Alternative Resolutions

State Bar of Texas | Alternative Dispute Resolution Section

Erich Birch, Chair, ADR Section

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Chair's Corner

They say time flies, but it seems to be on adrenaline these days. We are at the end of another Texas Bar year, and the ADR Section continues to do much in meeting its commitment to educate the public and be a resource about the proper role of alternative dispute resolution in our society. In the 2015-2016 year the ADR Section implemented changes that will keep the Section on track for improving its service into the future.

The most visible change this year was in January, when the Section held its first Annual Meeting in conjunction with the Section's Annual CLE. The move required some quick action by the Council after the last Annual Meeting in June, because in this transition year the timing for nominations of new Council members, officers, and candidates for the Frank Evans Award was significantly compressed from previous years. In fact, there was actually only one Council meeting between the two Annual Meetings.

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However, everyone rose to the challenge. As we hoped, the attendance at the Annual Meeting was the highest in recent memory.

One significant benefit of having the Annual Meeting during the ADR CLE was that more members witnessed the presentation of the Evans Award to this year's two recipients. Judge Alvin Zimmerman of Houston, and John Allen Chalk of Fort Worth, were both presented with the Award this year in recognition of their significant achievements and contributions to ADR in Texas and nationally. Congratulations again to both.

This year the Section also conducted a review of its newsletter, *Alternative Resolutions*, and set in motion a number of changes. First, the Council determined it was time to restructure the editor responsibilities to ensure the delivery of a timely and high quality newsletter. The newsletter will now be managed by a volunteer Chief Editor with overall responsibility for content, assisted by a retained Managing Editor responsible for review, editing, graphic presentation, and final publishing.

The changes are already in effect, and the newsletter you are reading today is the first edition published by our new Chief Editor, Kay Elliott, and new Managing Editor, Jennifer Alvey. Kay is a lawyer, mediator, arbitrator, and adjunct professor at Texas A&M School of Law, and is well known in the ADR field. Jennifer Alvey is a lawyer turned writer and publisher, and is eager to provide this service to the Section. Kay and Jennifer have lots of ideas for improving both the content and visibility of the newsletter going forward, so stay tuned. If you have ideas you would like to share, contact Kay at k4mede8@swbell.net or Jennifer at jalvey@jenniferalvey.com.

The long-awaited revised ADR Handbook is due out any day now. Kay Elliott is also the Editor of the Handbook and has worked hard with the authors of the various chapters of the book over the past several years to bring us to this point, and we look forward to seeing the fruits of her work. The Section again retained Jennifer Alvey to complete the editing and publishing of the Handbook, and she will also help with marketing the final product to non-members of the ADR Section. The Handbook will be a valuable, free member resource to all ADR Section members.

This year the Section was invited to help with an exciting project when Austin was selected as one of the sites for the Global Pound Conference Series. The worldwide conferences are to open a discussion about what can be done to improve access to justice, and about the quality of justice in civil and commercial disputes.

The data gathered from the conferences will be used for the ambitious goal of shaping the future of dispute resolution. Kim Kovak, the very first Chair of the ADR Section and a leader in the Texas ADR community, is the local coordinator

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for the Austin conference. Partly through the Section's efforts, the Pound Conference and the Section's Annual CLE have now been set to occur on adjacent days at the Texas Law Center the last week of January, 2017. Stay tuned for much more information over the coming months.

This year the Section also evaluated its budget and as a result trimmed expenses and delayed some planned expenditures. These actions were prompted in part by plans for the upcoming year, principally the costs of legislative monitoring in 2017 and, as mentioned above, the Section's commitment to the Global Pound Conference. As a result of these actions the Section is on sound financial footing for the upcoming year.

This is my last Chair's Corner. I've been privileged to serve as Chair of the Section. As is too often the case, I'm just beginning to feel comfortable in the job, but find it's time to move on.

Before I leave, on behalf of the Section I extend a special appreciation to Robyn Pietsch, who served behind the scenes helping to publish the Section's Newsletter for nearly 20 years. Also, I personally want to thank the Texas Bar staff for the countless ways they untiringly help the Section and all lawyers in Texas.

I've often wondered whether choosing a career in ADR makes a lawyer more congenial or whether naturally congenial lawyers gravitate to the ADR field; regardless, I find the people in this field, those working to peacefully resolve disputes, are some of the best around. There are some especially fine human beings serving on the ADR Council, and the Section is in good hands for the foreseeable future. Thanks for the opportunity to serve as Chair this past year.

Ethical Puzzler

by Suzanne Duvall

Q:

You are a seasoned Board-Certified trial lawyer. In addition to having tried more than enough cases to earn and maintain your board certification, you have taken on the occasional family law case as a service to your important business clients.

However, it is all starting to take its toll on you, and you have decided to simplify your life and reduce the pressure by becoming a mediator. At your current billable rate, you cannot afford the loss of the number of billable hours that it would take for you to attend the statutorily required 40-hour basic mediator training, much less the additional 30-hour family law mediator training necessary for you to be qualified under Texas law to mediate family law cases. In your view, it would be economic suicide to lose the income that would be generated by billing your clients for the time that you would have to take off to become trained as a mediator.

You have managed hundreds of settlement conferences. In addition, as you see it, you have already had on-the-job-training just by having participated as an attorney representing your clients in over 100 mediations during your celebrated trial practice. Those experiences have taught you that the process of mediation is a simple one that should not require any special training other than your experience and skills as a negotiator and successful trial lawyer.

However, when you approached several experienced practicing mediators for advice about setting up your mediation practice, you got a lot of push-back from them because they insist that mediation is a profession that requires specific training, education, skills and understanding for one to be able to perform competently and ethically as a mediator. You take their reaction merely as an expression of their fear that when you enter the field of mediation you will take business away

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from them because of your reputation as a good trial lawyer.

Who is right—you or your mediator colleagues?

Bob Black, Beaumont

While our trial lawyer may be loathsome and reprehensible, he is not necessarily unethical. For example, if he only takes family law mediations ordered by a trial court in full compliance with CPRC 154.052(c), he might be off the hook by virtue of the Rule.

However, it is likely that our narcissist is potentially in violation of Rule 1.01, Rule 7.02(a)(iv)6, and 7.04.

With respect to 1.01, the lawyer must be competent in a legal matter. Unlike many of the rules, it does not require an attorney-client relationship, which probably does not exist with respect to a mediation.

Rule 7.04 applies to how the attorney holds him or herself out. If he represents that he is a certified mediator, etc., that would be a violation.

Elaine Block, Houston

While this may sound heretical, I do not think the mediator courses are a prerequisite to being a good mediator. My skills as a mediator were not acquired from the basic mediator training or the family law mediation training, but from years of practice. The benefit of the basic course is that it provides one with the structure for mediation and the forms. The family law course I took was 90% psycho-babble and almost void of any substantive information (it was not taught by anyone who actually mediates).

All that being said, it would be unethical for a lawyer to mediate in violation of the statutory requirements. While the lawyer who has not taken the 40-hour basic course could mediate cases that are not part of court ordered mediation, he or she could not legally mediate a family law case.

Since to break the law would be unethical in my opinion, I would side with my mediator colleagues in your hypothetical.

Ray Green, Dallas

It is not a matter of being right. There are persuasive reasons for both points of view. It shouldn't surprise anyone that as a mediator, I seek common ground to build settlement, disdaining the simple goal of being "right." Part of that is based on training. Part is based on mediation experience, and a significant amount is based on knowledge of the law, the courts, and juries.

Having mediated hundreds of cases, and having the benefit of discussing facts and law with both plaintiffs and defendants, especially with the advantage of sharing their competing confidential analysis and strategies, it

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may well be reasonable to conclude that I in fact do have the necessary training, education, skills, and understanding to be a seasoned board certified trial lawyer. Maybe even more than one certification, since I mediate so many types of cases. Wow!! Except for creating more competition for other trial lawyers, we really could be on to something here.

And as a former seasoned trial attorney, I can verify that a trial practice over time does start to take its toll on you. After 20 years, I decided to simplify my life and reduce the pressure by becoming a mediator. And I love it!

At the time of making the transition, and taking the time, and spending the money to obtain mediation training, I wondered whether it was necessary. Besides the fact it is legislatively required, I thought it can't be that hard, and with my seasoned experience it probably wasn't really necessary. In the end I decided that the cost and time for mediation training wasn't all that much, especially compared to board certification.

Anyone thinking it would be economic suicide to lose the income that would be generated by billing their clients for the time they would have to take off to become trained as a mediator, probably needs to keep trying cases. Mediation is much too easy, and it sure doesn't pay as well. On the other hand, if they are ready to make the transition then they will be leaving behind all that well-paying work, and will have plenty of time to devote to learning the tricks of the trade in mediation.

My experience over the last 10 years practicing exclusively as a mediator have "taught" me that the process of mediation is not a simple one. It does require special training and practicing experience, as well as the more obvious skills as a negotiator, which are distinctly different from those acquired as a trial lawyer.

John Mercy, Texarkana

In 20-plus years of mediating, I have probably heard this same scenario at least 50 times in my area. Trial lawyers are under the illusion that mediation is easy. This belief comes from the fact that sitting in one room during mediation gives a completely skewed view of the process.

The reality is that the skill s necessary to be a good mediator do not come from the adversarial system.

- An advocate talks; a mediator listens.
- An advocate searches for sympathy; a mediator must be empathetic.
- An advocate makes judgments; a mediator is not judgmental.
- An advocate is confrontational; a mediator is collaborative.
- An advocate is attempting to win for his client; a mediator is attempting to achieve consensus.

It is the rare trial lawyer that is able to achieve the transition to a mediator without being trained. The experienced practicing mediators' advice about becoming trained is sound. There is nothing like actually learning the art of mediation, practicing the scenarios, or learning the various techniques for conflict resolution . Of the 50 or more trial lawyers that I know of that have attempted to transition without any training, none continue to mediate. They discovered that it was too difficult.

Amie Rodnick, Austin

On first blush, this "puzzler" seems almost too simplistic for the obvious answer that it seeks to provoke, since we all know good training is essential to be an effective, well-rounded mediator. And it is clear that the "seasoned trial lawyer" is in the wrong. Therefore, I'm not going to take the bait and see this in stark black and white terms.

There are probably some highly experienced trial lawyers who are able to make the paradigm shift from litigation to mediation and collaboration without too much effort. I have mediated with some of them, and they were effective at head-bashing and arm-twisting to get litigants to settle, and our egotistical lawyer fits that mold. However, there are attorneys out there who want that type of mediator, and if they are effective at settling difficult cases, they will continue to attract business.

However, many "big dog" litigators are also people with big egos. They may ultimately make the shift to mediation, but they may make many mistakes along the way. Mediation can be fairly unforgiving in that even in big cities like Austin, they are really in a small town when it comes to attorney gossip. If people think you're a bad mediator, you won't get another chance.

Bottom line: The lawyer in question probably does have some skills learned in trial practice that can't be taught just in a 40-hour mediation course or in the 30 hour family course. The lawyer probably does have some understanding of family dynamics if a lot of his cases were family law cases. However, he will not be well-versed in mediator ethics, personal dynamics at play in the sessions, or how to massage difficult litigants who respond badly to pressure. So, duh, he should listen to his colleagues and take the training. Otherwise his significant ego may be in for a bruising.

Comment

All of these mediator-colleagues seem to agree with our fictional "mediator-wannabe's" colleagues in their belief that mediation is a profession that requires specific training, education, skills and understanding in order to

perform competently and ethically as a mediator. In addition, it should be noted—even emphasized—that the ADR Statute *requires* training before anyone undertakes the mediation of lawsuits.

Perhaps John Mercy best summed it up both poetically (in comparing and contrasting the skill sets of an advocate and a mediator) and practically when he stated unequivocally that, "Of the 50 or more trial lawyers that I know of that have attempted to transition [to mediation] without any training, none continue to mediate. They discovered it was too difficult."

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, suzannemduvall@gmail.com*, or 4080 Stanford Avenue, Dallas, Texas 75225, or fax to 214-368-7528.*

Suzanne M. Duvall is an attorney-mediator in Dallas with over 800 hours of basic and advanced training in mediation, arbitration, and negotiation. She has mediated over 2,500 cases to resolution and serves as a faculty member, lecturer and trainer for numerous dispute resolution and educational organizations in Texas and nationwide. A former Chair of the ADR Section of the State Bar of Texas, Suzanne has received numerous awards for her mediation skills and service. She has also been selected "Super Lawyer" 2003 – 2015 by Thomson Reuters and the publishers of Texas Monthly, and been named to Texas Best Lawyers 2009 – 2016 and Best Lawyers in America 2014 – 2016. She is a TMCA Distinguished Mediator, the highest designation given by the Texas Mediator Credentialing Association.

Mediation Facilities: 3 Questions to Get Mediators Started

by John DeGroote

"What's the wireless passcode again?" *"Will we be going out for lunch?"* "Is there somewhere I can print?" As a mediator I encourage everyone in the room to ask questions, but none of these get us any closer to settlement.

Yet with just a little empathy, focus, and effort, you and your mediation facilities can help clients get past these questions, so they'll have the comfort and confidence to get a deal done.

Environmental details matter, and the success of your next mediation could depend on them.[1] Before you decide to use that interior conference room or to put off lunch just a little longer—or paint your conference room green or hang a picture of a lone deer or put red markers near your whiteboard—recognize that these choices have consequences.

It's the mediator's job to provide for the parties' comfort and to consider "the messages the mediation environment broadcasts and the frame of mind it invites."[2]

Concrete suggestions for mediation facilities are few and far between,[3] but a class[4] I took a few years ago from Douglas Noll[5] and Don Philbin[6] helped me recognize the

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[1] *I Hear What You Say, But What Are You Telling Me?: The Strategic Use of Nonverbal Communication*, 99 (Barbara G. Madonik, 2001)("The environment in which the mediation occurs can strongly influence the success of the mediation.").

[2] Barbara G. Madonik, *Managing the Mediation Environment* (undated), Mediate.com at http://www.mediate.com/articles/madonik.cfm.

[3] Paula Young, *The Where of Mediation: Choosing the Right Location for a Facilitated Negotiation* (2007), Mediate.com at http://www.mediate.com/mobile/article.cfm?id=2385.

[4] law.pepperdine.edu/straus/training-and-conferences/professional-skills-program/malibu/tactical-interventions.htm

[5] dougnoll.com

[6] www.donphilbin.com

value of natural light, low-glycemic snacks, and more as we negotiate. This class, and the work of Barbara Madonik, have helped guide my facilities choices, but is there more out there to guide mediators as they choose what our mediation environment will be like?

While Part II will explore mediation facilities in more detail, the 3 questions here in Part I can start the conversation as mediators decide how they'll manage where we mediate.

Do the Parties Know What To Expect?

Managing expectations is nothing new to negotiation,[7] and helping parties and counsel visualize their physical surroundings before mediation day is an easy way to start.

Madonik suggests that mediators "[i]nvite parties to visit the location before the mediation to become more comfortable about driving the route and meeting at the facility."[8] There's no question that an advance visit can make participants feel more at home when mediation day arrives.

In today's digital world, however, physical visits aren't as important as they once were. Mediators can take several steps that are even easier and almost as helpful:

- Invest in a mobile-friendly, easy to find website;
- Include a reader-friendly bio;
- Include photos (and, for today's audience, videos) of the mediator; and
- Give some additional resources that allow participants to explore how the mediator approaches negotiation and settlement;
- Send all participants a map with directions before the mediation, including a picture of the facility and a phone number; and
- Offer a mediation center tour for those who don't come to the mediation facility before mediation day.

Providing these details in advance can gives participants a sense of control,[9] and that's good for everyone involved.

What First Impression Does Your Space Give?

As a longtime mediation client, I learned that there is a difference in the services mediators provide, and how and where they provide it. The sense clients get when they first walk in the door to your facility may not be their first impression of you, but it can be the most impactful.

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[7]See, e.g., http://settlementperspectives.com/2008/09/managing-expectations-an-unexpected-lesson-on-the-bus-to-hertz/

[8]Madonik, *Managing the Mediation Environment*.

[9]Madonik 2001 at 104.

> Mediators need to recognize that environments send messages. They must create a place where people are able to approach, rather than freeze, flee, or fight.

I recommend mediators walk in from the parking lot like they have never been to their mediation center before, and consider "the messages the mediation environment broadcasts and the frame of mind it invites."[10] They should ask themselves:

- What is my first impression as I approach the front door?
- As I open the door, is it calm or chaotic inside?
- Am I greeted immediately?
- Is it clear where I should sit?
- If I wanted to sit, would I be asked to sit with my opponent?
- Is the paperwork handled smoothly and discreetly?
- Does what I see inspire confidence?

Do You Provide the Basics?

Like it or not, no mediator gets it all right. While a comprehensive list is beyond the scope of this article, the physical basics certainly include:

- ☐ A conference room and table large enough to accommodate the mediation, with a shape consciously chosen by the mediator to fit his or her practice and style;
- ☐ Adjustable conference room chairs that swivel;
- ☐ Power outlets;
- ☐ A comfortable temperature (maintained throughout the day);
- ☐ Natural light; and
- ☐ Noise abatement between caucus rooms;

Physical comfort isn't all that matters, of course. Modern businesspeople need access to many things to be at ease:

- ☐ Wireless access;
- ☐ A cellular signal for mobile calls;
- ☐ A private place to make phone calls;
- ☐ Coffee, beverages and snacks;
- ☐ Private caucus rooms;

[10]Madonik, *Managing the Mediation Environment*.

- ☐ A speakerphone (to call the occasional absent decisionmaker);
- ☐ A printer, a fax machine, and other support; and
- ☐ The right to stay in the space as long as necessary, with no artificial deadline.

At this point expectations have been managed, first impressions have been set, and the basics have been covered. More important, we understand that "[e]nvironments send messages,"[11] and that mediators "must create a place where people are able to approach, rather than freeze, flee, or fight."[12]

In the second half of this essay we'll discuss food choices, caucus rooms, and other details—and the one question that ties it all together. Come back for Part II. You'll be glad you did.

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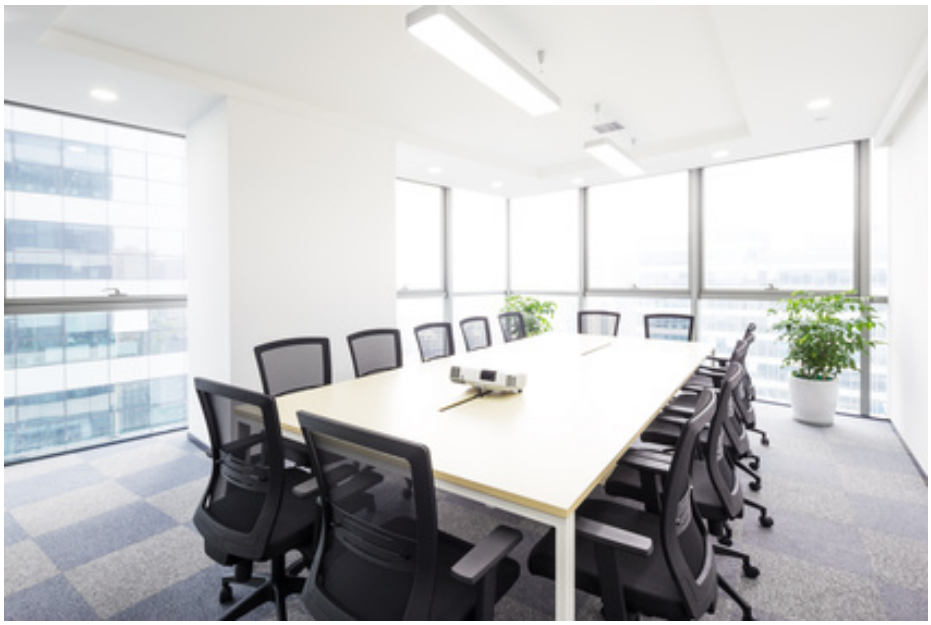

[11]Madonik 2001 at 99.

[12]Douglas Noll, *Ten Principles of Peacemaking* (undated), Mediate.com at http://www.mediate.com//articles/noll5.cfm.

Getting to the Bridge via the Backroads: The Effective Use of Back Channels in Negotiations

by Wayne Meachum

History can teach mediators a lot when it comes to negotiating. During 2 tense, high-wire events in U.S. and world history, we see the importance of using back channels during negotiation to effect a peaceful resolution to charged situations.

A Tale of Two Spies

When Francis Gary Powers was shot down while flying his U-2 spy plane over Russia in 1957, it was both an international embarrassment for the United States and a tremendous propaganda coup for the Soviet Union.

The incident happened during a period of dangerous escalation of the Cold War. Powers had failed to follow his training, which required that he not be captured alive. The American intelligence community feared Powers could, and most likely would, be forced by his Russian captors to give up

- important top secret information about the U-2 aircraft,
- the surveillance technology used in his mission, and

- information about the American spy efforts against the Russians.

Contemporaneously with, but unrelated to, the Powers incident, the FBI arrested Rudolph Abel, a Russian operative in New York, and charged him with espionage. The Russians feared that the Americans would be successful, eventually, in breaking Abel and obtaining valuable information that could compromise the Soviets' efforts to spy on the U.S.

Throughout this time, James Donovan was practicing law in Brooklyn, representing insurance companies, negotiating and settling claims, trying lawsuits and raising his family. He had left his role as a Nuremberg prosecutor behind.

The recent Academy Award-winning movie, *Bridge of Spies*, tells the dramatic and thrilling story of the intersection of the lives of Powers, Abel, and Donovan, who became the

lead characters in one of the most high-profile international negotiations in American history. The movie is based on Donovan's book, *Strangers on a Bridge*.

The Cold War Heats Up: Powers Crashes Yet Lives, Abel Arrested

Francis Gary Powers was chosen, with a few other select Air Force pilots, to work for the CIA. Their mission was to pilot top-secret flights using an advanced spy plane—the U-2—which was equipped with special cameras capable of high-altitude (70,000 ft.) aerial surveillance of the Soviet Union. If anything went wrong (like being shot down), and they didn't die in the destruction of the aircraft, the pilots were equipped with a poisonous needle. They were not to be taken alive. When Powers' plane was hit, he failed to follow that last little detail of his training.

When Rudolph Abel was arrested on espionage charges, the story swept the country and Abel was reviled across America. After all, it was the Cold War and Russia was the mortal enemy of the United States. While the U.S. Justice Department wanted Abel convicted and put to death, it also wanted to show the world that the American justice system was fair, and would afford justice even to a foreign agent engaged in subversive activities designed to destroy America.

Donovan Tapped To Defend a Spy

To that end, American government officials worked with the bar association, and together, they decided upon James Donovan as the lawyer who should represent Abel in his criminal trial. Though not experienced in criminal law, Donovan was pressed into doing his "patriotic duty," and agreed to defend Abel.

Abel was convicted, but Donovan was able to convince the judge to spare him from the death penalty, because he might someday prove to be a valuable asset if one of America's spies was ever captured by the Soviets. Donovan's prescience, and his persuasion of the judge, could not have been more fortunate for the United States.

U.S. Student Swept Up in Berlin

While Abel and Powers were spending time in captivity, a young American economics student, Frederick Pryor, got caught up in the Soviet army's clutches during the building of the Berlin Wall and the forced division of East and West Berlin. Pryor was detained in the East sector, and then taken into captivity by the East Berlin German officials. The East Germans, of course, were under the tight control of the Soviet Union.

Meanwhile, CIA Director Allen Dulles invited Donovan to Washington. Dulles wanted to discuss what he saw as an opportune time to pursue an exchange with the

Russians of Abel for Powers. Dulles believed that Donovan was the perfect person to negotiate the swap.

Donovan accepted, and the CIA began briefing him. During those briefings, Donovan learned of Frederick Pryor's captivity. Even though his CIA handlers insisted that, as far as the United States was concerned, Powers was "the whole ball game" in the negotiations for Abel, Donovan became determined to include Pryor—along with Powers—in what the Russians would give up in exchange for Abel.

Donovan Seizes on a Back Channel

When Donovan met in Berlin with his Soviet counterpart in the negotiations, he said that for the United States to release Abel to the Soviets, they would have to release Powers *and* Pryor, 2-for-1. The Soviet representative responded that the student was under the authority of the East Germans, not the Soviet Union. He provided a name and phone number of the person Donovan would have to see in order to obtain the release of Pryor. When Donovan met with that person, he was told that he would have to speak with the East German Attorney General before Pryor could be included in the exchange of Powers for Abel.

At the meeting with the East German Attorney General, Donovan was told that it was impossible for the student to be released. The Attorney General then had to take a phone call and Donovan was escorted out of the office so the Attorney General could talk in private.

While waiting outside in the hall, Donovan had a serendipitous encounter with a young employee of the Attorney General. After some small talk, Donovan told the young man to give his boss a message. The young man agreed, and Donovan told him to tell the Attorney General that there would be no release of Rudolph Abel unless there was a release of both Gary Powers and Frederick Pryor. Donovan understood not only the importance of Abel to the Russians, but also the power the Russians had over East Berlin. Donovan emphasized that the Soviets would know why it was that Abel was not going to be released.

> By seizing on that fortuitous meeting with the young East German employee, Donovan was able to deliver a critically important message. As a result, Donovan and the United States got everything they wanted in the deal.

When the arrangements were made, the exchange between the Americans and the Russians of Powers and Abel was scheduled on the now-infamous "bridge of spies." The exchange also included the delivery of Frederick Pryor by the East Germans at Checkpoint Charley.

By seizing on that fortuitous meeting with the young employee of the Attorney General, Donovan was able to deliver a critically important message, which had significant implications for the most powerful party on the opposite side. As result, Donovan and the United States got everything they wanted in the deal.

> A lunch between a journalist and a so-called diplomatic counselor provided the back channel to keep the Cuban Missile Crisis from morphing into nuclear annihilation.

Cuban Missile Impasse, Broken Through a Back Channel

An even more historically important example of the use of back channel negotiations is one that resulted in the successful resolution of the Cuban Missile Crisis. It also helped save civilization from nuclear annihilation.

Direct negotiations between the White House and the Kremlin over the introduction of nuclear weapons into Castro's Cuba were at a virtual impasse. President Kennedy had demanded that the weapons be dismantled and removed, and that no additional weapons be delivered. To enforce his position, Kennedy had imposed a naval blockade to intercept any Russian vessels approaching Cuba.

ABC News diplomatic correspondent John Scali had been covering the crisis since it began. On October 26, 1962, the 11th day of the crisis, Scali received a phone call from Alexander Fomin, officially a diplomatic counselor assigned to the Soviet embassy in Washington but, in actuality, the KGB station chief in Washington. Fomin wanted to have lunch with Scali.

Establishing a Deliberate Back Channel

Following that phone conversation, the two men met for lunch near the White House. Noting that, "war seems about to break out" and "something must be done to save the situation," Fomin inquired as to whether Kennedy would be willing to promise not to invade Cuba if Soviet Premier Khrushchev would promise to remove the missiles from Cuba under United Nations inspection, and promise

never to introduce such offensive weapons into Cuba again. Scali responded that he would find out.

Returning to his office in the State Department press room, Scali jotted a short memo relating what Fomin had told him and sent the memo up State Department channels. It soon reached Secretary of State Dean Rusk, and President Kennedy and Defense Secretary Robert McNamara shortly thereafter.

Soon, Scali found himself in Rusk's office, where Rusk gave him a note. Scali was to tell Fomin that Scali had been told by "the highest officials in the United States government" that the Kennedy Administration saw possibilities in the offer presented by Fomin.

At about the same time, Kennedy had received a letter from Khrushchev which he and his advisers interpreted —in light of Fomin's overture sent through Scali—as a coordinated effort by the Soviets to extend an olive branch. Later, it became obvious that the two events were likely more serendipitous than coordinated. Nevertheless, the break Kennedy had been hoping for had arrived.

The rest, of course, is history.

Sniffing Out a Back Channel

Back-channel negotiation has been described as communication that is often carried out in secret. It is usually made as a part of a larger negotiation. The purpose of back-channel negotiation is to provide a

means to avoid public disclosure of especially sensitive matters.

Back channels can be very valuable and effective in negotiations. But, by no means are back channels available in all negotiations. They might not be readily obvious in the negotiation in which you are engaged. A skilled negotiator, whether

(1) a party,
(2) a legal representative of, or adviser to, a party, or
(3) a third-party facilitator,

must be vigilant to the possibilities for effective use of back channels that might be employed in a negotiation.

The opportunities for back channels can present themselves in the form of

- a long-term, well-established, reliable relationship;
- the discovery of a previously unknown connection with someone you know to the party on the other side of your negotiation;
- the revelation of an important interest or weakness of the other side that can be capitalized upon with the use of a relationship available to you; or
- a door that serendipitously opens or an opportunity that "falls in your lap" as with the young East German man whom James Donovan alertly used to deliver a vitally persuasive message to key players in his negotiation with the Soviets.

It is important to remember that negotiations are seldom "what you see is what you get." Always be open to other possible ways "to skin a cat" that might be available for you to get the result you want.

Wayne Meachum is a TMCA- credentialed Distinguished Mediator. He practices in Dallas, and can be reached at wayne@todayinlions.com.

Further Resources

For additional informative and instructional examples of the effective use of back channels in negotiating, I highly recommend Lawrence Wright, *Thirteen Days in September* (Alfred A.Knopf 2014), about the Camp David Peace Accords.

I also recommend Anthony Wanis-St. John, *Back Channel Negotiation: Security in Middle East Process* (Syracuse University Press 2011)

Texas Nursing Home, Arbitration Clauses Often Counter the U.S. Trends

by John Allen Chalk, Sr.

At a time when the Centers for Medicare and Medicaid Services (CMS) has proposed a rule to abolish clauses requiring pre-dispute binding arbitration as a condition of admission or continued residency in a long-term care (LTC) facilities, Texas courts continue to enforce such clauses. If the CMS regulations become final, the validity of many arbitration agreements used by Texas LTCs could be called into question.

The Proposed CMS Rule

On July 16, 2015, CMS published its proposed rule for "Medicare and Medicaid Programs; Reform of Requirements for Long-Term Facilities." Comments on the proposed rule closed Sept. 14, 2015. CMS proposed[1] that LTC facilities receiving Medicare or Medicaid funding could no longer require pre-dispute binding arbitration as a condition of admission, or continued residency, in an LTC facility.

The CMS proposed rule met with widespread support from many sources, including Fair Arbitration Now, a network of more than 70 consumer, labor, legal, and community organizations.[2] As of mid-May, CMS had not issued its final rule.

Texas Law on Pre-Dispute Binding Arbitration

In the past few years, a trio of Texas cases have enforced pre-dispute binding arbitration for LTC facilities located in Texas.[3]

In *Fredericksburg Care Co. v. Perez,* the lower courts refused to enforce a nursing home's motion to compel arbitration. The Texas Supreme Court reversed, ruling that it

[1]42 C.F.R. §483.70(n)

[2]Fair Arbitration Now, http://www.fairarbitrationnow.org/coalition/ [https://perma.cc/3ZSU-72JX]; *see also* comments dated October 14, 2015 on the CMS proposed rule.

[3]*Fredericksburg Care Co. v. Perez*, 461 S.W.3d 513 (Tex. 2015); *Fredericksburg Care Company, L.P. v. Lira*, 461 S.W.3d 529 (Tex. 2015) (*per curiam*); *Specialty Select Care Center of San Antonio, LLC v. Flores*, 2015 Tex. App. LEXIS 9345 (Tex. App. – San Antonio September 2, 2015, no pet.); *Villas of Mount Pleasant, LLC v. King*, 454 S.W.3d 689 (Tex. App. – Texarkana 2014, no pet.).

did not need to apply the McCarran-Ferguson Act exemption of Federal Arbitration Act ("FAA") preemption to the Texas Civil Practice and Remedies Code §74.451.[4]

The Supreme Court in *Fredericksburg Care Company, L.P. v. Lira*[5] and *Williamsburg Care Co. v. Acosta*[6] applied *Perez* to the identical issues. Again, the Court held that the lower courts erred in applying the McCarran-Ferguson Act reverse preemption of the FAA.

In all three cases—*Perez*, *Lira*, and *Acosta*—Texas Supreme Court compelled arbitration.[7]

In *Specialty Select Care Center of San Antonio, LLC v. Flores*[8], the San Antonio Appeals Court reversed the trial court and compelled arbitration, following the Texas Supreme Court's ruling in *Perez*. The San Antonio Court of Appeals also decided

- there was no ambiguity in the arbitration clause;
- equitable estoppel bound the estate of the deceased resident to arbitrate an unsigned arbitration clause; and
- the nursing home did not waive its right to arbitrate.

Note the tension between CMS' proposed regulation, which aims to abolish pre-dispute arbitration agreements between LTC facilities and residents, and what the Texas Supreme Court has held is the law of Texas on the same issue. In a nutshell, the Court has held the precise opposite by:

- applying state law contract principles,
- recognizing the application of the FAA to arbitration clauses in facility-resident admission agreements for Medicare and Medicaid funded LTCs; and
- compelling pre-dispute arbitration in the LTC context.

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[4]Chapter 74 of the TCP&R Act ("Medical Liability") has Subchapter J. ("Arbitration Agreements") that requires at §74.451(a) 10-point font, bold-print language for an agreement to arbitrate a health care liability claim.

[5]461 S.W.3d 529 (Tex. 2015) (per curiam).

[6]461 S.W.3d 530 (Tex. 2015).

[7]The Texarkana Court of Appeals had come to the same conclusion in another nursing home case with its decision on December 31, 2014, in *Villas of Mount Pleasant, LLC v. King*, 454 S.W.3d 689 (Tex. App. – Texarkana 2014, no pet.).

[8]2015 Tex. App. LEXIS 9345 (Tex. App. – San Antonio Sept. 2, 2015, no pet.).

Ethical Considerations Under Texas Attorney-Client Arbitration Law

Three 2015 Texas cases addressed arbitration in attorney-client agreements.[9]

Royston, Rayzor, Vickery, & Williams, LLP v. Lopez upheld an arbitration clause in an attorney-client fee agreement, reversing both the trial court and the Corpus Christi Court of Appeals. *Royston* applied the Texas General Arbitration Act (TGAA).[10] The Court clarified that the party asserting defenses to a motion to compel has the burden of proof regarding those defenses. In *Royston*, Lopez had asserted unconscionability, violation of public policy, and illusory agreement. The Court was not persuaded that Lopez had met the requisite burden of proof for any of those defenses.

Cedillo v. Immobiliere Jeuness Establissement reversed the trial court's denial of a motion to compel arbitration against a limited partner of the law firm clients (two Texas limited partnerships), who had filed a derivative malpractice action against the San Antonio law firm. The law firm's arbitration clause failed to name any applicable arbitration law, but did specify the Commercial Arbitration Rules of the American Arbitration Association.[11] The *Cedillo* court applied both the TGAA and the FAA. The court reaffirmed that derivative claimants are bound by the original client's arbitration agreement. Thus, the derivative claims were within the scope of the attorney-client fee agreement.[12]

Parallel Networks v. Jenner & Block LLP[13] affirmed the lower courts' arbitration award of $3 million against Jenner & Block's client, who violated the terms of the attorney-client contingent fee agreement for patent infringement litigation. The *Parallel Networks* court applied the FAA to deny the contingent fee client's vacatur claims of unconscionability, public policy, and failure to admit certain expert testimony.

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[9]*Royston, Rayzor, Vickery, & Williams, LLP v.* Lopez, 467 S.W.3d 494 (Tex. 2015); *Parallel Networks, LLC v. Jenner & Block LLP*, 2015 Tex. App. LEXIS 10461 (Tex. App. – Dallas Oct. 9, 2015, pet. filed); *Cedillo v. Immobiliere Jeuness Establissement*, 476 S.W.3d 557 (Tex. App. – Houston [14th Dist.] August 27, 2015, pet. denied).

[10]Texas Civil Practices & Remedies Code ch.171.

[11]AAA Commercial Arbitration Rules, https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG-_004130 .

[12]Client never signed the attorney-client fee agreement but both performance and other documents established the attorney-client relationship and made the attorney-client fee agreement enforceable under Texas state contract law.

[13]2015 Tex. App. LEXIS 10461 (Tex. App. – Dallas October 9, 2015, pet. filed).

Bar Association Opinions on Mandatory Arbitration Clauses

A number of bar associations have examined arbitration clauses in attorney-client fee agreements, including the American Bar Association[14] and the Texas Bar Association.[15]

TEXAS OPINION NO. 586

The Texas Disciplinary Rules of Professional Conduct 1.03(b) require that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

In Texas Opinion No. 586, the State Bar of Texas addressed the question: *Are binding arbitration clauses in lawyer-client engagement agreements permissible under the Texas Disciplinary Rules of Professional Conduct?*

The committee noted that in general, provisions requiring arbitration of fee disputes had, to that point, gained more acceptance than those involving malpractice claims.

The committee advised that under the Texas Disciplinary Rules of Professional Conduct, provisions requiring the binding arbitration of fee disputes and malpractice claims can be included in an engagement agreement. The committee did limit this opinion by saying that for the provision to be valid:

> (1) the client must be aware of the significant advantages and disadvantages of arbitration, and have sufficient information to permit the making of an informed decision about whether to agree to the arbitration provision; and
>
> (2) the arbitration provision cannot limit the lawyer's liability for malpractice.

The committee largely relied on the reasoning of an ABA opinion on a very similar question.

ABA FORMAL OPINION 02-425

ABA Formal Opinion 02-425 addressed the question of whether mandatory arbitration provisions are proper. The Committee said that unless the retainer agreement insulates the lawyer from liability, or limits the liability to which she otherwise would be exposed under common or statutory law, mandatory arbitration clauses are acceptable.

Specifically, the Opinion stated:

> *"It is ethically permissible to include in a retainer agreement with a client a provision that requires the binding arbitration of fee disputes and malpractice claims provided that*

[14]ABA Formal Opinion 02-425 (Feb. 20, 2002) "Retainer Agreement Requiring the Arbitration of Fee Disputes and Malpractice Claims."

[15]Opinion No. 586 (October 2008), "Are binding arbitration clauses in lawyer-client engagement agreements permissible under the Texas Disciplinary Rules of Professional Conduct?"

(1) the client has been fully apprised of the advantages and disadvantages of arbitration and has been given sufficient information to permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement, and

(2) the arbitration provision does not insulate the lawyer from liability or limit the liability to which she would otherwise be exposed under common and/or statutory law."

Although the ethical guidelines for arbitration of attorney-client representation agreement disputes raise interesting questions, Texas courts are having no problem enforcing arbitration clauses in attorney-client representation agreements.

John Allen Chalk, Sr., is an equity member of Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas. Chalk is a long-time arbitrator and member of numerous neutrals panels for domestic and international arbitral providers. With special thanks to Macdonald Norman, a third-year law student at Texas A&M School of Law, for his research and editorial assistance for this article.

Wielding the Reciprocity Rule To Influence Settlement

by Kay Elkins Elliott

Most mediators understand that the rule of reciprocity is the engine that makes mediation move forward. Not all *negotiators*, however, understand how powerful a weapon of influence reciprocity is, or how to wield this powerful tool of persuasion. A recent text by James Holbrook on advanced negotiation and mediation, which I will be using in my fall mediation clinic and in coaching law school teams at Texas A&M University School of Law, devotes an entire chapter to reciprocity.

Several books that I am currently reading approach this aspect of bargaining from different and intriguing perspectives (see note at end). All of them are helpful to mediators and negotiators.

What Is the Rule of Reciprocity?

Reciprocity appears in many ancient traditions, particularly religious ones. Different perspectives from different religious traditions include:

- **Buddhism**: Treat not others in ways that you would find hurtful. Udlana–Varga 5:18.

- **Christianity**: And as ye would that men should do to you, do ye also to them likewise. Luke 6:31

- **Hinduism**: This is the sum of duty; do not do to others what would cause pain if done to you. Mahabharata, 5:1517

- **Janaism**: One should treat other creatures as one would prefer to be treated. Sutrakitanga 1.11.33

- **Taoism**: Regard your neighbors' gain even as your own gain, and your neighbors' loss as your own loss. Tai Shang Kan Ying P'ien, 213-218

Robert Cialdini, professor and author, explains reciprocity as a weapon of influence. It is a strong social rule that we should try to repay, in kind, what another person has provided us. Under of this rule, we are *obligated* to the repayment in the future of favors, invitations, gifts, Christmas cards and other benefits bestowed upon us, even if we did not seek or do not want them!

The term "much obliged" exists in some form in most cultures, and

literally means that once a benefit is accepted, we must oblige the gift-giver with a benefit. Archaeologist Richard Leakey has said we are human because our forebears learned the advantages of paying forward, in the form of food and skills, because there would be gain and no loss; social regulation assured us of getting something valuable in return. The ritual of give *and take* created an honored network of reciprocal obligations.

That web of indebtedness is unique to humans. It promotes the exchange of diverse forms of goods, services, labor, and creating group interdependencies, which bind us together in loyal and efficient social units. This system has promoted our surviving and thriving amidst creatures of far greater strength and lethality.

Four Types of Reciprocity

Reciprocity, quite simply, is mutuality of action. It is therefore a fundamental concept of conflict theory, describing a variety of negotiation behaviors. The 4 types include:

- *Positive proactive reciprocity*. One or two individuals initiate collaborative interaction for mutual benefit.
- *Positive reactive reciprocity.* An individual returns a favor due to obligation.
- *Negative proactive reciprocity*. Shoot first to avoid being shot!
- *Negative reactive reciprocity*. An individual strikes back after being struck.

Using game theory (Prisoner's Dilemma), researchers have empirically demonstrated that reciprocity explains cooperative behavior in decision making under conditions of risk. As the possibility of future encounters with an opponent (another player) increases, so does the chance of reciprocal behavior occurring. Depending on the players, the behavior could be positive or negative reciprocity, based on perceived payoffs, the relationship of the players, and whether the perceived gains outweigh the perceived losses. With training, negotiators can perfect positive actions either by initiating them or by responding with them.

The rule is ubiquitous and powerful. Virtually all human societies derive a truly significant competitive advantage from it. In all cultures, children are taught to comply with and believe in positive reciprocity.

The Data Behind Reciprocity

An experiment performed by Professor Dennis Regan at Cornell University illustrates the social power of the rule. Two subjects were asked to rate some art work. One subject was actually working with the researcher. Joe (let's call him) left the room and came back a few minutes later with two cans of soda. He offered one can to the other person, explaining that the researcher told him that he could give it as a gift during

the experiment. Later, Joe asked the other person to do him a favor: Buy some raffle tickets.

In the other variation, Joe left the room and came back empty-handed (no soda), then asked the subject to buy raffle tickets.

Subjects purchased twice as many raffle tickets if they had accepted a soda. Later, subjects were asked to fill out a form that rated their liking or disliking of Joe. Even those who disliked Joe, but accepted the soda, bought twice as many raffle tickets as others who got no soda, but liked Joe. The rule of reciprocity overpowered the like-factor!

The Burden of Social Debt

People we might ordinarily dislike can greatly increase their sales success rate by giving us a small favor before doing the sales pitch—a favor such as a free product sample, a flower, a poem, a mint with our restaurant check, or a simple service such as cleaning our car windows. All of this has been demonstrated in psychological experiments.

In fact, the rule enforces uninvited debts. The influential French anthropologist, Marcel Mauss, states the rule as a 3-part ritual: an obligation to give, an obligation to receive, and an obligation to repay.

The obligation to *receive* makes the rule easy to exploit, because we do not get to choose freely whom we wish to be indebted to. The rule can trigger unfair exchanges, as we saw in the Regan study. Logically, the subjects in the art-rating experiment could have easily refused the soda that Joe offered, even while he was also enjoying his own soda in the same room. But would it have been collegial? Likely not. Indeed, it would have been rather awkward.

Even those who disliked Joe, but accepted the soda, bought twice as many raffle tickets as others who got no soda, but liked Joe.

Debt is a psychological burden we do not feel comfortable with, so we may perform a larger return favor than we accepted just to lift that burden. We understand that violating the reciprocity rule exposes us to dislike and even ridicule by our social group. No one wants to be called, or thought of, as a welcher, a moocher, or an ingrate. Thus, even though the cost of a soda was far exceeded by the cost of the raffle tickets, participants were willing to buy the raffle tickets to cancel the social debt.

Reciprocity in Negotiation and Mediation

As a universal part of human behavior, the reciprocity rule is part of every negotiation and mediation. We ignore that truth at our own peril. Negotiators and mediators need to be

trained to use it as a major part of conflict resolution strategy, to effectively increase persuasive power.

> Beginning a negotiation with kindness (often the mediator can do this) sets up a greater possibility that the other side will respond positively.

Most parties, for example, not only want to make a deal that is within their perceived zone of possible agreement, but they also want it to be fair to them. We all want to believe we are understood by the other negotiator or mediator. We want everyone to treat us with courtesy and respect, even in the midst of conflict.

Holbrook and Crook identify 5 criteria in the provision and perception of procedural comprehension and fairness:

- **Voice.** The negotiator/mediator lets the other party have an opportunity to be heard**.** This reflects one of the pillars of mediation, self-determination.
- **Respect.** The negotiator/mediator behaves with civility and respect throughout the process, even while disagreeing with the other party's position.
- **Trust.** The negotiator/mediator acts in a trustworthy way that inspires the other party also to trust.
- **Transparency.** The negotiator/mediator is transparent, candid, and clear.
- **Comprehension.** The negotiator/mediator conveys objective understanding, as well as holistic comprehension, of the other party's perceptions, objectives, and interests.

As most readers know, these criteria are accomplished through compliance with objective standards; recognition of substantive precedents; excellent communication and interpersonal skills; and adhering to a system of procedural fairness consistently.

Four Basic Strategies

Theorists speak of 4 negotiation/mediation strategies: performative, transformative, integrative, and distributive. Here are some examples of how reciprocity works in each.

Performative strategy: Being the recipient of unfair treatment is perceived as injustice and causes the victim to be angry and sometimes to retaliate. This negative reactivity reciprocity is seen in performative negotiation (or mediation), when one party resorts to threatening, posturing, and being condescending and the other party responds similarly.

The main goal here is to improve the communication pattern so the negative behaviors do not reinforce each other in an escalating, downward direction. This scenario can look like a death spiral, and too often leads to destruction of the negotiation or mediation.

Distributive bargaining is one kind of performative negotiation that is characterized by taking rigid positions, digging in to them, and being reluctant to make concessions.

The negotiation style of a bargainer can provoke negative reciprocity. Sometimes in mediation, the distributive tactics include

- making extreme demands,
- moving against rather than toward each other to solve a problem, and
- not treating the other party with respect or civility.

This approach typifies the competitive bargaining style, seen too often in court-annexed mediation. Even if an agreement is finally achieved through concessions, the negotiation relationship has deteriorated to the point that the agreements are not as durable as agreements reached through a different, more positive approach.

Transformative strategy: Beginning a negotiation with kindness (often the mediator can do this) sets up a greater possibility that the other side will respond positively. In transformative negotiation, restoration of a conflicted relationship is the main objective. Positive reciprocity can range from doing simple courtesies for the other side (water, coffee, snacks) to permitting the other party to save face at the end of the mediation.

A simple way to achieve proactive positive reciprocity is to make a sincere and complete apology, and say something like this: "Perhaps my apologizing to you for any hurt you have suffered will mitigate your anger and allow you to really hear me today."

Integrative strategy: Problem-solving negotiation and mediation include both cooperative (positive reciprocity) and competitive (negative reciprocity) behaviors. In this strategy, all parties seek to create value through identification of interests, people skills, and the use of standards of fairness.

> Only when we realize that negative behavior begets more negative behavior can we train ourselves to practice positive negotiation and mediation kindness.

Seven elements of integrative negotiation are affected by positive reciprocity:

- Parties increase their commitment to a problem-solving process;
- Negotiators improve the content and quality of their communication;
- Clear, courteous communication strengthens the relationship;
- Communicating interests and preferences create value;
- Options are generated to meet interests;
- Objective standards provide legitimacy;
- Parties disclose alternatives, when necessary, to establish a bargaining zone.

Distributive strategy: The assumption of a limited, fixed value to be distributed, called the zero-sum assumptions, means that parties claim value at the expense of each other. This is a competitive, reciprocal series of demands, not options, that is often tense. It's also dangerous to any sense of trust or cooperation. The behaviors of distributive bargainers can destroy the perceived fairness of the process and reduce efficient outcomes.

It is possible, however, to be positively proactive in distributive bargaining. For example, a party can be proactive by not reacting to the negative behavior of the other party, by ignoring it, and by proceeding proactively with an agenda to get the problem solved.

The concept of a **positive no,** from William Ury, is a perfect example of being positively reciprocal even in distributive negotiation. Recently I had an opportunity to use this method to good effect. During a mediation class at Texas Wesleyan Law School I asked a guest presenter/mediator if he would agree to let a law student observe him in mediation.

His answer was: "I am just starting my mediation practice and haven't set up all my procedures yet. It is just too early to agree to what you have asked; it could be disruptive to my clients. I have to say no, but I would let one of the students work with me at the office doing things like copying settlement agreements and serving snacks and lunch."

I responded: "So you will let me assign 1 law student to you as a helper for the next 2 months? If you find your clients are comfortable with that person in the room to do the tasks you have designated, will you *consider* letting him or her also stay in the room for a mediation session to watch your unique style and techniques?" He agreed. Three days later he wrote me to say that the chosen law student would be able to observe him mediate as well as do simple tasks—fulfilling both his needs and mine.

Reciprocity Fuels the Process

When we are negatively reactive to someone's NO, or to unreasonable

behavior, we fall into the downward death spiral. When we are in control of ourselves, we can choose to change the tit-for-tat and pocket the insult. This is actually a positive reactive *intervention* that can produce a positive reciprocity out of a negative one, as the simple interchange above shows.

I don't have to accept the NO. I don't have to respond in kind to negativity; it is within my own control. In extreme situations, if acting positively isn't working in distributive negotiation or mediation, sometimes the best temporary solution is to leave, perhaps temporarily.

For example, you could say to the other party, "We need to change our behavior, and I am giving both of us a chance to do that now. I want to resolve this conflict with you, but I also want fair and courteous treatment from you—the same treatment I have been displaying toward you. It is now your choice as to whether we continue to negotiate/mediate or not. Please think it over during the break and decide how we should proceed."

Finally, we see that in all 4 negotiation/mediation strategies, reciprocity is the fuel of the processes. Too few negotiators understand this golden rule of negotiation behavior, and therefore violate it.

When the intuitive, fast-thinking part of our brain kicks in, especially in response to a perceived threat from the other party, or when resources appear to be too scarce for us to get our share of the pie, we may go into fight/flight mode. This is the opposite of going into slow, effortful, rational thinking and deciding to behave positively even when the other side is not doing so.

In the American individualistic, competitive, capitalistic society, there is little training in restraint, empathy, and what the Buddhists call "loving-kindness." Only when we realize that negative behavior begets more negative behavior can we train ourselves to practice positive negotiation and mediation kindness. We know that the social rules of even this country will obligate the other party to return the favor.

Positivity Techniques for Mediators

Positivity sounds good in theory. But in case you struggle with how to implement it in your daily practice, here are some techniques to try.

Pre-Session Caucuses. Before the joint session, have a caucus with each party. Invite each attorney to give an opening statement to you to help you understand that side's position and perceptions clearly. Validate that opening statement by asking questions to clarify issues and interests, while praising the attorney's preparation.

Ask the client in this caucus how (s)he sees the case and if there is anything (s)he wants to say now as preparation for the joint session. Secure the attorney's support to have the client speak about

concerns, hopes, feelings, and goals during the joint session.

Try to get the attorney to agree that only the client will speak at first, and will direct all those comments and remarks to the other party, the true decision-maker. Rehearse the client in using only positive, proactive statements that will promote positive reciprocity from the other side.

> Everyone already has the skills of disputing. What negotiators and mediators must do instead is dispute their own pessimistic thoughts.

Use Opening Statement To Set Positive Ground Rules. Use the mediator's opening statement as a way to set ground rules that reinforce positive interaction and promote empathy, active listening, and courteous dialogue. Use a calm, slow, deliberate pace. Demonstrate through body language and facial expression that you intend to treat the parties with kindness, civility, and respect.

Explain that part of your role is to ensure that they each use the same communication style with each other both to enhance the settlement likelihood and the perception at the end of procedural fairness. When you finish, ask each client to state how they perceive the case, and to speak to each other if they are comfortable doing so. If not, then explain they can make their statements to you.

Demonstrate Positive Behaviors. Throughout the joint session, and future caucuses, continue to demonstrate the positive behaviors that promote trust and creative problem solving. If either party degenerates into negative behavior, explain the communication ground rules again and emphasize the importance of clear, positive communication as a way of building a trusting negotiation relationship during mediation.

If either party persists in negative behavior, caucus with that side and try to change the communication pattern. Emphasize that research shows the most efficient settlement techniques eliminate negativity. Watch for non-verbal cues and try to prevent deviation from positive behavior.

These are not manipulative tactics. They are simply the behaviors of someone who understands the underlying social norms and human motivators that create informed cooperation and activate settlement and peace. We can deliberately increase optimism and hope in others by our own actions.

Everyone already has the skills of disputing. What negotiators and mediators must do instead is dispute their own pessimistic thoughts. First, they need to recognize them, and then treat them as if they were uttered by someone else whom we know to be mistaken.

Mediators need to demonstrate and model the foundations of a trust relationship: honesty, empathy, creativity, and hope. Positive affectivity can be enhanced through the techniques described above. Try them and see if they work for you!

Kay Elkins Elliott, J.D., LL.M., M.A. has mediated and arbitrated 2000+ cases since she entered private practice as a conflict specialist and trainer in 1982. She has taught and coached law students at Texas Wesleyan School of Law, now Texas A&M University School of Law, in Ft. Worth, Texas for 25 years. Her clients include companies, government, and lawyers. You can learn more about her private mediation practice at www.kayelliott.com. Contact her directly at k4mede8@swbell.net, or 214-546-3338.

ENDNOTES

For more information on positivity and its use in negotiation and mediation, dive into these references.

1. Holbrook, James R. and Cook, Benjamin J., "Advanced Negotiation and Mediation," St. Paul: West Academic Publishing 2013, 155-168.
2. Cialdini, Robert B., "Influence: How and Why People Agree to Things," New York: William Morrow & Co. 1984, 29-65
3. Kahneman, Daniel, "Thinking, Fast and Slow," New York: Farrar, Straus and Giroux 2011, 304 – 309
4. Seligman, Martin E.P., "Authentic Happiness," New York: Free Press 2002, 93-95

2016 Texas ADR Handbook

The forthcoming Texas ADR Handbook is a milestone update to the original Handbook published in 2003. The handbook will have more than 30 chapters covering nearly every aspect of ADR, and should be a useful tool for every ADR professional, and a handy resource for lawyers and their clients involved in an ADR proceeding. Following are several short summary excerpts from chapters in the books.

1. Expanding Dispute Resolution: Design & Use of Anticipatory and Preventative Processes

By Kim Kovach

This chapter provides a history of mediation, and points out how that past may be helpful in visualizing mediation's future. Kovach also discusses current opportunities in the mediation landscape, and examines possibilities in the design and use of anticipatory and preventative mediation.

2. ADR From a Judicial Perspective

By Judge John Coselli & Judge Dan Hinde

This chapter examines administered and non-administered arbitration: the processes, the roles of the parties involved, and the relative costs. Specifically, the chapter breaks down the arbitration process and the arbitration clause. The judges delve into the advantages and disadvantages of arbitration as an alternative dispute resolution method in various situations. Finally, the judges review:

- motions and actions to compel arbitrations;
- class arbitration and consolidated arbitration;
- damages available in arbitration; and
- standards of review for arbitration appeals.

3. ADR Procedures at the Appellate Level

By Judge Guadalupe Rivera

The ADR Procedures Act empowers both Texas trial and appellate courts to facilitate the early resolution of disputes. Trial courts have moved in that direction rapidly, unlike the appellate courts. The appellate courts have not yet developed a uniform approach for integrating settlement programs into the appellate process. Judge Rivera briefly reviews the use of ADR in Texas appellate courts, then focuses on mediation policies used in the federal appellate courts, and in other state appellate courts.

4. Environmental Conflict Resolution

By Suzanne Schwartz

Environmental conflicts often require the use of Environmental Conflict Resolution processes. Theses specialized mediations require an array of interested persons to participate in collaborative problem solving, with an eye to either making decisions or recommendations to a governmental entity. The chapter includes a short review of

- what ECR is,
- why and when to use it,
- the statutory and organizational infrastructure that supports it, and
- principles and best practices for its use.

The chapter focuses on how to conduct an ECR process. It covers internal and external assessments to determine if a situation warrants its use, participant selection and roles, process design, and the steps to build consensus.

5. Mediating Family Feuds and Other Tales from the Chronicles of Probate Law

By John Dowdy

What is a "probate dispute?" Who are the typical parties to one? Dowdy covers this and many other topics related to probate law mediations. He covers the unique emotional issues involved in probate disputes that must be addressed when designing an alternative dispute resolution system.

Finally, Dowdy discusses the mediation session itself, focusing on the productivity of the mediation session, the format, impasse scenarios, and the reduction of the final agreement to an integrated settlement agreement.

6. State and Local Government Use of ADR

By Susan Schultz

This chapter discusses the Government Dispute Resolution Act and the Negotiated Rulemaking Act, which gives Texas government a statutory framework for adopting ADR practices. Schultz delves into a discussion of embedding ADR in state agencies. She also covers implementing ADR programs such as Ombuds, Mediation, and Arbitration, and other forms of public engagement.

7. Mediation Advocacy

By Eric Galton

Today, most lawyers have attended dozens, if not hundreds, of mediations and have worked with many mediators. In this chapter, the author describes things lawyers can do to become better advocates and make their mediations more successful. A few highlights in this chapter on mediation advocacy include:

- setting up a mediation for success,

- who should attend the mediation,
- desired mediation styles,
- documents that need to be exchanged,
- pre-mediated submissions,
- exchanging settlement drafts in advance,
- working with the mediator effectively, and
- opening presentations.

8. Mediation in College and University Settings

By Karey Barnes & Gene Roberts

Colleges and universities use mediation for many of the same reasons that mediation is used elsewhere:

(1) to seek understanding between the parties;

(2) conciliation;

(3) salvage relationships;

(4) alternative to more formal procedures;

(5) increase self-determination;

(6) risk management;

(7) confidentiality; and

(8) meeting non-monetary/non-punishment interests.

This chapter explains how mediation in the college and university setting is similar to mediation in other settings: It provides processes and outcomes that are not available in other formal settings, consumes fewer resources, and is misunderstood.

ADR Section

2016 Calendar of Events

MAY

40 Hour Basic Mediation Training: San Marcos, May 11-21, 2016. Contact Central Texas DRC, 512-878-0382, www.centexdrc2.org

June

40 Hour Basic Mediation Training: Austin, June 8-10, 14-15, 2016. Contact Austin Dispute Resolution Center, (512) 471-0033, www.austindrc.org

Family Mediation Training: Dallas, June 13, 2016. Contact Conflict Happens, (214) 526-4525, www.conflicthappens.com or nkferrell@sbcglobal.net

July

Advanced Family Mediation: Austin, July 12-15, 2016. Contact Austin Dispute Resolution Center, (512) 471-0033, www.austindrc.orgAugust **Commercial Arbitration Training Domestic & International:** Houston, August 17-20, 2016. Contact A.A. White Dispute Resolution Center, http://www.law.uh.edu/blakely/aawhite/commercial-arbitration-training.asp

September

40 Hour Basic Mediation Training: Houston, Sept. 9-11 & 16-18, 2016. Contact A.A. White Dispute Resolution Center, http://www.law.uh.edu/blakely/aawhite/40-hour-basic-mediation-training.asp

Basic Mediation, Dallas, Sept. 27-30, 2016. Contact Contact Conflict Happens, (214) 526-4525, www.conflicthappens.com or nkferrell@sbcglobal.net

November

Family Mediation Training: Dallas, Nov. 7-9, 2016. Contact Conflict Happens, (214) 526-4525, www.conflicthappens.com or nkferrell@sbcglobal.net

Policy for Listing Training Programs

The ADR Section provides links to ADR training for the information of Section members and the public. The ADR Section does not review, recommend, certify or approve any of the listed trainings. Before relying on any of the standards, criteria, quality, and qualifications represented by a training provider, please confirm with the provider precisely what is being offered.

The ADR Section posts information about any ADR training that meets the following criteria:

* Provides an e-mail address or link to ADR trainings.; the title, dates and location of the program
* The training provider states on its website whether State Bar of Texas for MCLE credit is available, and for the number of hours approved by the State Bar. Providers can also state that approval is pending, if that is the case.
* The training provider states on its website whether the training meets the Texas Mediation Trainers Roundtable training standards that are applicable to the training.

Submit your training session details–name of training, date, location, contact information (telephone and/or email) & URL to Managing Editor Jennifer Alvey at jalvey@jenniferalvey.com.

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Alternative Resolutions Article Submission Guidelines

Deadlines. The deadlines for the submission of articles are March 15, June 15, September 15, and December 15. Publication is approximately 1 month later.

Topics. Articles addressing some aspect of negotiation, mediation, and arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management are welcomed. Promotional pieces are not appropriate for the newsletter.

Article Length. Ideally, articles are 1,500-3,500 words. Shorter and longer articles may be acceptable, depending upon editorial needs. Lengthy articles may be serialized, with the author's approval.

Fact-checking and citation style. Authors are expected to verify names, dates, quotations, and citations. Citations (which should be relatively few) to supporting material can be in Bluebook format, though it's not required. Citations should be given as endnotes. Alternatively, authors can submit a short bibliography of leading sources.

Style Guide. *Alternative Resolutions* uses the Associated Press Stylebook for general questions of grammar, capitalization, spelling, and abbreviation. Also, we strongly believe in the Oxford comma.

Author Information. The author should provide a brief professional biography and a photo.

Re-publication. The article may have been published previously provided that the author has the right to submit the article to *Alternative Resolutions* for publication.

Article Selection. The editor reserves the right to accept or reject articles for publication.

Editing Policies

The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format. The editor has discretion to select accompanying graphics for the article.

Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Rights

Authors retain all their rights with respect to their articles published in the newsletter, except:

The Alternative Dispute Resolution Section of the State Bar of Texas (SBOT) reserves the right to publish articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

Send article queries or ideas to Kay Elkins Elliott, k4mede8@swbell.net, or call her at 214-546-3338 to discuss your idea.

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State Bar Of Texas
Alternative Disputeresolution Section
MEMBERSHIP APPLICATION FORM
(Bar Year Runs June 1, 2016–May 31, 2017)

Here's a challenge for all members of the ADR Section: **Pay it forward**. If you know a colleague or associate with an interest in mediation or ADR, invite him or her to join the ADR Section. Send them this link, http://www.texasadr.org/Portals/0/ADR%20Membership%20Application.pdf?ver=2016-03-02-150920-283, so that they can enjoy all the great benefits of section membership.

Benefits of Membership

- Section Newsletter, *Alternative Resolutions,* published quarterly.Regular features include the beloved Ethical Puzzler, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around Texas.
- Valuable information on the latest developments in ADR is provided to both ADR practitioners, and those who represent clients in mediation and arbitration processes.
- Affordable Continuing Legal Education opportunities at basic, intermediate, and advanced levels through conferences and interactive seminars.

All of this, and more, for the low cost of *only $30.00 per year*!

State Bar Of Texas Alternative Dispute Resolution Section
Membership Application

Join online! Go to http://www.texasadr.org/Portals/0/ADR%20Membership%20Application.pdf?ver=2016-03-02-150920-283

Name:_____ Bar Card Number:_____

Street Address: _____

City:_____ State:_____ Zip: _____

E-Mail Address:_____

Mobile: _____Business Phone:_____

Fax:_____

Enclosed is $30.00 for membership in the Alternative Dispute Resolution Section of the State Bar of Texas from June 2016 to May 2017.

Method of Payment: Check ____ Visa ____ MasterCard ____ AmEx_____

Name on card:_____ Account #:_____

Expiration:_____ Authorized signature: _____

(No need to return this form if you are paying your section dues at the same time you pay your other State Bar of Texas fees.)

Make checks payable to: **ADR Section, State Bar of Texas**.

Mail your application to: State Bar of Texas ADR Section, P.O. Box 12487, Austin, Texas 78711

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