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The Section of Dispute Resolution launched its 16th year in September, working to promote quality dispute resolution processes that advance goals critical to society and to individuals. The Section is committed to mechanisms that preserve the rule of law while promoting processes that allow for resolution via understanding, healing, reparation, and restoration of individuals and community in conflict scenarios.

Restorative justice processes are explored in this issue of the magazine. A key goal of restorative justice processes—such as victim-offender mediation—is the restoration of the community’s health and balance after a wrong. In contrast to a criminal system’s exclusive focus on punishment that deters others, restorative justice initiatives highlight acknowledgment of wrongdoing, reparations to the victim and the community, and rehabilitative undertakings on the part of both the perpetrator and the community. In 2000, it was reported by the Department of Justice that there were more than 300 victim-offender mediation programs in place in the United States. That is a remarkable number, given that the first reported restorative justice mediation occurred in the United States in 1978.

Indeed, people around the world have been utilizing restorative justice principles since the beginnings of human history. The Chinese scholar Confucius believed that when disputes disrupted the community, restoring harmony, balance, and social relationships through community action were the ultimate goals. In traditional Navajo culture, the justice system involves a healing process, involving the victim, the perpetrator, the community, and a peacemaker, and is intended to restore good relationships and foster a healthy community environment.

As restorative justice processes continue to expand, the dispute resolution community must address new issues. If not carefully conducted, a victim-offender mediation can revictimize the victim. Cultural differences create barriers to understanding and reaching closure. The mediator or intervener must urge the parties to take into account what Scout learns from her father, the famous fictional lawyer Atticus Finch in To Kill a Mockingbird, that “you never really know a man until you stand in his shoes and walk around in them.”

The Section of Dispute Resolution is committed to the growth and expansion of restorative justice processes. From the plight of wrongfully convicted exonerees who might be made whole (or at least stronger) by a variety of restorative justice initiatives that states are slowly embracing to alternative sentencing schemes that promote offender rehabilitation, the promise of restorative justice is exciting. The ABA’s Criminal Justice Section, together with the Dispute Resolution Section, has tackled a year-long Mediation in Criminal Matters Enterprise Project, funded by the ABA Board of Governors. This project has awarded minigrants to numerous jurisdictions engaged in restorative justice projects and is developing a how-to guide on restorative justice for use by courts around the United States, as well as publishing a guide to existing projects.

It is exciting that restorative justice processes are being used to respond to tough situations. After the attacks of September 11, 2001, and other incidents of terrorism, crimes committed against Arab-Americans, Muslims, and immigrants increased dramatically. Such crimes call, on the one hand, for a conventional law-and-order approach. On the other hand, though, initiatives to increase understanding and intercultural dialogue are critical. In Eugene, Oregon, after leaving voicemail death threats at a Muslim Community Center and Mosque on September 11, an offender, with the help of Community Mediation Services of Eugene, agreed to write a letter of apology to Muslims that was published in the local paper. The offender also attended lectures on Islam. On another front, after Hurricane Katrina, mediators and restorative justice practitioners through the Section of Dispute Resolution created a list serve to offer their services in that devastated area. The Section also developed a document chronicling various dispute resolution efforts in response to that crisis. From man-made to natural disasters, restorative justice responses are impactful.

More traditional mediation efforts in civil cases also have important restorative elements. Personal injury, wrongful death, and employment cases (to name a few examples) are not only about money. Plaintiffs can gain closure from talking about their loss or injury and getting appropriate reparations and sometimes apologies. This potential benefit of mediation, however, is only preserved if parties participate in the process in a meaningful way.

The promise of the Section of Dispute Resolution is to develop many tools for society in its quest to be responsive to disputes and conflict. Sometimes conventional approaches suffice. Sometimes new methods are needed. Offering flexibility and quality, the stance is best described by the Outward Bound motto:

Be tough, yet gentle, humble yet bold,
Swayed always by beauty and truth. ♦

Lela P. Love, professor of law at Benjamin N. Cardozo School of Law where she directs the Kukin Program for Conflict Resolution, is a practicing mediator in New York City. She can be reached at love@yu.edu.
Greetings from Cambridge and congratulations on a great issue of Dispute Resolution Magazine. I was really pleased to read the article by David Seibel and Julia Gegenheimer (“Tomorrow’s Peacemakers: How to Encourage the Next Generation of Conflict Management Professionals,” Spring/Summer 2008). I was also very grateful for the mention that David and Julia made about the Negotiation and Mediation Clinic I started at Harvard Law School.

The website listed for the clinic in the inset box, however, is wrong. If you type the address the magazine provided into your computer, it brings you to the home webpage for the Program on Negotiation. Unfortunately, the Harvard Negotiation and Mediation Clinic is not part of the Program on Negotiation, however. The actual website for the clinic is www.law.harvard.edu/hnmc.

Related to this, the actual title of the clinic is simply the “Harvard Negotiation and Mediation Clinical Program.”

Also, the authors describe the clinic as being, “Analogous to traditional law school clinical advocacy program.” Actually, I would say we’re almost completely different from a traditional law school clinical advocacy program. Students in the program don’t advocate at all, and the clinic itself is actually very unlike a traditional mediation clinic. We focus our work almost exclusively on stakeholder assessment and dispute systems design, evaluation, and implementation.

—Robert C. Bordone, Thaddeus R. Beal Assistant Clinical Professor of Law and Director, Harvard Negotiation & Mediation Clinical Program

The Spring/Summer issue of Dispute Resolution Magazine contains an article on mediation by Gregg Herman (“ADR and Family Law,” Spring/Summer 2008), the current chair of the ABA Family Law Section and founder of the Collaborative Family Law Council of Wisconsin.

With 75 combined years of experience in facilitative mediation, we feel compelled to take issue with Mr. Herman’s characterization of that model as “of little or no use” in divorce mediation. The author’s comments, taken in context, seem to confuse facilitative mediation with evaluative mediation. Facilitative mediation does not “merely relay proposals.” It is a process in which the skill of the mediator guides the parties to find their own solutions to difficult issues, often with both parties in the same room and often very early in the divorce process. Facilitative mediation is far better in helping parents learn to work together on behalf of their children. It is typically used in the early stages of a divorce process, before people get highly invested in litigation strategies.

There is a legitimate place for evaluative mediation, but it lacks the potential that facilitative mediation has to achieve long-term participant empowerment. It occurs to us that evaluative mediation may be a more comfortable mode of practice for many lawyers, but facilitative mediation is more comfortable for most parties.

—Siri Gottlieb, MSW, JD, The Cooperative Parenting Center LLC; Margo Nichols, JD, Nichols Sacks Slank Sendelbach and Buiteweg, PC; and Zena Zumeta, JD, Mediation and Training Consultation Institute.

Ann Arbor, Michigan

The article by Hedeen, Barton, and Raines (“Improving Mediation Training and Regulation Through Collaborative Assessment,” Spring/Summer 2008) is very relevant to Nebraska right now. We are in the process of evaluating our mediator training policies, methodology, and curricula, and their article regarding their work with Florida’s system is right on point. I particularly agree with their concept of “core” mediation training, covering theory, process, and skills, and then to do “add on” specialized content or process training. In Nebraska, we use that model. We have a required 30-hour basic mediation training, and then persons who want to do family mediation training take an additional 30 hours. Specialized training for special education, family group conferencing, restorative justice, and other case types are other types of “add on” that build upon the skills and process learned by mediators in the 30-hour basic training.

Second, I have a terminology problem with how Gregg Herman characterizes “facilitative” mediation in his article (“ADR and Family Law,” Spring/Summer 2008). He states, “facilitative mediation, where a mediator merely relays proposals, is of little or no use to family law practitioners. We don’t need a third party to run settlement proposals back-and-forth.”

While I agree that having a mediator carry proposals back and forth with little other involvement seems ineffective, my concern with Mr. Herman’s statement is with his use of the term “facilitative” without the additional descriptor of “joint” or “caucus” when describing the type of mediation.

Mr. Herman’s preferred model of mediation is described as “evaluative.” However, it’s more clearly described as “evaluative, caucus-based.”

Thanks for the opportunity to make these comments, and much appreciation for this edition of the magazine.

—Debora Brownyard, Director, Office of Dispute Resolution, Nebraska State Court Administrator’s Office
MEDIATION in Criminal Matters

By Jack Hanna

DON'T GO DIRECTLY TO JAIL

Perhaps there is another option.
When the American Bar Association initially dipped its toe into the waters of mediation in August 1976, with the creation of the Special Committee on Resolution of Minor Disputes, it seemed to do so with a trepidation similar to that felt by the preacher's daughter in Tennessee Williams' *Summer and Smoke*. Contemplating a ride in the young doctor's sports car, Miss Alma stated, "Time and time again I have seen that four wheeled phenomenon drive by the rectory, but I have yet to put my quaking foot in it."

Since that tepid beginning with minor disputes, the ABA has blazed a trail of accomplishments in dispute resolution in civil matters, including creating the world's premier dispute resolution organization. However, the impact of the ABA on mediation in criminal justice has been much less dramatic.

The ABA Section of Dispute Resolution has never had a criminal law committee and has been relatively inactive in promoting ADR in criminal law settings. The Criminal Justice Section has been relatively inactive in mediation/ADR, and only in 2006 did it establish an ADR and Restorative Justice Committee. Partially due to the lack of ABA attention to ADR in criminal justice along with perceived need for certain reforms of the criminal system (see page 8), the ABA Board of Governors recently awarded a grant to survey the criminal law field to determine the level of utilization of dispute resolution in criminal law and to take steps to promote its greater use.

The survey of the field was distributed by each of the eight ABA entities to their constituents, and graciously by others outside the ABA, leading to the identification of close to 120 existing criminal law endeavors. The vast majority of these programs identified themselves as juvenile restorative justice or victim-offender programs with a few preindictment misdemeanor mediation operations. The survey results are an indication that the quaking-foot syndrome is still alive in criminal justice settings but that the need to save time and to save money is beginning to force ADR innovation just as it did in civil law in the late 1980s and early 1990s. Indeed, some interesting trends are budding in criminal law that indicate that this side of the justice system may be ready for more innovation, including processes involving third-party facilitation of plea negotiations.

Can dispute resolution be utilized to resolve serious crimes preindictment or at an appellate level? Can it be weaved throughout the criminal justice system from beginning to end as it has been in civil law? The survey revealed some promising local program attributes indicating that criminal justice may be poised to embrace mediation in a manner similar to that of civil justice. Perhaps we are on the cusp of real change in the criminal system that experience tells us ADR can bring about.

One of the success stories revealed by the survey has to be Maricopa County, Arizona, one of the largest jurisdictions in the country. It was facing crowded dockets in both civil and criminal courts in the late 1990s and implemented a program that called for judges to participate directly in settlement negotiations between the prosecutor and defense attorney to facilitate the plea negotiation process. The program was modeled after existing successful settlement conference programs in civil law. A two-year experimentation with the program quickly grew into permanent utilization of the process in criminal matters. Today, more than 600 cases a month go through the process with a successful settlement rate of more than two-thirds.

The settlement conferences are informal, with the judge sitting at a table with the defendant and addressing him or her by first name and beginning with a personal greeting. In ADR parlance, the judge begins by "gaining the parties' trust." The settlement conference judge then identifies the charges and the evidence the state will introduce at trial, and then goes over the pros and cons of the state's offer contrasting the possible sentence with that of an unsuccessful trial. The conferences can be done on relatively short notice and are most helpful if completed before the investment of an inordinate amount of time in trial preparation. This last factor recently led the county attorney to adopt a policy of no further plea negotiation within a month of trial date. This permanent program dating back over a decade serves as a major inroad of facilitated negotiation into the criminal justice field.

The program allows victims to voice their objection to approval of a plea offer and to be present at the negotiation if the defendant is present. Judges do not negotiate cases they will be presiding over without the consent of the parties and generally do not do this. The program helps defendants understand and evaluate the appropriateness of a plea offer, sometimes adding the judge's indication that it is a good deal to the defense attorney's recommendation to his or her client, helping with defendants with unrealistic expectations. It also gives the judge the opportunity to pressure the prosecutor if the plea is deemed unusually harsh. Some settlement conference judges even comment on the likelihood of success or lack thereof at trial.

The circuit court in Montgomery, Alabama, trains groups of lawyers and judges in restorative justice, victim-offender conferencing and circle sentencing and has a pipeline of cases including appeals from the local city court judges that are mediated by trained attorney mediators. The first case type involves city misdemeanor cases referred by city judges such as harassment, domestic violence, and theft. The program assigns two attorney mediators who have received at least four days of training in restorative justice and sentencing circles to deal with each case. Most of the lawyers have already been trained in civil mediation as well. The prosecutor and defense

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The ABA Board of Governors recently established an internal grant-making program to foster intra-ABA entity collaboration and innovation. In response, eight ABA entities—the ABA Section of Dispute Resolution, the Section of Criminal Justice, the Government and Public Sector Lawyers Division, the Standing Committee on Legal Aid and Indigent Defense, Section of State and Local Government Law, Commission on Domestic Violence, Commission on Effective Criminal Sanctions, and ABA Judicial Division—submitted a proposal for an ABA Mediation in Criminal Matters Project and received one of the initial grants under the fund in the amount of $80,000.

The ABA Board of Governors, through the Mediation in Criminal Matters Project, is committing the legal profession’s leading national/international entity to unleashing a burst of creative problem-solving energy in the criminal law field similar to the one it helped to let loose in the civil law field over the last 30 years.

In an effort to encourage more innovation and experimentation, the Mediation in Criminal Matters Project selected 10 minigrant recipients, all of whom will utilize a “train the trainers” approach to project implementation and, it is hoped, continue to spread the word in their locale beyond the grant period. Teams of prosecutors, defense lawyers, judges, and mediators from each grant site were scheduled to be trained in mediation in criminal matters in September in Minneapolis. Minigrant projects include:

- The Birmingham Bar Association will design a pilot program to implement mediation processes and services in an area of practice where previously mediation has not been used.
- The Scottsbluff, Nebraska, Center for Conflict Resolution will engage the local judiciary and corrections officials in a countywide restorative justice project.
- The Anne Arundel and Montgomery County, Maryland, Offices of State’s Attorney will expand their highly successful adult preindictment mediation programs into the juvenile arena.
- The Superior Court of Maricopa County, Arizona, will provide training for general jurisdiction judicial officers on settlement conferences and other techniques that support early disposition of felony criminal cases.
- The Alabama Bar Association will work to design and implement a criminal appeals mediation program to relieve what is one of the heaviest state appeals court case loads in the country.
- The Pima County (Arizona) Juvenile Court will design programs to improve parent-child communication in delinquency cases involving domestic violence and to improve communication within the juvenile detention facilities by training detention supervisors and others in conflict resolution techniques.
- The Safe Horizon Project will work with the Kings County (New York) prosecutor’s office to offer a range of services including mediation, conflict coaching, restorative justice, and restitution regarding cases referred by the prosecutor.
- Jefferson Parish, Louisiana, Department of Juvenile Services will provide training in dispute resolution and restorative justice techniques such as family group conferencing and increase the capacity of the juvenile justice system and the adjudicated youth alternative school to divert youth into restorative justice.
- The 21st Judicial District of North Carolina will train prosecutors, defense lawyers, and mediators to conduct mediated settlement conferences in criminal cases with priority given to cases involving jail time. The program will include certain felony cases.
- The Vera Institute of Justice will create a participatory justice mediation demonstration project in cooperation with the Kings County New York District Attorney’s Office and the Defense Bar of Brooklyn, New York, contingent upon victim agreement. Cases including felonies will be diverted as soon as possible to minimize court contact and save resources.

The victim and defendant to try to work out some type of written agreement for the circuit judge to approve. The parties and the mediator understand that what is said is said in confidence. The punishment is what the victim and offender decide upon and takes the place of the fine or imprisonment that may have been imposed by the city court judge or the circuit court judge. The cases are assigned after arrest and warrant service. The charges are dropped if the person lives up to the agreement. Judge Tracey McCooey told me, “I tell people the reason criminal mediation works is if you as the defendant are part of

attorney are not present. The victim and defendant work with the two mediators to come to a mutually agreed upon course of action in response to the crime. If they do, they draft a written agreement, which is given to the city judge for approval.

An additional case type involves appeals from cases already adjudicated in city court when the city attorney and defense attorney agree the appeal is appropriate for mediation. Again, two trained lawyers meet with the victim and defendant to try to work out some type of
the agreement, the odds of you living up to it are a lot better than if some judge just tells you what to do. The program has done some felonies, and felonies are very appropriate as long as the D.A. is involved.”

One mediated Alabama case involved an individual indicted for arson who had burned his mother’s trailer to the ground, an offense for which he faced up to 20 years in jail. McCooey described the case resolution as follows:

Both the prosecutor and the defense attorney wanted to do mediation. We did it, and the mom and son agreed to about fourteen provisions in an agreement. Key points were that he would buy her another trailer, that he would attend church, and go to alcohol counseling. After it was over and I got them in court, I said to the defendant, “What did you think?” And he looked at me and his exact words were “When you ordered me to sit down and talk to my Mom, I was really pissed off.” And I said, “Why is that?” He said, “Because I have not talked to my Mom that long ever, and you know what, it was all right. We talked for four hours.”

It was the longest conversation the two had ever had, and he lived up to the things he agreed to do. I could have sentenced him, but the bottom line is that he is still his mom and he is still her son, and what could I do to get to the underlying problem? I was not going to get to that in court in two minutes with 100 cases on my docket. There were a lot of good things that came out of this mediation that never would have come out if we had done it as a traditional case in court.

Another interesting program revealed by the survey is from Anoka County, Minnesota, the home of former Chair of the ABA Section of Criminal Justice Robert Johnson. Since February 2007, Anoka County has employed a case resolution expeditor to focus on resolving criminal cases when a defendant is housed in the county jail. The goals of the program are to remove system barriers to early case resolution and to reduce the jail population of people awaiting trial or plea. Achievement of the first of these goals will help eliminate some of the collateral consequences of serving time in jail such as loss of employment, loss of housing, child support, and custody issues, to name a few. It is these collateral consequences of being accused of and or committing a crime that can contribute to turning a felony conviction into a life sentence.

The Anoka County program understood from the beginning the importance of documenting its success and placed an emphasis on record-keeping. The project has kept records concerning success measures such as the number of jail days the county saved. The project continues to refine its measures of success, but focusing so far on saved time and saved money may have a nostalgic ring for civil law mediation pioneers.

The Anoka program achieves early resolution of cases by ensuring and facilitating the exchange of information between prosecutors and defenders. The expeditor attempts to break through the press of work and other priorities that cause prosecutors and defenders to delay focusing on each particular case. Often, this delay may be reduced if the prosecutor’s plea offer or unique concerns about the defendant are conveyed. The expeditor takes an aggressively proactive role in Anoka County. She does not wait around to be asked to get involved and assembles all the information necessary for resolution and presents that to the two sides.

The expeditor utilizes the Minnesota Court Information System to identify the charges and attorneys on a particular case. The expeditor may then provide the attorneys with information about relevant court dates pending in other counties, warrants that exist for the defendant, and sentences that were issued in other cases. She uses the Statewide Supervision System (SSS) to compile for the prosecutor and defense attorney the defendant’s detention history and any sentencing worksheets that are contained on the system. SSS also provides valuable contact information on any current parole officer, and the expeditor includes this in the background information for the attorneys. The expeditor also uses the Police Central (PCI) to determine at which facility the individual is held and may speak with jail personnel to obtain input about their concerns for the benefit of the plea negotiation.

By obtaining accurate information from the expeditor before heading to court, defense attorneys are in a better position to have meaningful conversations with their clients and to engage in constructive negotiations with prosecutors or make meritorious arguments to the court. Their clients are always available, which is not true for nonjail cases. Prosecutors also need as complete a picture of the defendant as possible in order to determine an appropriate plea. The information provided by the expeditor to both defendants and prosecutors not only helps them to focus on a particular case, but it also gives them more confidence in determining an appropriate resolution of the case. Having all the information increases the odds that a case will be resolved earlier than a trial date.

Finally, the expeditor applies pressure on the prosecutors and defenders to resolve cases. Persistent use of email communication and telephone calls has proved successful. Prior to the expeditor program, many defendants lan-
THE STATE OF CRIMINAL JUSTICE: RIPE FOR THINKING OUTSIDE THE PRISON

If one examines the state of criminal justice today, one is reminded of the disarray in the state of civil justice that led to the passage of the Civil Justice Reform Act in 1990. Implementing mediation and other problemsolving techniques in criminal settings is daunting. It is difficult to determine which parties need to be present for mediation because crimes are considered to have been committed against the state, and there are myriad factors, including sentencing laws, open processes, police discretion, prosecutor discretion, victims’ rights, and defendants’ rights involved.

Certain aspects of the criminal justice system are broken and in need of creative solutions that save time and money while protecting the public in both the short and long term. Decades of “get tough” policies such as mandatory minimums, longer sentences, three strikes equals life, the abolition of parole, and other measures have led us to the point where we have more of our citizens in prison than any other country in the world. In fact, according to a Pew Center for the States report, one in 100 American adults is behind bars in 2008. The impact on men of color is staggering, with one in nine African-American men and one in 36 Hispanic men incarcerated.\(^1\)

The problem is exacerbated by what happens when individuals are released from prison. The U.S. Department of Justice estimates that each year over 600,000 inmates are released from state and federal prison back into their communities and that close to one million are released from local jails. Individuals coming into society from the criminal justice system face a lack of affordable housing, reluctance of employers to hire them, probation and parole systems that rearrest for technical violations, the absence of alcohol and drug and other mental health services. All these factors contribute to a very high recidivism rate. This set of circumstances is seen by many as turning a felony conviction involving any amount of incarceration into a life sentence. In short, the criminal justice system is in need of some serious and innovative problem solving.

Criminal law experts need to start thinking outside the prison, and participants in the Mediation in Criminal Matters project believe that civil law dispute resolution success can influence criminal lawyers to do just that. The Mediation in Criminal Matters project was inspired by the successful path of mediation in civil law that was facilitated by widespread mediation training for civil lawyers, legal academics, and judges along with the implementation of statutes, court rules, some mandatory participation, and countless other components of a supportive dispute resolution infrastructure.

One individual who has made outstanding progress in this arena is District Attorney Charles Joseph Hynes, whose office will be involved in two of the local projects described under minigrants. His Kings County prosecutor’s office was recognized by the ABA Section of Dispute Resolution with the Lawyer as Problem Solver Award in August in New York for looking beyond the conventional borders that usually delineate a prosecutor’s sphere and successfully addressing the problem of offender recidivism. His commitment to innovative, boundary-spanning programs has inspired the confidence of other district attorneys, who seek to replicate these programs, and of criminal justice researchers who come to the Kings County District Attorney’s Office with fresh ideas, knowing that they will get serious consideration. Hynes has demonstrated extraordinary skill, creativity, and vision in problem solving.

Endnotes

(continued on page 29)
Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes
By J. Anderson Little

Learn how to deal with the peculiar problems of traditional bargaining through proven models and techniques that will help you to: gain a better understanding of the dynamics of money negotiations; identify the recurring problems presented in those cases; acquaint and arm yourself with new tools to handle those challenges; build a model of the mediation process that will serve as a roadmap when traditional bargaining is unavoidable; and assist the parties in traditional bargaining in a facilitative, rather than a directive way.

Product Code: 4740066
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Creative Problem Solver’s Handbook for Negotiators and Mediators, Volume I
By John W. (Jack) Cooley

This book focuses on specific creative problem solving techniques and tools that negotiation/mediation practitioners across the country have found to be effective in resolving disputes or making deals. A highly useful feature of this book is its multiple indexing to facilitate identifying techniques or tools appropriate for the problem solving task.

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Creative Problem Solver’s Handbook for Negotiators and Mediators, Volume II
By John W. (Jack) Cooley

This book is a guide for practitioners, academics, and students in the practice, teaching, and study of creative problem solving methods, tools, and techniques. The Handbook’s approach is eclectic, and provides a panoply of potential ideas from the creative problem solving literature. With these ideas, the negotiation/mediation practitioner can experiment in ways that satisfy his or her personal experiences, skills, and talents.

Product Code: 4740060. $48; $38 for Section of Dispute Resolution Members

Mediation: A Path Back for the Lost Lawyer
By John R. Van Winkle

This book is an instructive history of the explosive expansion of mediation these past 20 years, and a very useful guide of techniques for use by practicing mediators, as well as suggestions on how to start and grow a mediation practice. This book covers values and principles with practical help for mediators at all levels of experience.

Product Code: 4740058. $35; $25 for Section of Dispute Resolution Members

The ADR Handbook for Judges: Designing ADR Programs for Courts
By Donna Stienstra and Susan Yates

This book provides the information that judges need when considering developing or refining a court dispute resolution program. Each chapter focuses on the use of ADR in a particular type of case or a certain setting and includes the information a judge or court will need to develop or improve the court’s program. The authors discuss key elements of program design, implementation, and evaluation, including: how to recruit and train neutrals; how to fund and maintain programs; how to obtain support from the bench and bar; and how to manage a program.

Product Code: 4740057. $48; $38 for Section of Dispute Resolution Members

The Negotiator’s Fieldbook: The Desk Reference for the Experienced Negotiator
Editors: Andrea Kupfer Schneider and Christopher Honeyman

The most comprehensive resource on negotiation available, this book features 80 contributors who pull together the relevant ideas on negotiation from law, psychology, business, economics, cultural studies and a dozen other fields to provide a context for successful negotiation.

Product Code: 4740062. $79.95; $69.95 for ABA Members; $59.95 for Section of Dispute Resolution Members; $49.95 for students

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Does the ABA Have Your Email Address?

You may be missing out on important email from both the ABA and the Section of Dispute Resolution. A growing number of communications from the ABA are being sent by email because of the skyrocketing cost of paper, manufacturing, and postage. Paper consumes a tremendous amount of energy in its production and shipment. Effective May 12, 2008, the U.S. Postal Service started linking its postage rates to the consumer price index. Postage is expected to increase every May for the foreseeable future.

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With courts around the country struggling to keep pace with ever-increasing caseloads, an innovative criminal mediation project that has been successful in a northern Kentucky circuit court could provide a model to help others ease the burden.

In 2004, the circuit court for Boone and Gallatin counties located just outside of Cincinnati struggled with the largest caseload in Kentucky. That year, new case filings totaled 2,241, while an average circuit judge in Kentucky handled an average caseload of 1,074.

The increase disproportionately affected the criminal docket, where criminal felony indictments had more than tripled between 1998 and 2006. The flood of incoming cases meant judges were sometimes handling more than 150 cases in a day. Understaffed public advocates came to their trial dates announcing they had not yet met their clients.

Encumbered with cases, and seeking a way out, the circuit court in 2004 volunteered to be one of the first to participate in a new program called “settlement week.” The state of Kentucky’s settlement week model originally involved bringing in a volunteer mediator to settle disputes between parties in civil cases, but Boone County decided to add one day of mediation in criminal cases.

Four years into the program, settlement week has been a great success for the Boone and Gallatin circuit, which has yielded a decrease in criminal docket caseload and a host of other positive results.

Carol Paisley, manager of the Mediation Division at the Kentucky Administrative Office of the Courts, helped the court with its first settlement week. A schedule of one day of criminal cases and four days of civil cases was planned. At the end of the criminal mediation, 14 of the 16 cases chosen for the program resulted in negotiated plea agreements, and two were dropped because of attendance problems.

After the test run, the commonwealth attorney, the directing attorney for the Department of Public Advocacy, Paisley, and the mediators provided input about the new process. Criminal defendants also had a say during the guilty plea process. The consensus was that the mediation should be tried again, studied, and fine-tuned to meet the needs of the court.

The most imperative issues the panel felt needed to be addressed included scheduling issues and mediator qualifications. The first issue was easy to remedy—a participating lawyer should not be scheduled for back-to-back mediations, and an hour per mediation was determined to be an appropriate amount of time. The issue of mediator qualifications required more debate.

Section 3(5) of the Supreme Court of Kentucky’s Order 2005-02 provides that a mediator should inform the participants of his or her qualifications and experience. It also provides that a mediator should only serve if qualified to do so. The panel agreed on a list of qualifications for the ideal criminal circuit court mediator, which included experience with civil mediation, training through the Administrative Office of the Courts course or its equivalent, and experience as both a circuit judge and as a prosecutor or defense attorney.

One man who met these qualifications, Judge Anthony W. Frohlich is the chief circuit judge in Boone and Gallatin Counties in Kentucky. He can be reached at anthonyfrohlich@kycourts.net.
Felony Mediation: Essential Elements and Potential Hurdles
By Carol Paisley

Based on the same fundamental principles as civil mediation, felony mediation in Kentucky’s circuit courts has proven to be a simple and effective program for managing criminal cases. Below are some tips and insight from Kentucky’s experience with developing a felony mediation program.

Senior Judges as Mediators
Kentucky has been successful with having senior judges mediate felony cases. They are retired judges who continue working for a set amount of time for an enhanced retirement benefit but no other pay. The judges are trained and experienced mediators. Although they are neutral in mediation, their judicial experience enhances trust and credibility among defendants. Defendants appreciate the opportunity to speak openly with a judge without being judged.

Concerns of Prosecutors and Defense Attorneys
Prosecutors initially equate mediation to traditional plea bargaining and deem it unnecessary. Mediation does not replace plea bargaining but instead improves upon the concept by balancing power between the opposing sides. In mediation, attorneys focus on the individual case, with mediators helping define issues and review the strengths and weaknesses of each side’s case. Parties are encouraged to be realistic about the merits of each case and reach an outcome that best addresses the needs of all involved.

Defense attorneys are concerned about the potential for defendants to incriminate themselves or be coerced into unfair agreements. But mediation’s confidentiality principle protects information gained in mediation from being used against a party in a subsequent proceeding. There are no limitations or penalties attached to what a defendant can discuss with a mediator. Also, mediators generally separate the opposing sides, so it is unlikely that a prosecutor will hear incriminating evidence. As for coercion, mediation is voluntary; the defendant can withdraw from mediation at any time without penalty.

Orientation and Planning Meeting
The presiding judge invites officials who will be involved in the felony mediation (prosecutor, defense, law enforcement, security officers, others) to a meeting. The purpose of the meeting is to explain the process, discuss case selection, evaluate courthouse space in which to hold the mediation, establish a time line, answer questions, and identify the judge’s staff member who will serve as the facilitator for the felony mediation from that day forward.

If possible, a judge, prosecutor, and mediator who previously participated in felony mediation should attend the meeting to support the program and answer questions.
mediation, the ultimate outcome of the case does not rest with the parties. The judge presiding over the case may not accept the plea agreement. In that situation, the mediation agreement would become null.

The mediator is provided with the court file, the defendant’s criminal history, and the prosecutor’s file in the event police files and discovery become important. It was decided that the mediators should also familiarize themselves with the presiding judge’s sentencing philosophies.

The other issue was the integrity of the end product—the guilty plea. The taking of the guilty plea in Boone and Gallatin Counties is a detailed process involving about five pages and 20 minutes of questions. At the first mediation, the defendants were asked about the process to ensure the pleas were still voluntary, intelligent, and knowingly made and not corrupted by the mediation process. It was decided to adopt a uniform set of questions in addition to the usual ones. The questions asked about the participant’s thoughts on whether the process was voluntary and fair.

Finally, the group decided to take drug possession cases off the mediation docket before the second settlement week. Although these cases were on the first mediation docket, it was decided that drug cases could be worked out without a mediator because they usually are easier to manage through other diversion programs already in place. The other change was to open the second docket to the private bar. The first mediation docket was strictly for the Public Advocates’ Office.

During the circuit’s second settlement week, 21 cases were mediated. Thirteen were represented by private attorneys and eight by the Public Advocates’ Office. Of this total, 17 cases were successfully mediated. One misconception about mediation that arose, particularly with defendants with long criminal histories, was that they would somehow be rewarded by participating in mediation. However, even those defendants acknowledged on the record after the guilty plea process that they were treated fairly and received a fair result under the circumstances. Private attorneys also have told me that they have found this kind of mediation to be a success.

After the second round of mediation had finished, the group decided to add a greater focus on the victims of crimes during mediation. The third criminal mediation docket included a variety of crimes, such as burglary, theft, and abuse. Nineteen defendants were assigned to mediation. Three of them withdrew, and two cases settled prior to mediation. Of the remaining 14 defendants, all

Case Selection
Referrals are initiated by a presiding judge, prosecutor, defense attorney, or defendant. The presiding judge approves all referrals. Any case with a defendant who will voluntarily participate is eligible for mediation. To alleviate jail overcrowding, preference may be given to cases in which the defendant is incarcerated. Burglary, robbery, and theft cases typically are the best cases for mediation. Cases involving sex crimes are the most difficult cases to mediate; however, mediation does work with them. Depending on the jurisdiction, like Judge Frohlich’s, drug possession cases routinely settle without the assistance of mediation, and there are plenty of other cases to mediate. However, the caseload in other Kentucky counties may be mostly drug related.

Time Line
From planning to concluding the mediation, the process takes six to eight weeks. During most of this time, the facilitator’s role is to encourage referrals, ensuring that the presiding judge and attorneys submit them in time to notify defendants of their scheduled mediation date.

Docket Size
Each case requires a mediator, prosecutor, defense attorney, defendant, and about one hour to complete. One mediator can handle six cases a day. If more than one mediator is working, the mediations should be arranged so that the same attorneys aren’t needed in two mediations simultaneously. Be flexible. Mediators and cases may need to be shuffled based on how the mediations are proceeding. Snacks, and in some cases lunch, should be available to everyone participating in mediation.

Location
Mediations take place in the courthouse so that the presiding judge can take a plea immediately following a successful mediation. This provides closure and allows security personnel to return incarcerated defendants to jail quickly.

Forms
We have developed Q & As, time line, docket form, survey, checklist, and other miscellaneous forms. To obtain more information or forms used in felony mediation, contact Carol Paisley, manager of the Division of Mediation at the Kentucky Administrative Office of the Courts, at (800) 928-2350.

Carol Paisley is the manager of the Mediation Division at the Kentucky Administrative Office of the Courts. She can be reached at carolpaisley@kycourts.net.
but two had their cases resolved by mediation. One of the unsettled cases involved a defendant who had always maintained his innocence.

After the third mediation docket, the panel decided to hold one more before reporting the results of the project. For the next round, they settled on a non-English speaking criminal mediation docket with a mediator who spoke English and Spanish fluently.

Etienne Badillo, a retired judge from Puerto Rico, was chosen to be the mediator. Badillo has a doctorate in civil law from Valladolid University in Spain and a master’s degree in judicial administration. He had previously worked for the Department of Justice and had served as a superior court judge in addition to teaching at a judicial college, authoring several books on the law, and being a member of the Special Commission on Judicial Reform in Puerto Rico. Although he was experienced in mediation and arbitration in Puerto Rico and a former delegate to the International Congress of Alternative Dispute Resolution, the panel required Badillo to complete the Kentucky Administrative Office of the Courts mediation training course and familiarize himself with the Kentucky criminal laws. He agreed, and Paisley signed him up for the next course.

Five issues arose before the final mediation docket: There were too few spaces on the docket to handle all the parties who wanted their cases mediated; two defendants accused of rape requested mediation with involvement of the victim; civil mediators wanted to observe the process; codefendants wanted to mediate their cases together; and there was a gap between Badillo’s experience and that of the other three judges.

The panel got together to resolve these issues. In regard to the case selection process, they decided to accept cases based on who had signed up first, and they accepted only one of the rape cases. The group allowed the three codefendants who wanted their cases mediated together to have a two-hour time slot. The defendants and their attorneys were given separate rooms.

Regarding observers in the room, the group decided to give the issue to the parties. During the first three criminal dockets, only Paisley was allowed to observe. In fact, Kentucky Rule 2005-2(3)(8) provides that “mediation sessions should be closed to all persons other than the parties, their legal representatives, and other persons invited by the mediator with the consent of the parties.”

In previous mediations, the parties had accepted Paisley’s presence, so it was decided to allow observers if the parties allowed it. The observing mediators also had to agree to maintain the strict confidentiality of the mediations.

The group and Badillo worked together to resolve the last issue. He was given his cases more than a week before his mediation. He wrote his opening remarks in advance, and they were critiqued and edited to meet previously established standards. He studied Kentucky’s criminal law for each case. Then, during the three morning sessions of mediation, he observed and was second chair to a different mediator each hour. In the afternoon he was the lead mediator, but was assisted by one of the others.

The mediation docket included five Spanish-speaking defendants. Although an interpreter was present, Badillo spoke directly to the defendants in Spanish. Almost every case reached a resolution that day, and the defendants expressed their appreciation for Badillo’s communication to them in their native language. Only the case involving a defendant who adamantly maintained his innocence was not settled.

In Boone and Gallatin counties, the caseload burden felt in 2004 is no longer as overwhelming. A second judge was appointed earlier this year. Although still overworked, the Commonwealth Attorney’s Office and the Public Advocates’ Office have hired additional employees, and the once-new attorneys in 2004 have gained experience. Today, criminal trials are set within 45 days of arraignment, generally 20 jury trials apiece on two Mondays and Thursdays each month. Criminal dockets are maintained at about 100 cases.

The program’s next challenge was set for September 2008, when mediations will focus on sexual crimes. Mediations will involve victims, including minor victims and their parents.

Since the program began in 2004, the Commonwealth Attorney’s Office, the Public Advocates’ Office, and the private bar have all embraced the concept of criminal mediation and have indicated their desire to have periodic criminal mediation dockets to help reduce the caseload. Criminal mediation has also gained the support of the other circuit judge in Boone and Gallatin Counties, J.R. Schrand. The overwhelming support and positive results of the criminal mediation program in Kentucky seems to be raising the public’s confidence in the mediation process as well. ◆
Top 5 Reasons to Choose Missouri

REPUTATION
Missouri was the first U.S. law school to offer an LL.M. exclusively focused on dispute resolution. Missouri consistently ranks as one of the top law schools in dispute resolution.

FACULTY
Our scholars generate important work influencing dispute resolution theory and practice around the world. We have one of the largest collections of full-time law faculty who focus on dispute resolution, publishing leading articles and texts.

CURRICULUM
Our program blends theoretical analysis, practitioner skills, and systems design work.

COMMUNITY
Our classes are small, creating a close community among faculty and students, forming lifelong bonds for networking and future collaboration. Classes generally are limited to LL.M. students.

DIVERSITY
Our student body is diverse – by age, race, nationality, legal background – which enriches the level of discussion inside and outside the classroom.
They gathered on the north side of the city, where most of Milwaukee’s violent crimes occur. There were two dozen members of the community and eight special guests—offenders, who had committed severely violent crimes, returning from prison. They sat in a traditional Native American talking circle on the second floor of what used to be a bank. It is now a community center for this poor, African-American neighborhood. With a lit candle in the center, the facilitator explained the purpose of the gathering and of the restorative practice of meeting in a circle. Those gathered included victims, neighborhood residents, the community prosecutor, faith leaders, business owners, police officers, parents of local school children, and the federal prosecutor who leads the Safe Streets Initiative.

For the next two hours, participants reflected on how violence affected their lives. For some, it brought tears. For others, it brought a chance to tell their story. But for all, it was a transformative experience.

Restorative justice talking circles are held in the Milwaukee community, involving both offenders returning from prison as well as first-time offenders. For the first-time offenders, this is a second chance and is chosen instead of prosecution or incarceration.

Milwaukee, like most major American cities, experiences violent crime on a daily basis. Wisconsin has one of the highest incarceration rates for African-American males. The prisons, like many elsewhere, are seriously overcrowded.1 A trend of incarceration has formed like a black hole, moving from one generation to the next. Our traditional system of retributive justice will only feed this trend. Locking everyone up and throwing away the key is simply not a viable solution.

Although the most violent and severe offenders must be incarcerated to protect the community, there are those who, within a restorative model of justice, can be helped to lead productive lives when they return to their communities. Because of its collaborative efforts in addressing crime, Milwaukee became one of eight cities in the country to implement a pilot project to decrease crime in 2007. In particular, Milwaukee implemented the Safe Streets Initiative, emphasizing a second chance that included restorative justice talking circles for offenders returning from prison and as an alternative to prosecution or incarceration for first-time offenders. This project, funded by a grant from the U.S. Department of Justice, seeks to decrease crime by implementing alternative means of law enforcement, increased community engagement, and new practices in the Department of Corrections.

Based on a model developed by Professor David Kennedy, the director of the Center for Crime Prevention and Control at John Jay College of Criminal Justice in New York, Milwaukee’s Safe Streets Initiative is a communitywide effort, engaging city leaders and institutions in ways that have never before been achieved. The 2007 Common Ground Conference, held in Milwaukee and hosted by Mayor Tom Barrett and Deputy U.S. Attorney Bill Lipscomb, brought together myriad leaders to propose a project that would integrate three main components: (1) enhanced and nontraditional resources for members of law enforcement; (2) engagement by staff to create stronger connections in the community; and (3) different operational correctional practices, both at the state and community levels. The project focuses on two areas of the city: the near north side, Milwaukee Police District 5, a chiefly African-American community that is burdened with poverty, a jobless rate for African-American males of about 44 percent, and one of the city’s highest violent crime rates, and the near south side, Milwaukee Police District 2, a largely Latino community that has struggled with drugs, guns, and gang warfare.
Marquette University Law School's Restorative Justice Initiative leads the community engagement section of the program and operates a restorative justice model for achieving new outcomes. Restorative justice is a philosophy that is victim-driven and seeks to place the harm in the middle of the equation. Traditional justice practices are offender-focused: Nearly all the resources, time, and effort are spent on the offender—arresting, charging, investigating, prosecuting, convicting, sentencing, and incarcerating. The only time a victim is brought into the equation is to testify. Restorative justice allows the victim a voice and focuses on the harm that has been done. There are several models of restorative justice, including victim-offender dialogue, community conferencing, and Native American talking circles.

Since May 2007, while law enforcement agencies have been conducting intensive surveillance, research, and planning for gang “take downs” and “call-ins,” Marquette Law School’s Community Coordinators have been developing relationships, strengthening community ties, and holding talking circles for a variety of constituencies. These experiences have been indubitably positive. The Native Americans believe that when a community gathers in a circle, everyone has an equal place; there is no hierarchy in a circle. A talking piece, such as a feather or another treasured object, is used, and when one holds the talking piece, it is believed that he or she can speak only the truth. Circles require active and deep listening as the talking piece is passed from one to the next. Only the one holding the piece speaks.

In one of our earliest circles, an African-American mother of three sat opposite of the mayor and said to him, “Mr. Mayor, I can’t stay in Milwaukee anymore. My children aren’t safe; there is a gunshot in the wall above the bed where my baby girl and I sleep. I’m taking my kids and moving to the South because we can’t take another violent summer in Milwaukee.” Everyone in the room could feel the sadness associated with that decision.

One of the most significant challenges in this project has been a long, negative history between the police and the communities of color. Together those who would not have been likely to meet otherwise. They transform the participants, who come to realize how far a violent act can spread, and how tragedies can happen to anyone—even a cop.

Circles involving offenders returning to their communities from prison have two parts: a premeeting and the circle itself, known as a “contact notification.” First, community prosecutors, police, and other law enforcement officials meet with the offenders as a group. In this premeeting, the offenders are told that the officials do not want to send them back to prison, but that the offenders are being watched. The offenders learn that the police, the FBI, the DEA, the ATF, and local and federal prosecutors are working together and surveying their activities in the community. They are told that if they reoffend, they will be put away for hard time. And they are told that they are being “handed over to the community.” At this point, the Safe Streets staff explains to offenders that they are about to enter another room that is full of community members who are there to support them but are not going to put up with more violence in their neighborhoods. For many offenders, it is the first time that they hear from victims and communities the deep and substantial impact that their criminal behavior has had on many people. They are told that when the circle is finished, they will be given information about education, job training and employment, alcohol and drug treatment, recovering a driver’s license, and other resources. In these circles, many offenders have had the courage to tell their stories and have received tremendous support afterwards. Victims and community members talk about the healing nature of this process. At pilot sites for this program around the country, these contact notifications have been shown to reduce recidivism significantly.

In another circle on the south side, a young member of the brutal gang the Latin Kings had just been released.

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One of the most significant challenges in this project has been a long, negative history between the police and the communities of color.

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from prison. This gang member approached a compassionate officer after the circle and told him, “I’ve never had a cop talk like that to me before.” The police officer gave him his card and said, “If there’s ever anything I can do to help you, give me a call.” And he did.

One of the keys to this work is asking victims of crime to describe their lives before the crime, what they experienced during the offense, and how the event has affected them and those close to them. The more that victims can convey to the offenders how much the crime has harmed them, the more powerful the experience. A regular participant in our circles is a woman who has been a chaplain at the Milwaukee Children’s Hospital for more than 10 years. She describes her experiences of holding sobbing mothers whose children have been injured or killed by gunfire. She then shares how three years ago she became one of those sobbing mothers. She was the mother of a 33-year-old Department of Justice drug agent named Jay. One evening, Jay was filling his car with gas on the way to start his shift. He went into the gas station to buy a cup of coffee. As Jay was returning to his car, he was approached by two men who wanted to rob him. One of the men held him at gunpoint, while the other patted him down to find his wallet. The robber suddenly felt her son’s gun and told his partner. Having left his bullet-proof vest in the passenger’s seat, Jay had no armor to deflect the bullet when he identified himself as a police officer and asked them not to shoot him. Jay died a week later. This is one of the unforgettable stories brought to the circle by victims.

Other circles are being conducted with a group of offenders who have been arrested but have had their prosecution deferred in hopes that, with community resources, they will avoid further crime. Circles are being conducted in schools for issues like bullying, gang violence, and poor sportsmanship. In one classroom, the behavior of students was so rude and disrespectful that the teacher requested a facilitator to conduct a circle. All the students in this elementary school classroom gathered in a circle with their teacher. When her time came to speak, she broke into tears. The students were shocked. This event transformed the entire classroom, and after the circle, the students started to realize the impact of their disruptive behavior.

Whether in a classroom, with violent offenders, in a poor community, or in a prison, restorative justice circles work because they create a safe place for everyone at the table, while removing the boundaries that keep people separated. The experience of a circle transforms the participants, and forges healing for all members of the circle community.

Endnotes
Ten dollars for 24 years. That is the deal the criminal justice system of Louisiana handed Michael Williams after he spent 24 years of his life incarcerated for a crime he did not commit. Williams is one of 200 individuals who have been cleared of criminal charges using DNA evidence incontestably showing that they did not commit the crimes for which they were charged, tried, convicted, and imprisoned. The parting gift that the State bestowed upon Williams to compensate him for his loss and to help him reintegrate into society was $10.

In cases like Williams', where it is clear that the traditional criminal justice system has failed to deliver justice, ADR processes are well posed to restore a sense of justice to exonerees and to the original crime victims whose cases have been unexpectedly reopened. Restorative justice, specifically victim-offender mediation, is one model that may help spur the healing process for all involved and deliver a modicum of justice to the wrongfully convicted.

This article examines the worlds of wrongful conviction and victim-offender mediation to show why the two are a good fit.

Wrongful Conviction and Exoneration Through DNA
America has long suspected its judicial system delivers less-than-perfect justice. This imperfection has become increasingly apparent in the last 18 years. The more than 200 people who have been exonerated using DNA evidence in that time spent an average of 12 years in prison. The story of Michael Williams provides an example of what those who are wrongfully convicted endure and the role the justice system plays in these cases.

Early in the morning of February 21, 1981, a 22-year-old woman was beaten with a wooden board and raped three...
times in her apartment. The victim immediately identified her attacker as Michael Williams. She had been tutoring Williams in math, and their families had known one another since he was a baby. She said that she was able to see him in the moonlight and that she recognized his voice as he was mumbling to himself during the attack. Within six hours of the attack, Williams was arrested.

Williams was 16 years old when he was arrested. He testified at trial in May 1981, admitting he had a crush on the victim. However, he consistently denied having any connection to the rape, and he testified that on the night of February 20 he went to a church revival with friends and was home by about 11 p.m. He said he listened to music and went to bed, not leaving the house until he woke up around 8 a.m. on February 21. His grandmother and sister confirmed these details.

At trial, the prosecution presented no physical evidence to link Williams to the crime. The police found no clothing that matched those the victim said her attacker was wearing, no blood on any of Williams's clothes, no shoes that matched the perpetrator's footprints, and no scratches, cuts, or abrasions on Williams. The prosecution rested its case on the victim's testimony. Despite the lack of physical evidence, the jury convicted Williams after deliberating for less than an hour. At the age of 16, Williams was sentenced to life in prison.

Twenty-four years later, Williams was released from Angola State Penitentiary after three rounds of DNA testing proved conclusively that he was innocent. Williams was 40 years old when he walked out of prison on March 11, 2005, having spent his entire adolescence and much of his adult life in prison. At a press conference after his release, he described his time in prison as "a living hell" commenting, "a lot of terrible things happened to me when I went in there." Justice Bernette Johnson of the Supreme Court of Louisiana took note of Williams's plight, discussing his time in jail and the sexual abuse he endured as a young man while prison guards turned a blind eye. Johnson stated:

Persons wrongfully convicted lose time during incarceration that cannot be retrieved. Furthermore, inmates, generally, leave prison with no savings, dismal employment prospects, and oftentimes medical and mental issues. Wrongful conviction can also cause significant stress on family relationships including the financial pressure that may have been created by legal fees associated with the wrongful conviction.7

Much of Johnson's opinion has proven true for Williams. At his release, he had no job skills or long-term employment. For 16 years, his only contact with the outside world was through his attorneys at the Innocence Project. Williams settled in Baton Rouge because he was unsure whether those in his hometown of Chatham would welcome him. The original crime victim and her family still believe Williams is guilty. The victim is so certain of Williams's role in her rape that Jackson Parish District Attorney Walter May says the victim now feels there must have been two people present during her attack. Finally, because Louisiana had no compensation statute in place at the time Williams was exonerated, he had little money with which to start a new life. He was not even eligible for the vocational and job training that are provided to ex-offenders and parolees.

The one silver lining in Williams's story is that it helped spur Louisiana to adopt a compensation statute providing an exonerate with $15,000 for each year of wrongful incarceration, including up to $150,000 for the loss of life opportunities, and funds for job-skills training, medical care, counseling services, and tuition to attend school. As Louisiana's statute demonstrates, one way of attempting to repair the wrongfully convicted is through compensation statutes. Financial awards are critical to exonerees' survival in the outside world, and it is essential to encourage legislation in the 25 states that still lack compensation statutes. However, just as neither prosecution nor punishment of an offender provides crime victims with a meaningful opportunity to heal, no amount of money will provide exonerees with what they truly need to move forward—recognition by the state of the injustice and a sense of justice restored.

Among the many problems faced by exonerees, particularly those who have served lengthy prison sentences, are long gaps in their resumes, debts to repay (such as child support), few job skills, little money and little education, poor physical and mental health, and a lasting stigma from their time in jail. A holistic statutory compensation scheme may remedy some of these problems. These forms of redress are critical but insufficient. Exonerees need an additional remedy aimed at easing their emotional baggage: victim-offender mediation.

Victim-Offender Mediation as a Model

Beginning in the 1970s, a restorative justice movement emerged to recognize the impact on, and the role of, the victim and the community in dealing with crime. Restorative justice has been described by John Braithwaite as a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the
crime.”11 The restorative justice movement addresses the needs of the crime victim, the exoneree, and the community—three entities that are deeply affected by the wrongful conviction. Rather than seeing crime as an act only or primarily against the state, restorative justice is collaborative; it focuses simultaneously on the past harm and how best to repair this harm in the future. Although many processes fit within the restorative justice rubric, victim-offender is best suited to addressing exonerees’ needs because it is well tested yet flexible enough to meet the demands of each case.

The Ability of Victim-Offender Mediation to Address Serious Offenses

Victim-offender mediation seeks to provide a safe, neutral space for dialogue among the crime victim, the offender, and others that is guided by a trained mediator. Mark S. Umbreit, one of the nation’s foremost authorities on victim-offender mediation, explains that in victim-offender mediation, “the victim is able to let the offender know how the crime affected them, to receive answers to questions they may have, and to be directly involved in developing a restitution plan for the offender to be accountable for the losses.”14 Victim-offender mediation has grown tremendously in the United States and around the world. In 1990, there were approximately 150 victim-offender mediation programs; in 2000, there were more than 1,200 such programs.15 Victim-offender mediation began as a way to handle crimes against property, misdemeanors, and juvenile crimes. However, it has since been applied to increasingly serious offenses, particularly in Germany and Austria, where about 70 percent of all victim-offender mediation cases involve violent crimes.16

The Promise of Victim-Offender Mediation in the Exoneree Context

Ronald Cotton’s story is the closest an exoneree has come to victim-offender mediation. It stands in sharp contrast to Williams’s reentry into society. Cotton was also convicted of crimes he did not commit—rape and burglary—and he served more than 10 years of a life sentence before he was exonerated. Much like Williams, Cotton’s case revolved around the testimony of the victim, Jennifer Thompson, who testified against him at trial and was “completely confident” that Cotton was the man who had raped her.17 What distinguishes the two cases is that after Cotton was exonerated, Thompson apologized to him. Two years after Cotton was released, he met Thompson in a church where they spoke for two hours. Cotton married, had a daughter, bought a home, and worked for the company that conducted the DNA testing that exonerated him. In 2000, Thompson wrote a moving op-ed for The New York Times describing the case, in which she said, “If anything good can come out of what Ronald Cotton suffered . . . let it be an awareness of the fact that eyewitnesses can and do make mistakes.”18 True to these words, Cotton and Thompson now speak publicly together to educate the nation about the causes and costs of wrongful conviction.

The recognition and healing that enabled Cotton to become a proponent for change can be extended to all exonerees through victim-offender mediation. Victim-offender mediation provides a strong foundational model for mediation sessions because it focuses on dialogue and communication. It is voluntary, and there is no statute of limitations after which a case is no longer able to be mediated. In contrast to criminal prosecutions, where district attorneys may pursue a case against the wishes of the victim, a victim, such as the exoneree in victim-offender mediation, retains full authority to decide whether to proceed with mediation. Studies have shown that victims who interact with offenders through victim-offender mediation “feel a significant reduction in fear and a significant increase in their sense of security.”19 This increase in personal security is an important common interest between the crime victim, whose safety was violated by the crime and the revelation that the true offender could still be at large, and the exoneree, who lost all privacy and security in jail and who may be distrustful of any state actor. This common interest can provide a powerful moment for the exoneree and the crime victim to realize they have more in common than they might have thought.

Overall, victim-offender mediation holds promise to restore justice at a much deeper level than even the most generous compensation from the state.20 Victim-offender mediation enables the representative of the state to give exonerees access to financial compensation, education, job training, and health care; in addition, it also enables a conversation between the exoneree and the state. This conversation would help to heal and empower the exoneree while educating those who oversee the criminal justice system about the impact and causes of wrongful conviction, such as mistaken eyewitness identification and overdependence on non-DNA forensic disciplines.

How Victim-Offender Mediation Can Address Exonerees and Crime Victims: Necessary Alterations to the Typical Model

In the context of wrongful conviction mediations, there are several alterations that should be made to the standard victim-offender mediation model to truly maximize the benefits of victim-offender mediation. These alterations stem from the fact that the offender in the mediation is arguably the state; the variety of possible parties who might be present at the mediation; and sensitivity to the timing and number of mediation sessions that are appropriate to the particular parties. In addition, wrongful conviction cases are particularly sensitive because the offense in most DNA exonerations is either murder or rape, as these are the crimes where DNA evidence is present. The mediator must be particularly sensitive to the possibility that the mediation could explode. A flexible mediation model that considers and adapts to each individual case is necessary to handle these issues.
Typically, victim-offender mediation includes four phases: (1) intake and prescreening, (2) preparation for mediation, (3) the mediation itself, and (4) a follow-up phase. The key phases and considerations unique to the mediation of exoneree cases are discussed below.

**Who Should Be Present**

In the context of exoneree mediation, there are a number of people who could attend the mediation including: the exoneree, a representative from the state such as the prosecuting attorney or a member of law enforcement who was involved in the case, the crime victim, the true offender when known, members of the community, counselors or psychiatrists, and support persons.

The two core parties are the exoneree and the state representative(s). Wrongful convictions turn the usual relationship between these parties on its face. The state, as the people's voice in criminal prosecutions, failed to ensure justice, while the exoneree, originally labeled the “offender,” becomes a wronged victim. The state should mend the egregious miscarriage of justice that occurred to retain its moral authority. It is thus critical to include the exoneree as well as the prosecuting attorney and members of law enforcement who investigated the case.

The decision of whether to include the crime victim is a particularly thorny issue. The crime victim’s presence raises two possible complications. The first issue is that having the crime victim present will shift attention away from the exoneree. A trained mediator, through conversations with the crime victim and the exoneree, should have a sense of their respective desires and needs. From this the mediator can determine whether the crime victim’s presence would be beneficial to the exoneree’s healing. Another option is to hold a two-tiered mediation in which the mediator meets first with only the exoneree and the state representative and once both parties are satisfied, the mediation can then explore the idea of expanding the mediation to include the crime victim. The second issue emerges where the crime victim still believes that the exoneree is guilty despite forensic or DNA evidence, as is the case with Williams. Here, to ensure that the exoneree is not revictimized by the crime victim, the mediator should not schedule the mediation if the mediator gets any indication that the crime victim has not come to terms with the exoneree’s innocence. Instead, the mediator should explore this issue in depth with the crime victim. The mediator does not, however, have to immediately close the case. It can take victims months or even years to prepare for mediation. For example, in one case where a mother mediated with the man who murdered her son, nine years elapsed before the mother was able to meet the offender.22

**Intake and Prescreening of Cases**

During the intake phase, a mediator contacts all parties to assess whether the case is appropriate for mediation. There are a number of different avenues by which an exoneree’s case might reach mediation: the nationwide network of innocence projects could serve as a gateway to mediation; the exoneree might learn of victim-offender mediation just as he or she learned of DNA exoneration and reach out to a mediation center; the crime victim might initiate the mediation; or, ideally, each state and federal criminal justice system would have a system whereby it affirmatively offers mediation at the time of the exoneration. For example, the Milwaukee County District Attorney’s Office runs a Community Conferencing Program that resembles victim-offender mediation. Assistant District Attorney David Lerman receives referrals from prosecutors, defense attorneys, victim-witness advocates, judges, law enforcement, probation officers, and victims.23 Such a program could be expanded to address cases of wrongful conviction.

Another critical part of this stage is the prescreening of cases to assess whether they are appropriate for mediation. In the exoneree context, a heightened screening process is necessary to ensure the safety of all parties and the success of the mediation. The mediator should pay particular heed to the voluntariness of the process, to the parties’ stated motivations for wanting to mediate, to the nature of the offense, and to how much time has elapsed since the crime and since the exoneration.

**Preparation for Mediation: Individual Meetings**

While preparing for the mediation, the mediator meets individually with each party to explain the victim-offender mediation process, listen to each party’s story, encourage participation, and, in general, establish expectations. Upon their release, exonerees may feel entitled to money, job training, and special treatment for being wrongfully imprisoned. Crime victims report feeling cast aside after the named offender in their case is exonerated. This confluence of emotions, expectations, and sense of entitlement creates a tricky web for the mediator to navigate, and the
mediator should use individual meetings to unearth these feelings and to help the parties set realistic expectations for the mediation. Marty Price, the founder of numerous Victim Offender Reconciliation Programs, explains:

"Relationship-based, separate, preliminary mediator meetings with victim and offender are the backbone of the victim-offender mediation process. To establish trust and safety, explain the process, answer the parties’ questions and assist them in preparing for the face-to-face encounter." 24

These meetings are particularly important in the exoneree context to monitor progress and determine when parties are ready for mediation. The mediator has a chance to establish rapport with each party and build the parties’ trust, which gives parties a sense of security in the actual mediation. The mediator should also use these meetings to explore each party's goals for the mediation to better structure the actual mediation session and to ensure each party is prepared to actively participate.

The Mediation Session

In the actual mediation session, customary practices, such as setting the room up to make sure all parties have a balanced place at the table and delivering an opening statement, apply with equal force to victim-offender mediation. The exoneree should be allowed to speak first because he or she is the main focus of the mediation. Having the floor first might also help counter any perceived power imbalance that the exoneree feels sitting across from "the state."

Once the exoneree has finished speaking, the state can take a number of actions to begin to right the injustice committed under its watch. The state should begin by acknowledging the wrongful conviction and apologizing. The power of apology is widely discussed within dispute resolution literature, and exonerees are likely to benefit greatly from an apology by the state. 25 As in the restitution phase of a typical victim-offender mediation, the state should explore and work with the exonerees to meet their individualized needs with respect to health care, job or vocational training, housing, and so forth. Finally, the mediator and the state should allow the exoneree to vent frustration and anger while listening for evidence concerning the causes of wrongful conviction.

Restoring Dignity

There are no simple answers as how best to correct the harm done to those wrongfully convicted. Yet it is clear that a check for a nominal amount is never enough to compensate a human being for 24 years of his life or to meaningfully reintegrate him into society. By offering victim-offender mediation, however, the state comes to the table as an equal with the exoneree and extends a bit of human dignity. If the state enters victim-offender mediation in good faith, learns from the exonerees' stories, and implements safeguards to prevent future wrongful convictions, the state will begin to deliver something that a $10 check could never buy: justice.

Note

This article is adapted from an article that previously appeared in World Arb. and Mediation Rev., Vol. 1, No. 6 (2007).

Endnotes


3. The terms exoneree, meaning an individual who has been exonerated, and wrongfully convicted are used throughout this article to refer to individuals whose innocence has been established, often through DNA evidence.


7. In re Roger W. Jordan, 913 So. 2d 775, 785 (La. 2005) (Johnson, J., concurring) (suspending an attorney for three months for failing to disclose to the defense the statement of a key witness regarding identification of the defendant).


10. LA. REV. STAT. ANN. § 15:572.8 West (2005)


18. Id.


21. In many cases, after DNA evidence reveals the wrongful conviction, the evidence is run through DNA databanks to attempt to find the true offender. See, e.g., Barry Scheck, Peter Neufeld & Jim Dwyer, Actual Innocence (2003).


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On March 25, 2008, the Supreme Court of the United States issued what may really be just an interim decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Some view the decision as putting to rest the question whether parties in arbitration can contract for grounds of review of an award beyond those listed in Federal Arbitration Act (FAA) sections 9 to 11. Indeed, the majority in the 6–3 decision did conclude that FAA sections 10 and 11 provide the exclusive regimes for the vacatur or modification of an arbitration award under the expedited procedures of the FAA, and that parties cannot expand those statutory grounds. The traditional FAA universe was saved from outside intrusion.

However, the Supreme Court recognized an alternative non-FAA universe and the potentially different vacatur rules that might apply there. Thus, the opinion left open—wide open—the possibility that parties, by obtaining district court approval of expanded grounds of review or by resting their arbitration award review on common law, may have awards reviewed for even errors of law and errors of fact. The Supreme Court expressed no opinions on those alternative universe matters, instead remanding them for further consideration by the lower courts.

The outcome of those issues on remand, which could include another trip to the Supreme Court, create significant drafting opportunities for businesses and others who seek or prefer court review of the factual and legal determinations by an arbitrator. Award review in that alternative universe could enable parties in arbitration effectively to avoid the Supreme Court’s decision in *Hall Street*. The second half of *Hall Street* may change the ultimate outcome.

**The Hall Street Background**

Underneath the Supreme Court issue of arbitration review was a lease dispute. In the lease between Hall Street, the landlord, and Mattel, the tenant, Mattel agreed to indemnify Hall Street for any costs resulting from Mattel’s or any predecessor lessee’s failure to follow environmental laws while using the premises. When Mattel sought to terminate the lease, elevated levels of a pollutant were found on the property, and Hall Street filed suit to compel Mattel to indemnify it for costs of cleaning up the pollutants. There was no arbitration agreement in the lease, and after a bench trial in the district court for the District of Oregon, the court held for Mattel on its claim for termination. The indemnification claim was not litigated, however, and the parties decided to arbitrate it in lieu of further court proceedings. An arbitration agreement was signed.

This postdispute arbitration agreement provided, among other things, that the arbitration award would be subject to vacatur, modification or correction “where the arbitrator’s findings of fact are not supported by substantial evidence, or . . . where the arbitrator’s conclusions of law are erroneous.” The district court agreed with that protocol and approved the terms of the arbitration agreement as a court order. Notably, at that time, the governing rule in the Ninth Circuit, under *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), was that parties could agree by contract to standards of review different than those set forth in the FAA.

Following the arbitration, the arbitrator entered an award for Mattel on the indemnification claim, concluding in part that the environmental laws governing the lease did not include compliance with the Oregon Drinking Water Quality Act. Contending that this conclusion of the arbitrator was legal error, Hall Street filed a motion to vacate, modify, and/or correct the award pursuant to the parties’ arbitration contract and court order. The district court agreed with Hall Street, vacated the award, and remanded the matter for further consideration by the arbitrator. On remand, the arbitrator then ruled in favor of Hall Street. This time, both parties sought court review based upon the con-
tractual standard of review for legal error, and the district court substantially confirmed the new award, making a change only in the calculation of interest due Hall Street.

In the interim, the Ninth Circuit had overruled LaPine en banc in Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987 (9th Cir. 2003), holding that parties could not vary the FAA standards of review. Accordingly, the Ninth Circuit reversed the district court’s confirmation of the award and instructed the district court to reinstate the initial award in favor of Mattel. Upon remand to the district court, however, the district court again held for Hall Street, and upon further review, the Ninth Circuit again reversed. The Supreme Court granted certiorari to decide whether the grounds for vacatur or modification under FAA sections 10 and 11 were exclusive and could not be modified by agreement of the parties.

Where Hall Street v. Mattel Fits in the FAA Scheme

The FAA, a surprisingly short federal statute, can be divided into essentially three parts dealing with: getting into arbitration (sections 2 to 4); getting through arbitration (sections 5 and 7); and getting out of arbitration (sections 9 to 11). The getting-out phase covers the postarbitration issues of confirmation, vacatur, or modification of the arbitration award.

Prior to Hall Street, most of the Supreme Court decisions on arbitration dealt with the getting-in phase. Only a couple decisions addressed cases postarbitration, but even those two cases looked back too, and decided getting-in issues.

Thus, Hall Street v. Mattel was unique because, for the first time, the Supreme Court addressed a case dealing solely and exclusively with the getting-out phase. Moreover, because there was little Supreme Court precedent on this, the Court was not bound by the concepts and directives from its other FAA cases. Instead, it focused on the plain language and meaning of the FAA itself.

The Majority Decision and Its Unresolved Tensions With or Effects on Prior Rulings

As noted, the Supreme Court held that the vacatur and modification grounds under FAA sections 10 and 11 were exclusive when parties follow the “expedited” or “streamlined” motion practice, pursuant to FAA section 6, for court review of an arbitration award. Thus, where the parties pursue “the FAA shortcut to confirm, vacate or modify an award,” the text of FAA section 9 “compels a reading of the Sections 10 and 11 categories as exclusive.” The Court noted that FAA section 9 states that a court “must” confirm an arbitration award “unless” it is vacated, modified, or corrected “as prescribed” in FAA sections 10 and 11. The Supreme Court therefore rejected Hall Street’s argument that, because arbitration is a creature of contract, parties should be allowed to tailor many features of the arbitration proceeding, including court review.

Thus, in that FAA aspect, the Supreme Court repeated its benchmark that courts make arbitrability decisions under the FAA unless the parties make a “clear and unmistakable” agreement that the issue is to be decided by an arbitrator. The “clear and unmistakable” guideline had been applied to getting-in issues that FAA section 2 stated were for the courts. Thus, in that FAA aspect, the Supreme Court approved the parties’ contractual changes of the courts’ statutory empowerment.

But Hall Street said nothing about that, despite Hall Street’s repeated reference to the “clear and unmistakable” concepts in briefs. Perhaps the Court did not feel that Houssam and Bazzle applied because they dealt with “getting-in” issues, whereas Hall Street dealt with a “getting-out” issue. But that is not a justifiable distinction, and certainly not a reason to not even discuss the “clear and unmistakable” precedent. There clearly was a tension between the Court’s prior rulings and the Hall Street appeal, but the impact of Hall Street upon that earlier guideline was left for
another day. The Supreme Court signal is clear, however: Hall Street has pulled back from the power-of-contract rationale espoused in Howsam and Bazzle.

A second major tension in, and express casualty of, Hall Street is the Court’s dramatically shifted treatment of its prior pronouncements that an arbitration award could be vacated for “manifest disregard” of the law. Hall Street argued that the time-tested nonstatutory manifest disregard standard meant that the FAA vacatur grounds were not exclusive, and also that if the grounds could be modified by a court, contracting parties should also be permitted to do so.

In one sweeping paragraph of Hall Street, the Supreme Court may have significantly undermined, if not eliminated, the manifest disregard test for vacatur. A district court in Minnesota held as much shortly after the Hall Street decision was handed down. The Supreme Court said that manifest disregard no longer has the significance that it has carried. Indeed, the court stripped manifest disregard of any clear meaning, instead saying that it “maybe” meant any of three possibilities. Irrespective what it may mean, the court was clear that manifest disregard did not mean a review for legal error.

Hall Street may also signal the end of other judicially created, nonstatutory grounds of vacatur such as arbitrary and capricious or completely irrational decisions by arbitrators and violation of public policy. Federal courts that have been applying those nonstatutory grounds have now been instructed that there is no longer a place for them in the vacatur topography of the FAA.

Finally, a new but unanswered question raised in Hall Street is how clearly the parties must embrace the FAA in order to render the sections 10 and 11 grounds nonmodifiable. In Hall Street, the parties’ arbitration agreement did not expressly invoke FAA sections 9 to 11, and none of the various motions to vacate or modify the award expressly said that the parties were relying on the FAA. Nonetheless, the district court apparently thought it was applying the FAA, and the Ninth Circuit did also. Also, the parties’ arbitration agreement incorporated FAA section 7, a “getting-through” provision empowering arbitrators to compel attendance of witnesses. Moreover, in their submissions to the Supreme Court, the parties referred to issues “under the FAA” and policies “of the FAA.”

Ultimately, the Supreme Court held that “the parties at least had the FAA in mind,” a rather uncertain and subjective standard upon which lower courts are supposed to now judge whether the FAA applies and therefore limits the parties’ contractual opportunities. Indeed, where much of that test is not what the parties intended but, as occurred in Hall Street, what the lower courts decided to apply, the test for invoking the FAA—and thus upending the parties’ contract rights—may depend little on the parties’ positions. Lower courts can be expected to be troubled by the test of what the parties had “in mind” and their required proximity to the FAA.

The Supreme Court did not interfere with the parties’ rights to creatively fashion the features of the arbitration proceeding itself, such as the selection and qualifications of arbitrators, the scope of the arbitration clause and what claims are arbitrable, and choice of law. Thus, the Supreme Court has restricted the parties’ power of contract in the “getting-out” phase that is before the courts, but has not interfered with it in the “getting-in” and “getting-through” phases that are before the courts or the arbitrators.

It appears, therefore, that the majority opinion in Hall Street decided much less than it left open and unresolved. And when one considers the unanswered questions that the Court remanded for further development discussed below, it is even clearer that the results of the second half of Hall Street v. Mattel may substantially upend the score from the first half.

The Dissents
Three justices—Stevens, Kennedy, and Breyer—made two separate dissents. Stevens and Kennedy adopted Hall Street’s argument that parties’ contractual rights trumped the FAA. Relying substantially on Southland Corp. v. Keating, 465 U.S. 1, 18 (1984), and Volt Information Sciences, 489 U.S. at 478 (1989), Stevens and Kennedy stated that the parties’ contract rights are the “settled understanding . . . core purpose of the FAA,” “the primary purpose of the statute,” and the “overriding importance” of the FAA. Indeed, they contended that the interests favoring enforcement of parties’ arbitration agreements are even stronger today than when the FAA was enacted in 1925, giving additional reason to effect the parties’ fairly negotiated terms of arbitration. This dissent criticized the majority’s reading of sections 9 to 12 as “a wooden application” of statutory interpretation—“a reading that is flatly inconsistent with the overriding interests in effectuating
the clearly expressed intent of the contracting parties.”

Notably, Stevens and Kennedy did not address the “clear and unmistakable” argument espoused by Hall Street. That argument would have bolstered their dissent by providing additional and more recent Supreme Court authority endorsing parties’ contract rights. The absence of their discussion of Howsam further leaves the fate of “clear and unmistakable” muddled. Perhaps their silence also means that Howsam, like manifest disregard, may not in the future be accorded the significance that it once had.

Breyer’s short dissent simply stated that the FAA does not set forth the exclusive grounds for vacatur. Thus, Breyer agreed with the majority of the circuit courts of appeal on this issue, which were split five to three.15

The Remand for the New and Unanswered

Although the majority concluded that FAA sections 10 and 11 provide the exclusive regime for the review of an award if review is sought under the FAA, the majority acknowledged that “the FAA is not the only way into court for parties wanting review of arbitration awards.”16 Indeed, three means to circumvent the FAA limits and the Supreme Court’s majority decision were set forth: Parties may enforce arbitration awards under state arbitration statutes, via common law contract rights, or possibly pursuant to the district courts’ inherent authority to manage cases under Federal Rule of Civil Procedure 16. Only this third aspect was discussed by the majority because Hall Street “suggested something along these lines in the court of appeals,” but the court of appeals had not addressed the point.17

The Supreme Court noted that this issue was relevant because the parties’ lease did not have a predispute arbitration clause, and their arbitration agreement was submitted to and adopted by the district court as an order. Hall Street and Mattel submitted supplemental briefs on this issue after the oral argument, but the Supreme Court concluded that it was “in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA.” Accordingly, the Supreme Court expressed no opinion on this aspect and instead vacated the judgment and remanded the case to the court of appeals and possibly the district court for further consideration of this issue.18

The question raised by the Supreme Court was “whether the district court’s authority to manage litigation independently warranted that court’s order on the mode of resolving” the award review process.19

This open question means that the proper blend of the parties’ contract rights with federal procedure may be enough to avoid the FAA limits on vacatur. It thus leaves a potentially huge hole in the majority’s decision. It is quite possible that contracting parties could successfully expand the scope of review beyond the FAA statutory grounds if they obtained court approval under Federal Rule 16 to do that. Of course, it is not yet clear how district courts would react to such a request. A district court may adhere to the majority’s decision and refuse to permit an end run around the FAA. Or a district court may feel strongly in the parties’ contract rights, or believe that expanded review for legal error actually enhances the arbitration process.

Ultimately, how the district courts react to the parties’ agreements and requests might be driven by the Stevens and Kennedy dissent that, as shown above, exalted the parties’ rights to contract. The parties could help themselves get expanded award review by distancing themselves from the FAA, such as by agreeing that vacatur is not governed by the streamlined or shortcut motion practice under the FAA, which the Supreme Court said compelled the exclusivity of FAA sections 10 and 11. How successful parties are in getting the district courts’ imprimatur under Federal Rule 16 may heavily determine whether the majority decision in Hall Street retains vitality or is whittled away.

Clearly, a lot depends on the sophistication of the parties’ counsel in drafting arbitration agreements. For the large majority of contracts, where arbitration clauses are reflexively inserted, the FAA will likely apply to award review, and the majority decision will apply. Conversely, where an arbitration clause does not clearly embrace the FAA, the majority decision may not apply if counsel do not step too closely to the FAA in the arbitration or in litigation. Based upon the majority’s decision in Hall Street, it does not take much for the parties to touch the FAA or show that they had it “in mind.” And once the FAA is embraced, like a Venus flytrap, it carries with it the majority’s decision.

The Intersection of Universes

Hall Street v. Mattel has recognized two separate and alternative universes of arbitration award review. First, there is the FAA universe, where sections 10 to 11 provide the exclusive grounds for vacatur and modification of an award. Second, there is the court-approved/state statu-
tory/common law universe, where the parties can or may be able to expand the scope of review, including for legal error. How and where these alternative universes intersect or diverge remains to be seen.

If the Hall Street v. Mattel remand plays out fully, another visit to the Supreme Court is quite possible. But even if that does not occur, the many questions raised in the wake of Hall Street—what about manifest disregard? what about “clear and unmistakable”? what about other judicially created grounds of review?—will still be litigated in the federal courts for years to come. While it may be tempting to view the Hall Street decision as a definite answer, it reflects only, at best, a halftime score, with much more left to play.

Finally, whether the decision will encourage or discourage arbitration is unclear. Even the Supreme Court said that it “cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts.”20 That outcome, too, will depend significantly upon the results of the second half.

Endnotes
1. 126 S. Ct. at 1400–01
2. 196 Fed. App. 476 (9th Cir. 2006)
3. Certain provisions, such as sections 6, 12 and 13, have general application to multiple stages, particularly the getting-in and getting-out of phases. Those apply across the board as procedural rules, most particularly governing the form of pleading to be used in district court proceedings.
6. 128 S. Ct. at 1404.
7. Id. at 1402.
8. Id. at 1405.
9. See Howsam, 537 U.S. at 82; see Bazzle, 539 U.S. at 452.
12. 128 S. Ct. at 1407.
13. 128 S. Ct. at 1408–09.
14. Id.
15. 128 S. Ct. at 1410.
16. 128 S. Ct. at 1406.
17. Id. at 1407.
18. Id.
19. Id. at 1408.
20. 128 S. Ct. at 1406.

Criminal Matters
(continued from page 8)

Springs refers cases including some felonies to the Neighborhood Justice Center there; and several programs utilize victim impact panels especially in drunk driving cases. Some of the minigrant recipients under the ABA Enterprise Fund Project will be experimenting with utilizing mediation in felony cases, and all 10 locales will be encouraged to innovate and expand the usage of mediation and restorative justice.

The criminal justice system is in crisis, with more and more Americans behind bars and on probation costing taxpayers more and more money. Many courts feel overwhelmed by the number of criminal cases on their docket. A felony conviction is morphing into a life sentence. The Mediation in Criminal Matters Project funded by the ABA Board of Governors hopes to stimulate the kind of problem-solving explosion that reduced the stress on the civil justice system in the 1990s. Hopefully, we are on the cusp of a movement to further utilize ADR in criminal settings. It is time for us to think outside the prison.

Endnotes
1. Professor Mitch Michkowski, Ph.D., and Judge Robert L. Gottsfield have published a more in-depth article evaluating the program. It is available from Maricopa County Deputy Criminal Court Administrator Christopher Bleuenstein.
The Current State of Consumer Arbitration

By Sarah Rudolph Cole and Theodore H. Frank
In 2007, the advocacy group Public Citizen issued a scathing report attacking the consumer arbitration process. This report, coinciding with more than a dozen pending antiarbitration bills in Congress, as well as lawsuits against National Arbitration Forum and credit card companies, provided support to many antiarbitration advocates’ claims that consumer arbitration is bad for the “little guy,” a conclusion repeated with little scrutiny by stories in *Business Week* and on *Good Morning America*. Academics and arbitral organizations responded quickly, providing arguments and statistics that suggest significant difficulties with Public Citizen’s analysis of the available empirical evidence. Although problems with consumer arbitration exist, our review of the available empirical evidence suggests that claims by Public Citizen and others that consumer arbitration is inherently unfair to consumers are overstated.

In writing this article, we reviewed the available empirical evidence about consumer arbitration. We did not consider empirical findings related to employment arbitration because the two processes are different in many ways. More important, perhaps, analysis of employment arbitration data is probably no longer necessary to provide insight about consumer arbitration. California’s requirement that various arbitral organizations collect data about their California consumer arbitration cases provides a rich resource from which to draw conclusions about the benefits and drawbacks of consumer arbitration. Public Citizen utilized this rich resource of consumer arbitration data in preparing its report on consumer arbitration. Public Citizen’s analysis of the California data, which appeared to reveal many potential concerns about consumer arbitration, is, however, only one of a number of analyses of that data.

Our analysis of the Public Citizen report and evidence collected in California and elsewhere reveals different, and more positive, conclusions about the state of consumer arbitration.


Public Citizen articulates two major concerns about arbitration. First, it argues that businesses prevail at a “stunning” rate in arbitration. Second, it claims that the use of a small cadre of arbitrators results in biased decisions against consumers. A closer examination of Public Citizen’s findings, however, raises significant concerns with its selective use and interpretation of data.

Public Citizen’s study started with a data set of 33,948 consumer arbitration cases filed with the National Arbitration Forum (NAF) between January 1, 2003, and March 31, 2007. All but 15 of these cases were designated “collections” cases. Collections cases are unlike other consumer cases. In a collections case, the consumer is the defendant. Typically, there is no question that the consumer owes the debt to the credit card issuer. In mediation, the consumer admits the debt and then typically works out a payment plan with the issuer. In arbitration, though, the debtor will lose, because he owes the debt. In such situations, all an arbitrator can do is enter an award against the debtor. Thus, the win-loss record for consumers in these cases is not cause for concern. Moreover, it mirrors consumer success, or, more aptly, lack thereof, in court collection cases.

Another concern the Public Citizen report raised is the use of a small number of arbitrators to decide a large number of cases in a short period of time. Though Public Citizen had a data set of 33,948 cases, it reviewed only the 19,294 of the consumer cases that proceeded far enough to actually have an arbitrator assigned to hear the case. According to Public Citizen, NAF used 148 arbitrators to resolve these cases, 28 of whom handled 89.5 percent of cases (17,265 cases). These arbitrators ruled in favor of business almost 95 percent of the time. The remaining 120 arbitrators handled the other 10 percent of the cases in which an arbitrator was assigned, ruling for business 86 percent of the time and for consumers 10 percent of the time, with the remainder settling. By themselves, these results should not be surprising because collections cases are very easy to resolve in favor of the credit issuer, and because more than 16,000 of the 19,294 cases Public Citizen analyzed involved default judgments. A far larger proportion of consumer civil litigation results in default judgments.

**Navigant Analysis (2008)**

So what does the available data actually reveal? A July 2008 study that Navigant Consulting performed at the behest of the Institute for Legal Reform analyzed the same data set that Public Citizen considered, but found major discrepancies between the underlying data and Public Citizen’s statistical analysis of it. According to Navigant’s report, Public Citizen’s numbers are quite misleading. Navigant reported that Public Citizen slanted its numbers by omitting from its analysis more than 8,000 cases that were dismissed without an award before an arbitrator was selected because the creditor decided not to pursue charges for lack of evidence or otherwise. When the dismissed cases are included in the data set where the prevailing party is identified, the analysis reveals that consumers prevailed in initiated arbitration cases 32.1 percent of the time. According to Public Citizen’s own

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spreadsheet, consumers prevailed in nearly every case that Public Citizen omitted from its percentages.

Moreover, even in the cases where Public Citizen identifies the business as the prevailing party, the consumer was frequently successful in reducing the amount the business sought. Consumers won reductions in 37.4 percent of the cases that went to hearing, with a median reduction of $824. More impressive, in 3,632 of the 16,054 cases where there was no hearing because the respondent defaulted, the arbitrator refused to award the entire amount the business requested. The median reduction for consumers was $599. This may be because “[i]n cases administered under the NAF Code of Procedure, the arbitrator considers all evidence, whether or not there is a response to the claim.” This added layer of protection is unavailable to consumers in civil litigation, where default judgments are entered on sums certain without consideration of the underlying evidence. The average consumer thus comes out ahead in arbitration, compared to court.

The Public Citizen report also criticizes the “loser pays” rule employed in mandatory binding arbitration, and claims that arbitration often results in consumer costs that are higher than those incurred in court. Public Citizen’s own data set contradicts this contention. In 99.3 percent of cases, the consumer paid no fee; in the remaining 246 cases where a consumer paid a fee, the median fee was $75.

Overall, out of 26,665 cases in the Public Citizen data for which a prevailing party was identified, businesses received all of what they requested in 13,731 of them—meaning consumers had at least partial success in 48.5 percent of the cases in Public Citizen’s data set, a far cry from the 95 percent business success rate portrayed in Public Citizen’s report.

As we went to press, Public Citizen had not responded to the Navigant report. It did, however, respond to ILR’s earlier response to the Public Citizen report.11

**Other Consumer Arbitration Studies**

Several other independent studies on consumer arbitration reveal additional discrepancies between what the data establish and Public Citizen’s characterization of them.


The California Dispute Resolution Institute (CDRI), a California organization focused on dispute resolution policy, issued a study focused on data from six providers (ADR Services, AAA, Arbitration Works, ARC Consumer Arbitration, JAMS, and Judicate West) spanning January 1, 2003, through December 31, 2003. CDRI collected and analyzed 2,175 cases, though it noted repeatedly in the report that inconsistencies and ambiguities made analysis of the data difficult. CDRI’s report presents a dramatically different picture of consumer arbitration than the one Public Citizen advanced.

The CDRI study revealed a prevailing party for 302 cases. The consumer was listed as the prevailing party for 71 percent (215) of those cases, with business prevailing 29 percent of the time. This consumer success rate is much higher than those reported in either the Navigant or Public Citizen analyses. The CDRI study also analyzed all 2,175 cases in order to calculate the average amount of claim, amount of award, and arbitrator fees. It did not differentiate between cases in which either business or consumer prevailed for the purposes of calculating these averages. Nevertheless, the report’s average and median arbitration fees are relatively small—$2,256 and $870, respectively. Although CDRI’s report does not provide great detail, its findings offer further support for the notion that consumers do find success in arbitration and that, regardless of the outcome, do not pay exorbitant fees.

**Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases (2004)**

In 2004, Ernst & Young published a study about consumer arbitration. The results of this report suggest that consumers fare extremely well in consumer-initiated arbitration, prevailing in 55 percent of cases that reach decision. In close to 80 percent of the cases reviewed, consumers obtained “favorable results,” defined as cases where the parties reached a settlement satisfactory to the consumer or cases dismissed at the consumer’s request. In addition, the report contained the results of a telephone survey of 26 of the participants. The telephone survey found that 69 percent of the respondents indicated that they were satisfied or very satisfied with the process.

Public Citizen criticized Ernst & Young’s report, primarily because of its small sample size (226 respondents) and the representativeness of the sample studied (limited to consumer-claimants).

The American Arbitration Association (AAA) conducted a similar small study that offers further support of results other than those contained in the Public Citizen report. In this study of 310 AAA consumer cases decided between January and August 2007, AAA found that consumers prevailed in 48 percent of cases in which they were the claimant, whereas businesses prevailed in 74 percent of cases in which they were the claimant.12

**Fellows’s Analysis of Consumer Arbitration Data**

In 2006, Mark Fellows wrote an article in which, among other things, he analyzed the California consumer arbitration data.13 Fellows’s analysis of the data revealed that consumers prevailed in 65.5 percent of consumer-initiated arbitration cases that reached decision. By contrast, consumer plaintiffs litigating contract claims in the 75 largest American counties prevailed only 61.5 percent of the time overall and 60.9 percent of the time in bench trials. Businesses prevailed in 77.7 percent of business-initiated arbitration cases that reached decision. In comparison, business plaintiffs litigating contract claims in the 75 largest American counties prevailed 76.8 percent of the time overall, and 78.9 percent of the time in cases by bench trial. Although not directly inconsistent with Public
Citizen’s conclusions, this analysis suggests that consumers fare better in arbitration than Public Citizen’s report alleges.\(^\text{14}\)

Fellows further states that case duration in arbitration is shorter than in litigation. Consumer claims against businesses typically last 4.35 months in arbitration and 19.4 months in litigation. For business-initiated claims, the figures are 5.60 and 15 months, respectively. In addition, for claims brought by consumers against businesses, businesses paid an average arbitration fee of $149.50; for claims initiated by businesses, consumers paid an average arbitration fee of $46.63. This is consistent with findings that consumers typically do not pay large arbitration fees. It does not address Public Citizen’s concern that mandatory binding arbitration may discourage the filing of valid consumer claims, though Public Citizen presented no empirical evidence that consumers are less likely to file valid consumer claims in the mandatory arbitration regime than in the civil litigation regime. In theory, the loser pays rule in mandatory arbitration regimes should actually encourage the filing of small, valid claims relative to civil litigation and the American Rule.\(^\text{15}\)

**Consumer Surveys**

Three studies in the last few years polled arbitration participants and consumers.

Harris Interactive surveyed 609 adults who participated in binding arbitration in 2005.\(^\text{16}\) Because all survey respondents participated in arbitration reaching a decision, and only 19 percent of the respondents indicated that they participated in arbitration because it was contractually required, the applicability of the study to the question at hand is limited. In addition, only 48 percent of those surveyed were involved in disputes between an individual and a business. Generally, however, this study suggests greater satisfaction with arbitration than the Public Citizen study reported. Sixty percent of respondents stated that rules for the arbitration were given in advance and largely followed, in contrast to Public Citizen’s suggestion that arbitration rules are not often followed. Only 13 percent indicated that the arbitrator did not follow the arbitration rules, provided in advance to both parties. In addition, 74 percent of respondents found arbitration faster than litigation (63 percent found arbitration simpler, and 51 percent found it cheaper). The majority of respondents were either moderately or very satisfied with both the arbitrator’s performance and the fairness of the procedure and outcome.

Competing studies done on behalf of the Chamber of Commerce’s Institute for Legal Reform (ILR) and the American Association for Justice (AAJ) had contradictory results. The AAJ study, conducted by Peter D. Hart Research Associates, Inc., polled 833 adults by telephone nationwide. The study found that consumers disapproved of arbitration by a 51 percent to 32 percent margin. When questions were phrased to emphasize purported drawbacks of arbitration while downplaying arbitration’s benefits, the margins increased. For example, respondents were told that the “consumer may never take legal action against the company over the dispute,” which falsely implies that arbitration is not “legal action.”

In contrast, the ILR study, conducted by Public Opinion Strategies and Benenson Strategy Group, which polled 800 likely voters in December 2007, reached the opposite result. Voters in that poll said they preferred arbitration to litigation by 82 percent to 15 percent. Another question asked:

Arbitration is a non-court procedure for resolving disputes using one or more neutral third parties—called the arbitrator or arbitration panel. Arbitration uses rules of evidence and procedure that are less formal than those followed in trial courts. Now, there are lots of products and services you buy where you are required to sign a contract with the company providing the good or service. In some of these contracts there is an arbitration agreement, so when you sign the contract agree to resolve any disputes with the company through the process of arbitration. Now, some officials in Congress would like to remove these arbitration agreements from the contracts consumers sign with companies providing goods and services. How about you, do you think Congress should or should not remove arbitration agreements from contracts consumers sign with companies providing goods and services?

Voters answered in the negative, 71 to 24 percent, with 56 percent strongly opposing.

These last two surveys reveal little, other than that consumers’ opinions about arbitration vary depending on the characterization of the questions: Consumers appear to like the idea of “a judge or jury” but strongly dislike “litigation” and “filing a lawsuit and going to court.”

**Is Arbitration a “Good Deal” for Consumers?**

Contrary to the claims in the Public Citizen report, the available data—including Public Citizen’s own data—suggest that compared to litigation, arbitration is a relatively inexpensive and fair mechanism that produces positive outcomes for consumers. Public Citizen’s use of collections cases to demonstrate inherent bias within the arbitration system undermines its conclusions. The win rate in those cases will always be low for consumers. Worse, Public Citizen misses thousands of cases where businesses voluntarily dismissed arbitrations against consumers and thousands more cases where consumers won reductions in debt, making its statistics unreliable. As other studies show, consumers as plaintiffs actually are quite successful in arbitration and, when they participate in arbitration, do not pay exorbitant fees. Public Citizen’s study fails to compare apples to apples or to account for the benefits to consumers through lower prices from mandatory binding arbitration clauses. Although additional analysis of the California data may eventually show other trends, the news so far seems good.

Nevertheless, Public Citizen has succeeded in creating a false perception among legislators, some advocacy groups, and some academic commentators. Professor
Nancy Welsh, while finding some fault with the Public Citizen report, concluded that, “[i]f the numbers reported by Public Citizen are accurate . . . I fear that arbitral firms and arbitrators involved in the mass processing of cases will find it increasingly difficult to argue that people’s concerns about the appearance of bias are just not plausible.”17 Certainly some of the one-sided media coverage of the Public Citizen report did not help the case for consumer arbitration. One hopes that the Navigant refutation of Public Citizen’s misleading numbers will garner the same publicity.

At the same time, perceptions are important. One concern that NAF could easily address is the repeated use of the same arbitrators in hundreds of cases. NAF and other organizations have already pushed to diversify their ranks18 and could add the numerous qualified neutrals available to their rolls so that consumers will be more convinced that they are receiving a fair hearing. If consumers incorrectly perceive that the arbitration process is unfair, it behooves the arbitral organizations and companies utilizing arbitration to continue efforts to address any appearance of unfairness.◆

Endnotes
3. See Koppel, “San Francisco Sues Provider of Arbitrators,” WALL ST. J., Apr. 7, 2008, at A3; Ross v. Bank of America, No. 06-04755 (2d Cir. Apr. 25 2008) (holding plaintiffs have antitrust standing to allege conspiracy). At least three of the defendants alleged to be part of the conspiracy to agree to include mandatory arbitration clauses do not actually have mandatory arbitration clauses.
5. Hillard M. Sterling & Philip G. Schrag, Default Judgments Against Consumers: Has the System Failed?, 67 Disp. Resol. J. 357 (1992) (finding consumers prevailed in Small Claims and Conciliation Branch of the Superior Court of the District of Columbia only 4% of the time, with the vast majority of cases being default judgments); Matthew C. McDonald & Kirkland E. Reid, Arbitration Opponents Banking Up Wrong Branch, 62 ALA. L. W. 56, 60 (2001) (“[V]irtually all of these cases were collection cases filed by the bank against customers more than six months behind on their credit cards bills. Unquestionably, the result in collections court would have been the same.”).
6. Under Rule 21A of the NAF Code of Procedure, parties select an arbitrator on “mutually agreeable terms” or by each party selecting an arbitrator and those two arbitrators selecting a third arbitrator for a panel. NAF selects an arbitrator only if a party has failed to participate under Rule 21A.
7. More than half of NAF’s California consisted of MBNA claims. NAF provided the name of the arbitrator for 10,573 of those cases. In cases where NAF provided the arbitrator’s name and indicated that there was a recorded decision, MBNA won 96% of time, with awards totaling $145.8 million. Eighty-four percent of MBNA cases were decided by 27 arbitrators. One hundred sixteen arbitrators handled the remaining 16%. The group of 27 arbitrators ruled for business 94% of the time and for consumers 2.8% of the time. The 116 arbitrators ruled for MBNA 87.9% of the time and for consumers 8%.
8. These numbers come from Public Citizen’s report. The report does not explain what happened with the remaining 4 percent of cases, which are presumably among the 7,283 cases that settled without identifying a prevailing party.
9. Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 99; Teresa McUsic, Unpaid credit-card bills giving rise to lawsuits, FORT WORTH STAR-TELEGRAM, Aug. 31, 2007 (80% of consumers fail to contest civil litigation brought by credit-card companies).
14. It is impossible, however, to calculate the overall win rates for businesses and consumers without knowing the ratio of consumer-initiated to business-initiated filings. The studies summarized above suggest that the vast majority of filings are initiated by businesses. Thus, it is possible that the overall consumer win rate, assuming that 95% of cases that reach decision are business-initiated, may be as low as 25%.
16. HARRIS INTERACTIVE, ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION (2005). The sampling error is +/- 4 at the 95% confidence level.
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Conflict Coaching
Brainstorming to Best Practices

By James McGuire

Are you a litigator in a law firm? Do you have one case that you think should settle, but nothing that you have tried has worked? Where can you turn for help when you are stuck? Dispute resolution professionals can be effective coaches in helping counsel brainstorm to develop and to implement effective dispute resolution strategies. One approach that can be effective in a law firm is to hold a conflict coaching clinic.

Anyone in the firm with a current problem can drop into the clinic, present the problem, and engage in a problem-solving discussion with other attorneys and a dispute resolution professional. Such a brainstorming session usually takes less than an hour and may result in new strategies that will lead to an early successful resolution of the dispute.

Clinics are a proven, cost-effective technique used by problem-solving, proactive professionals. Mediators know that parties can get stuck even before the mediation process starts. Even with the best team focusing on a problem-solving approach, counsel may face obstacles that prevent a constructive negotiation or mediation. The problem may be persuading someone (client, opposing counsel, the other side) to participate in a dispute resolution process. The problem may be unreasonable or inexperienced counsel on the other side. The problem may be an apparent lack of new good ideas for a possible solution. The problem may be the wrong mediator or the wrong process for resolving this dispute. A clinic provides an opportunity to explore these problems at any stage of a dispute and to brainstorm to create new approaches.

The basic setup for a conflict coaching clinic is simple. You will need: (1) a coach, such as an in-firm DR professional or an outside coach; (2) a conference room; (3) a block of time, typically three to four hours; (4) an invitation to attend (when, where, how long); and (5) a flip-chart, blackboard or other coaching aids. It is useful, but not mandatory, to invite attorneys to summarize the problem in an email sent to the coach a day or two before the clinic. As in other clinics, one can use open hours, where anyone is free to drop in at any time, or people may prefer to schedule an appointment for a specific time. An open-hours clinic encourages all who are present to participate in brainstorming and problem-solving. Sometimes, people waiting to present their problem gain new insights into their problem by listening to the presentation and discussions of other attorneys who are presenting a problem. Scheduling appointments works well better when confidentiality concerns or time pressures militate against dropping into the clinic.

As in a mediation, it is important to establish ground rules and appropriate confidentiality safeguards in conducting a clinic. It takes a certain amount of courage to ask for help. This may be especially true inside the litigation department of a large law firm where “can-do” and self-confidence are keys to success. Develop policies and procedures so that attorneys can know (and believe) that “what is said here stays here.” The clinic is not part of a firm’s peer review or evaluation process. Anyone should feel free to ask a question without also worrying about whether the question is dumb or that asking betrays lack of experience or competence. The attorney who comes to the clinic “owns” any ideas and constructive approaches that come from the brainstorming session. Any glory that comes from successful implementation of the ideas generated is his or hers to claim or to share. Coaches are not players.

After the coach reviews the ground rules, the attorney presents the problem. In most cases, five to 10

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Establishing a Culture and Framework to Coach Conflict Resolution Within the Corporation

By Deborah Masucci

The field of alternative dispute resolution promotes creativity, teamwork, and efficiency. The environment creates passionate people who search for opportunities to use the communications, management, and negotiation skills developed in the ADR field in their everyday jobs or who strive to create jobs centered on ADR. No matter where you work or what you do, you have an opportunity to tailor your job to center on ADR. Increasingly, companies hire ADR specialists to ensure that the inevitable dispute is resolved at the right value. However, ADR specialist job descriptions are not cookie cutter and can be as diverse as the brainstorming tools used in mediation. What’s important is the value they bring to the business and the bottom line. This article proposes just one suggested pattern for someone itching to find that perfect ADR job.

The pattern begins with an understanding of why companies value ADR. Companies are established to develop or create products and services that are placed in commerce. Those products and services are purchased and used by other businesses or consumers. Unfortunately, it is often the case that an unwanted but natural outgrowth of commerce is a dispute. Each dispute represents a failure and diversion of resources away from the main business that a corporation and its employees were established to produce. Each dispute erodes corporate good will and resources as well as impedes relationships that are the foundation for future business dealings. When a dispute arises the stakes can be very high, and bad decisions may even cause insolvency of a business. If a case goes to trial, the issues may be decided by a judge or jury forced to make decisions without fully understanding complex technical issues. Media reports about the case can have huge reputation consequences.

Corporate employees are experts in the jobs they are hired to accomplish but not necessarily experts in resolving disputes. Smart corporations establish protocols or controls to deter disputes, educate their employees on best practices for resolving disputes, resolve disputes early before they explode into full litigation, and provide tools and resources to resolve disputes effectively. Corporations increasingly recognize the benefits to their bottom line of managing litigation using ADR with traditional forms of litigation. The effective use of mediation and arbitration results in the achievement of the best resolution and control legal expenses associated with resolving disputes. A study published in the September issue of the Journal of Empirical Legal Studies suggests that plaintiffs do better by settling rather than going to trial and that defendants may pay more than they expect by settling but still less than proceeding to verdict. Clearly, using an ADR tool provides parties with control over the outcome, legal expenses, and finality.

Though early settlement makes good business sense, each corporation differs greatly in the way it engages the process leading to settlement. An ADR specialist integrated into a corporation can sort through these (often
political) decisions to find the right path. The ADR specialist has the opportunity to create and execute consistent policies throughout the enterprise and to reduce confusion. The ADR specialist can expect to face cultural barriers dictating when and how ADR is used, incomplete ADR directories and intelligence held close by departments that work on ADR initiatives part time, and confusion by outside counsel about which policy to follow.

A vital task for the personnel in an ADR department is to understand the corporation’s core values, objectives, and business. The ADR department forms a partnership with managers, employees, and lawyers to resolve disputes effectively with ADR as a part of an overall strategy to resolve the dispute for the right value. The core of the department is a corporate policy on resolving disputes that coalesces the interests of every department. An often cited benefit of a corporate policy is that a policy debunks the perception that suggesting mediation is a sign of weakness. When a manager or lawyer can say “Use of ADR is our corporate policy,” there can be no legitimate argument that the manager is suggesting mediation because his or her case is flawed.

An ADR expert can bring this concept to life adding value to a corporation and positively impacting its bottom line. Two methods to do this are: (1) creating a central ADR department responsible for developing comprehensive policies and protocols for using ADR and (2) establishing a framework for coaching dispute resolution skills that ensures employees are making intelligent strategic choices about when and how to use ADR.

The Central ADR Department

The foundation for a viable and integrated dispute resolution philosophy is a central department devoted to alternative dispute resolution. Employees who are indeed experts in dispute resolution form the core of the department. Key to an effective department leading the ADR effort is the ability of the ADR specialists to cross business lines, solidify partnerships between the legal and business departments, measure performance and impact on the business, and receive the commitment of all levels of management.

The establishment of a corporate policy on dispute resolution is a first step to develop the mission of the central department. A corporate policy for dispute resolution can best be communicated and reinforced by a central department devoted to alternative dispute resolution proactively coaching managers and employees on how to best utilize ADR techniques and processes.

In 1997, the CPR Institute for Dispute Resolution published Building ADR into the Corporate Law Department. The book collected best practices established by many corporations to foster ADR for dispute resolution. Much has changed since the book was published, but the analysis and footprint embedded in the book provide ideas and principles that can revitalize and bolster a dispute resolution philosophy for the 21st century. A basic block for building ADR into the corporate law depart-

ment is the CPR Pledge, which was first proposed in the 1980s and which has more relevance and importance in today’s global economy. The pledge commits signatories to explore resolution of disputes through negotiation or ADR techniques before pursuing full-scale litigation. If the parties believe that the dispute is not suitable for ADR techniques, or if such techniques do not produce results satisfactory to the disputants, either party may proceed with litigation. The pledge’s precepts are a critical component to a viable corporate dispute resolution philosophy.

The establishment of a central department that develops and controls tools and resources for effective resolution of disputes reinforces the corporate message. It leverages not only the expertise within all departments but also increases the likelihood that all employees can focus their time on the job for which they were hired. The tools and resources developed by a central department form the backbone of a framework in which effective coaching improves results.

A Framework for Coaching Conflict Resolution

I propose three branches of a framework that can be built. The first branch is to develop analysis and systems support to increase and accelerate the appropriate use of alternative dispute resolution. The analysis breaks down the dispute to determine whether an ADR option is viable and when ADR should be used. Early case assessment or a strategic resolution plan is an analytical tool that determines ripeness and timing for ADR. The analysis delves into whether a predispute resolution agreement exists and whether, in the absence of an agreement ADR best serves the resolution process or the courts in those jurisdictions requiring ADR.

If a predispute agreement exists, the analysis would offer employees (1) resources to help understand the rules, or (2) ways to negotiate out of rules that are no longer beneficial. If a dispute is arbitrated, it is critical to know and understand the practical mechanics of the applicable arbitration rules. The employees of the dispute resolution department should be proficient in the nuances of all ADR rules and kept abreast of changes in the rules or case law developments to ultimately explain in plain English the impact of the rules and case law on the dispute at hand. In one example from my experience, a client received an adverse arbitration decision that included an award of punitive damages. Outside counsel recommended filing a motion to vacate, arguing that the arbitrators exceeded their authority because the arbitration agreement included a provision precluding punitive damages as a remedy. I explained that under the regulatory rules applicable to the industry involved, the client would incur regulatory sanctions for including a remedy restriction in the arbitration agreement. In addition, the regulatory rules abrogated any remedy restrictions in a separate predispute agreement. The motion was not filed, and the client avoided unnecessary legal expenses, regulatory sanctions and adverse publicity.
The second branch is to support ADR advocacy techniques—not litigation techniques—in an ADR setting. ADR advocacy techniques go beyond simply advancing positions during negotiations or a mediation session. Effective ADR advocacy involves carefully preparing your case and understanding your interests, strengths and weaknesses in the dispute; knowing your adversary’s interests, strengths and weaknesses as well as if not better than your adversary does; understanding the business person’s needs and interests; determining the right ADR technique to use and when to use it; tailoring the ADR process to the dispute; determining objectives for the ADR process; engaging the right ADR professional to foster those objectives; selecting the right attorney to foster the corporate objectives; and being ready to go to trial if you are not able to resolve the dispute to your advantage. When preparing to mediate or arbitrate, it is critical that counsel understand the need to establish an ADR team to coordinate roles and responsibilities during the ADR proceeding and to script the approach for negotiation and advocacy that meets the objectives for resolution. A significant part of this branch is to share prior experiences that the corporation and its counsel have had with mediators and arbitrators. This intelligence is critical to determine whether the ADR professional being considered is the right one for a case and how to strategically use the ADR professional to resolve the matter.

A central concern is securing commitment of outside counsel to early case assessment and development of a resolution strategy. The commitment to intelligently use ADR is key and needs to be reinforced by requiring that outside counsel is trained in ADR advocacy and evaluated on ADR effectiveness. Here the ADR specialist’s role changes to that of “conflict coach” working with corporate management to develop standards and requirements for law firm ADR proficiency. This last piece includes a postresolution reporting mechanism in which ADR preparation and negotiation is analyzed to determine whether opportunities to organize and manage the ADR process were missed. The analysis engages business and legal participants. By implementing this last component, the corporation becomes an organization that learns from its experiences and incorporates the lessons into its work flow for better results in similar matters. Incentives should be developed to encourage best practices that support intelligent resolution strategy.

The third branch is to develop and deliver training programs and resources tailored for the types of disputes that the corporation encounters. Interactive training that places employees in an ADR setting and enables them to simulate the actions they plan to take in live sessions giving employees confidence when they attend a session where results matter. The training should be delivered to all employment levels within the corporation. Even if an employee is not likely to attend or be involved in the resolution of disputes, participation gives each employee an appreciation of the process and how decisions are made.

An effective teaching technique for ADR is to assign roles that the employees would not usually play when faced with a dispute so they can put themselves in the shoes of the other side or other people who typically are involved in dispute resolution. When role plays are incorporated into training, participants learn tactics through debriefing sessions where they reflect on how each negotiation choice changes each step and the outcome.

Training begins with a study of the psychological factors affecting the evaluation and decision-making process. Employees learn not only what personal psychological factors they draw upon to evaluate their chances of winning but also what psychological factors affect the other side’s evaluation and negotiation strategy. Critical to the understanding is development of a plan of action to avoid reacting to the other side’s strategy or moves instead of responding in a planned and deliberative fashion. Understanding available negotiation styles and techniques provides the employee with a toolbox of different approaches that can be tailored to each situation.

ADR training is particularly effective when the level of proficiency among the participants is mixed. The training becomes an opportunity for mentoring and sharing experiences and tactics that have been successful. The training also raises the proficiency of more experienced employees since they are able to learn new skills especially if they never attended a training session previously. Reinforcement tools continuously remind participants of what was learned and the benefits of using the skills. Employers are armed with approach choices and not restricted to a set ADR formula. During a regional training, a participant said that in her jurisdiction, mediators never begin a session with a joint opening session. Part of the training analyzed the pros, cons, and impact of a joint opening session. The training also emphasized that the mediation process for each matter should be designed with the mediator. On her next case, the participant wanted to start the mediation with a joint opening statement. It was important that she speak directly to the
injured plaintiff. She secured the agreement of the mediator, but when she arrived at the mediation session she was told that the mediation would not proceed as agreed. Undeterred, she found out where the plaintiff and counsel were sitting, knocked on the door, and asked if she could speak to them in advance of the mediation. She proceeded to deliver what she prepared as an opening statement. On the heels of the presentation, the parties settled—without the mediator. Lesson learned!

The integration of these three branches and the development of internal ADR experts as a resource can prepare corporations and their employees to become more savvy in resolving disputes and conserving their assets to serve business needs. All three branches do not have to be implemented at the same time. A plan that is timed with staged implementation based on the corporate needs and culture is a plan destined for success. Be part of the change by tailoring your own ADR-centered role.

**Endnotes**

1. Randall L. Kiser, Martin A. Asher and Blakeley B. McShane, Let’s Not Make a Deal. 3 J. Empirical Legal Stud. 551 (September 2008).

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**Conflict Coaching**

*(continued from page 36)*

minutes are enough to provide the necessary background that puts the problem in some context. In most cases, the best practice is to avoid identifying clients or opposing counsel by proper names. Only when the presenter considers that to be uniquely significant is it necessary to disclose that information. The coach may assist by summarizing, reframing, or other techniques to help frame the problem-solving discussion.

Problems presented cover the full spectrum familiar to mediators: Persuading someone (client, opposing counsel, opposing party, third party) to enter into a dispute resolution process; obtaining, sharing, or evaluating information; fitting the forum to the fuss; dealing with ineffective or overbearing mediators; developing and implementing negotiation strategies, and dealing with difficult people. Sometimes the problem may be presented by a corporate attorney, who is looking for solutions before the conflict degenerates to a dispute requiring litigators.

Coaching takes many forms. It may include further questions on prior approaches and a discussion of why those approaches did not work. If others are present, the coach should open the question for group discussion. New ideas presented from such a discussion can be noted on flip charts and summarized or reframed by the coach. Sometimes it may make sense to discuss ideas as presented; other times a story-boarding approach may work better. The group brainstorming a possible solutions, each of which is written on a separate sheet. During that phase, no one comments or criticizes any approach or idea. After all possible solutions are developed, the coach facilitates a discussion about which ideas seem workable to the attorney who presented the problem.

Coaching can also help find patterns and structures that may not be obvious to the presenter. One approach is to help identify the type of problem that is presented and to place the problem in one or more categories. PIPO works: Process, Information, People, Other. Is the main problem a question of bringing parties into a process? Developing a process? Dealing with a mediator in the process? Is the problem an information access or information sharing problem? Does the problem present as dealing with a difficult person? Client? Opposing counsel? Opposing party?

Goals can vary. Sometimes, an individual walks out more confident that the approach he or she intended to use still seems to be the best. Sometimes, new strategies are suggested. Sometimes, a detailed step-by-step plan is developed. The coaching process may identify resources (within the firm or elsewhere) of which the problem presenter was unaware. At the end of the session, it may be useful to have the initial presenter summarize the takeaways that resonate. The coach can help in the summarizing process. In some cases, of course, the presenter may treat the session as producing “food for thought” that takes time to digest.

Some skeptics may react: “Why do you need a clinic? If you get stuck, just walk down the hall and ask someone for help. We are a collegial firm, and my door is always open.” Of course, that may be the correct answer in some cases, but experience suggests that something different happens when more people are involved in a conflict coaching clinic. When attorneys get stuck, the easiest and safest way to get help is from people whom you already know. Their ideas, however, may not be new and may not be the best available within the firm. Brainstorming is itself a creative process and can develop new approaches that no one person thought of. The mediator/facilitator can help shape the discussion to bring those ideas into focus. A dispute resolution professional, when serving as a coach, will bring his or her own experiences and knowledge to bear, which may be different than any of the attorneys in the firm.

New problem-solving approaches are like a breath of fresh air to many clients. Innovative firms that use a conflict coaching clinic as a regular part of firm best practices may find that a hidden benefit is the competitive advantage of giving new meaning to the cliché of being “proactive.” Dispute resolution professionals who lament longingly, “Why did they wait?” may find a new way to be involved much earlier in the process. Try it. You will like it. It works.
Since the American Arbitration Association “enacted” its Supplementary Rules for Class Arbitration in October 2003, more than 200 class action arbitrations have been filed in the AAA. However, these Supplementary Rules have not been modified or amended since their enactment. Consequently, in at least one phase of AAA class arbitration proceedings, parties are engaging in expensive written submissions and oral arguments concerning issues that have already been decided.

The Supplementary Rules were enacted following the decision of the U.S. Supreme Court in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003). In Bazzle, the relevant arbitration provision of the parties’ agreement provided that “all disputes, claims, or controversies arising from or relating to this contract . . . shall be resolved by binding arbitration.” Nevertheless, Bazzle filed a class action in state court, and moved to certify a class, and Green Tree Financial moved to compel arbitration. On the same date, the state court certified a class and entered an order compelling arbitration. Thereafter, the arbitrator issued an award in favor of the class. Green Tree Financial challenged the legality of the award on the grounds that class arbitration should not have been permitted, but the South Carolina Supreme Court affirmed the award, holding that class arbitration was permitted because the agreement was silent as to whether the parties agreed to arbitrate on a class basis.

The Supreme Court vacated the judgment, holding that “the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.” Following the Court’s direction in Bazzle for the arbitrator to decide issues of class arbitration, the Supplementary Rules were enacted to govern (1) “any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the AAA where a party submits a dispute to arbitration on behalf of or against a class or purported class,” or (2) “whenever a court refers a matter pleaded as a class action to the AAA for administration,” or (3) “when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.”

There are three phases in class arbitration proceedings conducted pursuant to the Supplementary Rules: (1) construction of the arbitration clause (clause construction), (2) class certification, and (3) final award. Of these phases, only clause construction is unique to class arbitration. Clause construction allows a respondent to challenge, as a threshold matter, whether the class claimant and the respondent agreed to resolve their disputes on a class basis. The clause construction phase generally includes extensive briefing by the parties, an in-person or telephonic hearing, and a written opinion by the arbitrator(s).

As reflected in the 78 “clause construction awards” on the AAA’s electronic docket as of August 2008, parties in AAA class arbitrations are rehashing the same rule-related issues, despite the fact that arbitrators are reaching the same conclusions in deciding those issues. In fact, only three of the 78 clause construction awards determined that the relevant agreement did not permit class arbitration, while the other 75 determined that the relevant agreements did permit class arbitration.

The uniform resolution of these issues warrants modification of the Supplementary Rules to eliminate further
unnecessary rehashing and the costs resulting therefrom. The most common rule-related issues are analyzed below in the context of the following standard arbitration clause:

Arbitration Clause
The parties will work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if either party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Harris County, Texas.

Issue: What Law Governs Clause Construction?
In Bazzle, the Supreme Court held that, where an arbitration clause is silent as to class arbitration, the interpretation of an arbitration clause “is a matter of state law.” As a result, it appears that arbitrators and parties have accepted as the starting point for construing an arbitration clause the principles of contract construction under the relevant state’s laws, but the issue of what law governs is still briefed and argued nonetheless.

Issue: What Is the Standard on Clause Construction?
In Bazzle, the Court held that “the question—whether the agreement forbids class arbitration—is for the arbitrator to decide” (emphasis added). However, under the Supplementary Rules, the question for the arbitrator in evaluating an arbitration clause is whether the agreement permits class arbitration. This difference has resulted in debate as to the appropriate standard on clause construction.

Does “permit” require some affirmative provision for class arbitration, or is it enough that the relevant arbitration clause uses broad terms that cover arbitration of “any” dispute? Does “forbid” require some express exclusion of class arbitration, or is it enough that other terms in the parties’ agreement suggest their intent to preclude class arbitration? Is there even a real distinction between “forbid” as used in Bazzle, and “permit” as used in the Supplementary Rules?

Issue: Did the Parties Intend to Permit or Preclude Class Arbitration?
In Bazzle, the Court held that, where an arbitration clause is silent as to class arbitration, the relevant question for the arbitrator(s) is “what kind of arbitration proceeding the parties agreed to” (emphasis in original). As a result, briefing on clause construction has centered on whether the unambiguous terms of the arbitration clause evince the parties’ intent vis-à-vis class arbitration, or whether parol evidence may shed light on the meaning of ambiguous terms relative to class arbitration, with the following arguments being made most often.

Even where a dispute resolution provision appears to be silent as to class arbitration, claimants have successfully argued that, under the relevant state’s plain meaning rule, commonly used terms such as “any dispute,” as contained in the above arbitration clause, are broad and all-encompassing and necessarily include disputes that may be resolved on a class basis. Claimants have also successfully argued that, to the extent the arbitration clause is deemed ambiguous, the principle of interpretation contra proferentem should be applied. Defendants have countered, usually unsuccessfully, that such a reading requires implication of an inconsistent term, or the rewriting by the arbitrator(s) of a new agreement between the parties. Defendants have also argued, unsuccessfully, that terms like “any and all disputes” and “any disputes” refer to the scope of arbitral claims, not procedural issues.

Arbitration clauses may require some sort of dispute notice and an attempt at good-faith negotiations before commencing arbitration, as does the above arbitration clause. Respondents have argued that such provisions are intended to result in prearbitration negotiations between only the signatories to the relevant agreement and therefore demonstrate that unresolved disputes are intended to be arbitrated between only the signatories. Claimants have successfully responded that prearbitration negotiation requirements do not themselves contain language limiting such

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negotiations to the signatories, nor do those requirements contain language somehow precluding class arbitration. In other words, claimants have argued that a prearbitration negotiation provision simply does not bear on the parties’ intent vis-à-vis the kind of arbitration to which the parties agreed, but rather refers only to when an arbitration may be commenced, i.e., after good-faith negotiations.

Arbitration clauses may also select a locale in which the arbitration shall occur, as contained in the above arbitration clause. Respondents have argued that the selection of differing locales in an arbitration clause of putative class members demonstrates an intent to preclude class arbitration. Such a selection, argues a class claimant, reflects a choice by the class to preclude class arbitration. As with the prearbitration negotiation provision, claimants have successfully argued that a locale selection provision does not bear on intent vis-à-vis class arbitration. In other words, locale selection only determines where to conduct the arbitration proceeding but not bear on the kind of arbitration proceeding to be conducted. In arbitration, class claimants could also argue that even considering locale selection provisions in the arbitration clauses of putative class members is beyond the scope of clause construction, which is intended to focus on the arbitration clause of the class claimant.

In contrast to the AAA’s Commercial Rules, which require arbitral proceedings to be confidential, the Supplementary Rules require that class arbitration proceedings be kept open to the public, subject to the discretion of the arbitrator(s). Consequently, respondents have attempted to construe such a provision as not precluding class arbitration. As with the prearbitration negotiation provisions, arbitrators have countered that a confidentiality provision cannot be read as bearing on the intent of the parties vis-à-vis the kind of arbitration, but is rather focused on the intent of the parties vis-à-vis how to conduct the arbitration pursuant to their agreement. Claimants have also highlighted the discretion of the arbitrator to resolve any real confidentiality concerns, which may include not posting documents on the AAA’s electronic class arbitration docket.

It is obvious that an agreement may refer to the parties, between them and their relationship without expressing any intent in using those terms vis-à-vis class arbitration. Thus, arbitrators have rejected arguments that the terms “any and all disputes between them” or “any disputes about their business relationship,” as used in the arbitration clause above, were inserted into an arbitration clause to preclude one of the parties from asserting claims on a class basis.

Respondents have also argued that agreements predating the enactment of the Supplementary Rules should necessarily be construed as not “permitting” class arbitration because the procedure did not even exist when the parties reached their agreement. Obviously, as claimants have successfully argued, it would be virtually impossible to arbitrate pursuant to rules that have been superseded, thus arbitration clauses that generically require arbitration pursuant to the rules of the AAA have been read as contemplating arbitration pursuant to the AAA rules as they exist at the time of the arbitration.

Although other issues have been raised during the clause construction phase in various arbitrations, the issues highlighted above appear to be the most common. The uniform resolution of the above issues underscores the need for change to the Supplementary Rules. Formal direction by the AAA as to the governing law in class arbitration, the standard on clause construction, and how certain standard arbitration clause provisions should be read by the arbitrator(s) would reduce the significant expenses that are now being incurred by parties in rehashing these already resolved issues.

Specifically, the Supplementary Rules should be amended to provide that class arbitration shall be permitted if the relevant arbitration clause requires arbitration of “all disputes,” “any disputes,” or “any and all disputes.” The Supplementary Rules should also be amended to state that provisions related to venue, confidentiality, and prearbitration negotiations, as described above, shall be deemed not to preclude class arbitration to the extent such provisions are not specifically tied to class arbitration. Such changes would eliminate the arguments most frequently raised on clause construction, and therefore have the potential to eliminate or, at least, reduce the significant expense parties are currently facing during that phase of a class arbitration. In fact, were the AAA truly interested in cutting the costs of class arbitration, the Supplementary Rules could be amended to state that only those arbitration clauses that expressly prohibit class arbitration shall be read as precluding class arbitration pursuant to the Supplementary Rules. Indeed, such a rule would be entirely consistent with the view of the U.S. Supreme Court, that the question for the arbitrator is “whether the agreement forbids class arbitration” (emphasis added).
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Compiled by Thomas J. Campbell. Forward information about your organization’s regional, national, or international conferences to campbelt@staff.abanet for possible publication in a future issue.
Third Circuit Upholds Arbitration Agreement Despite Party’s Inability to Read It

An arbitration clause in a contract is enforceable even if one of the parties can’t read the language in which it is written, the U.S. Court of Appeals for the Third Circuit ruled in August.

In Morales v. Sun Constructors, Inc., No. 07-3806, 2008 WL 3974059 (3d Cir.), Circuit Judge Michael A. Chagares reversed the finding of the District Court of the Virgin Islands that the arbitration clause in Juan Morales’ employment contract with Sun could not be enforced because Morales did not assent to it.

Morales, a Spanish-speaking welder who spoke little English, signed a contract offered by Sun that included an arbitration clause, which ran to nearly eight pages of the 13-page document. Sun fired him about a year later for violating safety standards, and Morales sued for wrongful termination; Sun moved to stay litigation pending arbitration.

The court ruled that under common law, Morales had an obligation to make sure he understood the contract before he signed it. Absent fraud or misrepresentation, which Morales did not allege, he was bound by all the terms of the contract, including the arbitration clause.

Sun also argued that the district court applied a heightened standard of “knowing and voluntary” consent to the arbitration agreement. The circuit court, while saying it was unclear whether the district court had indeed done so, reiterated its holding in Seus v. John Nueven & Co., Inc., 146 F.3d 175 (3d Cir. 1998) that a heightened standard of “knowing and voluntary” consent would be inconsistent with the Federal Arbitration Act.

FAA Does Not Compel Mediation, 11th Circuit Holds

The Federal Arbitration Act cannot be used to compel mediation, the U.S. Court of Appeals for the 11th Circuit has ruled.

In Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc., No. 07-12309 (11th Cir. April 21, 2008), Advanced Bodycare, which had acquired exclusive rights to market and distribute Thione’s nutritional supplements and a related testing kit, sued Thione in Florida state court, alleging breach of contract after Thione did not replace all the kits found to be defective. The marketing agreement included a clause specifying that the parties agreed to nonbinding arbitration or mediation to resolve disputes. The case was moved to the U.S. District Court for the Southern District of Florida, where Thione sought to stay the suit pending arbitration. The motion was denied, and Thione appealed.

Having determined that the FAA cannot apply to a clause that allows for either mediation or nonbinding arbitration unless mediation can be considered arbitration under the act’s scope, the appeals court saw the key issue before it on interlocutory appeal as a simple question: Is mediation the same thing as arbitration? Noting that the circuit had not created a test to resolve the issue, it went on to answer in the negative.

The court defined classic arbitration as a situation in which the parties have agreed to submit a dispute to a third party for a binding decision. Mediation does not meet that standard, the court said, noting that “mediation does not resolve a dispute, it merely helps the parties do so.”

Failing to Send Representative With Settlement Authority May Result in Sanctions

A California appellate court has warned insurance carriers with potential coverage in a court-ordered mediation that failing to send a representative with full settlement authority to all mediation sessions will result in financial sanctions. Parties to mediation and their attorneys who do not notify their carriers will also face sanctions.

Citing local rules, the Court of Appeal for the Third Appellate District issued the warning in Campagnone v. Enjoyable Pools & Spas, No. C055050 (May 30, 2008). Campagnone had sued Enjoyable Pools and the filter’s builder, Sta-Rite, alleging negligence and product liability after the filter in his swimming pool exploded, causing severe injuries. A jury awarded Campagnone $2.4 million, with interest accruing from the date of judgment until the damages are paid. Enjoyable and Sta-Rite appealed.

The case went to court-ordered mediation. Sta-Rite had listed National Union Fire Insurance Co. as its “excess insurer” for amounts of more than $3 million. No National Union representative attended the sessions, and the Campagnones filed a motion seeking sanctions.

The court ruled that the Campagnones did not violate the confidentiality of the process by filing their motion, but it declined to impose sanctions on National Union, noting that it had not been notified by Sta-Rite. It also did not impose sanctions on Sta-Rite for failing to notify National Union because such sanctions were not spelled out in the local rule. But noting the “resounding success” of its mediation process—more than half the cases sent to mediation have been settled—the court made clear that such sanctions would apply in the future.

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Mississippi’s Katrina Mediation Program Handles Thousands of Claims

A mediation program set up by the state of Mississippi to handle the thousands of insurance claims in the wake of Hurricane Katrina has compiled an 82 percent settlement rate—and set off a dispute in U.S. District Court over a settled claim.

As of September 26, the hurricane mediation program had accepted 5,099 claims; of the 4,270 claims that have been through the mediation process, 816 were settled before the mediation conference; 2,682 were settled during the conference; and 772 were ruled at an impasse, according to the Mississippi Insurance Department website.

The mediation program, established with the help of the American Arbitration Association, was created in December 2005, by state Insurance Commissioner George Dale. Under the program, Mississippi residents with a disputed claim of $500 or more over property damaged in the storm can elect mediation; the insurance company is required to participate.

Eldridge Boyd, who accepted a settlement payment from State Farm during the mediation process in July 2006, filed suit against State Farm in June 2007, alleging a conspiracy among the insurer and the adjusters and engineers it employed to survey storm damage after the hurricane. In Boyd v. State Farm, No. 1:07CV820 (S.D. Miss., Aug. 6, 2008). Boyd claimed that he was owed additional damages beyond State Farm’s payment under a provision in the settlement allowing for supplemental payments for unknown damage, arguing that losses resulting from the alleged conspiracy fell under the provision.

District Judge L.T. Senter ruled that the settlement agreement between Boyd and State Farm was an enforceable contract, and that reading the provision to allow tort claims for fraud or bad faith “would undermine the very purpose of this type of settlement agreement.” The judge granted State Farm’s motion for summary dismissal unless Boyd could show that additional damage unknown at the time of settlement had been discovered.

The program attracted the attention of Judge Senter, who asked Dale in August 2006 to consider allowing some cases in federal court to participate in the program. As part of the resulting pilot project, Judge Senter ordered 21 cases in U.S. District Court into mediation through the state program. As of August, 235 federal court cases had been settled through mediation.

Mediation Available in Michigan Tax Disputes

Mediation has been added to the Michigan Tax Tribunal’s tool kit, although the tribunal is still working on setting up the rules and certification process.

House Bill 4433, which was signed into law in May by Governor Jennifer Granholm, authorizes the tribunal, which handles property tax disputes, to set up rules for mediation and requirements for mediator certification. Mediation is not mandatory in all cases under the law. Instead, a case would go to mediation if both parties agreed to mediation, if they agreed to a mediator, and if the tribunal agreed to designate the case for mediation.

Those interested in being certified as mediators would apply to the tribunal; the law gives the tribunal discretion on certification requirements, specifying only that candidates must have five years of state and local tax experience in the seven years before their application. The tribunal will publish a list of certified mediators, their fees, and relevant experience.

The tribunal is working on setting up the process, but it hasn’t gotten very far, deputy chief clerk Marijo Wakerly said. The work will be done as time allows, she said.

California Protects Mediation Confidentiality

The doctrine of estoppel cannot be used to create a judicial exception to the confidentiality of the mediation process, the California Supreme Court has ruled, noting the state’s interest in encouraging mediation as a matter of public policy.

In Simmons v. Ghaderi, S147848 (Cal., July 21, 2008), Dr. Lida Ghaderi, facing a wrongful death claim, initially agreed to mediation under the terms specified by her medical malpractice insurance provider, and signed an agreement consenting to a settlement. When Ghaderi was told during the mediation process that the case had been settled, she revoked her agreement and left, never signing the settlement.

The plaintiffs alleged that an oral agreement had been reached during the mediation process. Ghaderi’s trial brief, filed 15 months after the mediation, argued for the first time that California’s mediation confidentiality statutes did not allow the plaintiffs to prove their claim. The trial court ruled that an agreement existed, and the appeals court ruled that Ghaderi’s use of evidence from the process and her failure to object to the plaintiffs’ use of similar evidence during pretrial motions estopped her from claiming confidentiality.

The Supreme Court reversed the appeals court, ruling that the plaintiffs were seeking not estoppel but a waiver, which requires express consent under the state’s mediation confidentiality statutes, and declining to create an implied waiver where the legislature did not contemplate one. ♦

Greg Kerr is a graduate student in journalism at Texas Christian University. He can be reached at Greg.Kerr@tcu.edu.
The New Lawyer: How Settlement Is Transforming the Practice of Law
By Julie Macfarlane

The last two or three decades have produced a number of important new developments affecting the legal profession: The growth of ADR, the development of collaborative and cooperative lawyering, the growth of settlement counsel whose principal task is to seek a viable settlement while the litigators “push on to victory,” and the growing focus on joint problem solving in lieu of all-out war. At the same time, ethical codes have taken steps to shift the attorney’s responsibility away from purely partisan advocacy toward greater focus on the public interest. Needless to say, these tectonic shifts raise difficult ethical issues for the practicing lawyer.

The virtue of Macfarlane’s new book is that it brings together these and other related strands into a picture of the “new lawyer” who, through the focus on settlement, “is transforming the practice of law.” Although the author is a Canadian scholar who teaches at the University of Windsor Faculty of Law, she purports to deal with both Canadian and U.S. developments. But a reading of the book suggests that U.S. developments in this regard are a good step ahead of their Canadian counterparts. For example, almost all U.S. law schools now teach one or more courses in ADR. At least three major law schools have added instruction on legal problem solving, and the American Bar Association Section of Dispute Resolution, which now has more than 17,000 members and a vibrant annual spring conference where some of these issues are discussed, awards annual prizes for outstanding work in problem solving.

But as Professor Macfarlane says, “much, much more is needed.” Any reader interested in tracking this important movement will find this book a useful companion.

**CALL FOR NOMINATIONS**

**The D’Alemberte-Raven Award**

**BACKGROUND**

The Section’s D’Alemberte-Raven Award was created to recognize outstanding service in dispute resolution. The award is usually presented annually, in conjunction with the ABA Section of Dispute Resolution Spring Conference. The Section of Dispute Resolution honors Robert D. Raven and Talbot D’Alemberte by using their names in the award title. Both men served as President of the American Bar Association and were proponents for dispute resolution. Both guided the ABA to be a leader in the dispute resolution arena: D’Alemberte as the first chair (1976–79) of the then ABA Special Committee on Resolution of Minor Disputes and Raven as the first chair (1993–94) of the ABA Section of Dispute Resolution.

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The selection of an individual or organization that has contributed significantly to the dispute resolution field shall be in accordance with these rules:

1. The nominee for this award shall have shown leadership in the field of dispute resolution for at least three years.
2. The nominees shall be judged among the following criteria:
   a. development of new or innovative programs
   b. demonstrated improvements in service
   c. demonstrated improvements in efficiency
   d. research and writings in the area of dispute resolution
   e. development of continuing education programs
3. Within two years preceding the date of his/her nomination, the nominee shall not have served as a member of the D’Alemberte/Raven Award Board or held an elective office in the Dispute Resolution Section of the American Bar Association.

Send nomination packages, including a nomination letter, the nominee’s CV or resume, and supporting letters, by November 24, 2008, to:

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Spring/Summer 2008 Winners

OK, maybe it wasn’t such a good idea to start with opening statements.

—Peter R. Silverman

Mickey the Mediator soon realized that he too had an interest in the cheese in dispute, and that this case would take some very creative problem solving.

—Anonymous

Fluffy and Butch, thank you for selecting me as your mediator in your conflict of who gets to sleep on the couch. Before we get started, however, as per Section 9 of the Uniform Mediation Act, I need to tell you that although I do believe that I can be impartial in this mediation, Fluffy’s family has often chased my family around the house.

—Anonymous

As your mediator, part of my job is to help you expand the cheese.

—Phillip M. Armstrong

So if I can settle your dispute, do I get the cheese as my fee?

—Michael P. Carbone

Yes, besides being a trained mediator, I am also the author of Who Moved My Cheese?

—Anonymous

Thank you for meeting with me to resolve ownership of the cheese. At your request I will keep it for you temporarily, provided you agree that my fee may be taken out of it in nibbles.

—Master Carol Albert

I need to know whether this is a court ordered mediation, or whether one or both of you have an appetite for mediation.

—Ed Roy III
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