn C. From the Chair: Meeting the needs of the customer. Spring 2006 12/3, 3.

Mitchell, Robyn C. From the Chair: Focus for year to come: End users and youth. Winter 2006. 12/2.

Mitchell, Robyn C. From the Chair: Looking Ahead—and lending a hand. Fall 2005. 12/1.


Moore, Pamela. Building partnerships: Police, mediators work together to promote public safety. Fall 2000, 7/1, 14.


Mussehl, Robert C. From the Chair: Section takes initiative on Sept. 11, as well as the promotion of diversity. Spring 2002, 8/3, 2.

Mussehl, Robert C. From the Chair: Bringing mediation to political disputes. Winter 2002, 8/3, 3.


Neesemann, Carroll E. Should an arbitration provision trump the class action? Yes: Permitting courts to strike bar on class actions otherwise clean clause would discourage use of arbitration. Spring 2002, 8/3, 13.


Neesemann, Carroll E. The wrong result: Badie ruling creates uncertainty in consumer arbitration. Fall 1999, 6/1, 18.

Neesemann, Carroll E. Contracting for judicial review: Party-chosen arbitral review standards can inspire confidence in the process, and are good for arbitration. Fall 1998, 5/1, 15.


Nolland, Christopher. How to start and grow a mediation practice. Fall 2003, 10/1, 21.


Osterrmeyer, Melinda. Funding, judicial commitment and basic resources are keys to successful ADR programs in developing nations. Spring 1998, 4/3, 9.


Overton, Benjamin F. From the Chair: The UMA is a section project: Your support is essential. Summer 2001, 7/4, 3.

Overton, Benjamin F. From the Chair: Independent judiciary important to freedom, dispute resolution. Spring 2001, 7/3, 2.

Overton, Benjamin F. From the Chair: Training is essential for judges as mediators. Winter 2001, 7/2, 2.

Overton, Benjamin F. From the Chair: Can dispute resolution shine in a justice system in transition? Fall 2000, 7/1, 3.


Peluso, Steven T. Mediating the licensing and certification labyrinth. Fall 2001, 8/1, 3.

Pierce, Lemoine. Media access: Pro-active approach to managing the media is necessary. Winter 1998, 5/2, 23.
 Purcell, Sheila. Court program funding: Advice from the trenches. Winter 2003. 9/2, 19.

Rack Jr., Robert. Settle or withdraw: Collaborative lawyering provided incentive to avoid costly litigation. Summer 1998, 4/4, 8.
Raven, Robert D. From the chair: Development of ADR programs by state courts. Summer 1994, 1/2, 2.
Raven, Robert D. From the chair: The future of court-annexed ADR. Spring 1994, 1/1, 2.
Repa, Barbara Kate. ADA 101: The good, the bad, the undecided. Winter 2004. 10/2, 7.
Reuben, Richard C. ADR News: Alliance works to bring mediator training to new level. Fall 2000, 7/1, 28.


Rogers, Nancy and Reuben, Richard C. Confidentiality in Mediation: Choppy waters for a movement toward uniform confidentiality privilege. Winter 1998, 5/2, 4.


Rogers, Nancy and McEwen, Craig. Bring the lawyers into divorce mediation. Summer 1994, 1/2, 8.

Rogers, Stephen C. Can tripartite arbitration panels reach fair results? Fall 2001, 8/1, 27.

Rogers, Theodore. Mandatory pre-dispute arbitration: Self-Interested critics only spinning truth about a process that has been approved by Congress. Fall 1998, 5/1, 5.


Rosenbaum, Sara and Guidotti, Tee. Expanding ADR in health care: Need for consensus on emergency preparedness may increase ADR use in public-health arena. Fall 2004. 11/1, 19.


Sander, Frank E.A. A Friendly Amendment. Fall 1999, 6/1, 11.


Schmitz, Amy J. Book review: Bennett explains arbitration fundamentals, without legalese. Fall 2002. 9/1. 27.


Schragler, Lewis and Costantino, Cathy. Physicians, heal thyself: Negotiations and conflict management are key skills for today’s health care professional. Spring 1999, 5/3, 12.


Schweitzer, Nicholas J.; Cialdini, Robert B. And Wissler, Roselle L. The Science of Influence: Using six principles of persuasion to negotiate and mediate more effectively. Fall 2002. 9/1. 20.


Scott, Robert W. and Baron, Linda. Embedding mediators. Fall 2006. 13/1, 13.


Shaw, Margaret L. and Cohn, Lynn. Employment class action settlements provide unique context for ADR. Summer 1999, 5/4, 10.


Sibbison, V. Heather and Laidlaw, Robert M. A case study: Appropriate legislation can be key to resolving Indian/non-Indian disputes. Winter 2002, 8/2, 24.


Smith, Jennifer. Scrapping the plea-bargain: Mandatory mediation of criminal cases would further justice, at a lower social cost. Fall 2000, 7/1, 19.

Snapp, Kent. Five years of random testing show early ADR successful. Summer 1997, 3/4, 16.


Sternlight, Jean R. Should an arbitration provision trump the class action? No: Permitting companies to skirt class actions through mandatory arbitration would be dangerous and unwise. Spring 2002, 8/3, 13.

Sternlight, Jean R. Mandatory pre-dispute arbitration: Steps need to be taken to prevent unfairness to employees, consumers. Fall 1998, 5/1, 5.

Stewart, Chip. State and Federal Cases: Class arbitration ban is conscionable in lending case, NJ High Court says. Fall 2006, 13/1, 37.

Stewart, Chip. ADR News: U.S. Supreme Court asked to review “manifest disregard,” “essence” tests. Fall 2006, 13/1, 36.


Stewart, Chip. State and Federal Cases: U.S. Supreme Court to review key arbitration doctrine. Fall 2005. 12/1, 34.

Stewart, Chip. ADR News: Revised Model Standards for Mediators to provide more detailed guidance. Fall 2005. 12/1, 33.


Stipanowich, Thomas. ADR and ‘the vanishing trial’: What we know—and what we don’t. Summer 2004. 10/4, 7.


Stone, Douglas and Heen, Sheila. Talking about Sept. 11: Sometimes even dispute resolution professionals may need help. Fall 2001, 8/1, 30.

Strasser, Alan W. Community-Based advisory groups: How confusion over neutrality, sponsorship and legal impact can tarnish them. Winter 2005. 11/2, 23.


Wissler, Roselle and Hinshaw, Art. How do we know that mediation training works? Fall 2005. 12/1, 21.


Wissler, Roselle. New Research: Barrier to attorney’s discussion and use of ADR. Fall 2003. 10/1, 27.


Wissler Roselle; Cialdini, Robert B. and Schweitzer, Nicholas J. The Science of Influence: Using six principles of persuasion to negotiate and mediate more effectively. Fall 2002. 9/1, 20.


Wissler, Roselle. New Research: Attorneys’ use of ADR is crucial to their willingness to recommend it to clients. Winter 2000, 6/2, 36.


Young, Michael D. The right balance: Provider principles mitigate the potential dangers of mandatory arbitration. Spring 2001, 7/3, 18.


