



THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

Published by the Alternative Dispute Resolution Section of the Federal Bar Association

Editor's Letter

by Victoria Pynchon

Welcome to the first issue of the Federal Bar Association's ADR Section Newsletter, *The Resolver*. The subjects covered in this issue include the chaotic state of federal mediation confidentiality protections; the dangers of class action fairness declarations, which the judiciary continues to seek from federal mediators; and the difficulties inherent in applying federal conflict of interest laws developed with attorney advocates in mind to attorney neutrals and their law firms.



Though these issues are of critical importance to daily practice in our federal courts, very few advocates are aware that these problems exist, let alone how they might be fixed. *The Resolver's* first mission is to make available to FBA members the highest level of scholarship and best practices in federal mediation and arbitration practice.

The second—and perhaps the most important—mission of *The Resolver*, is to commence a robust and sophisticated conversation among federal lawyers, on the one hand, and district and circuit court mediators on the other, about the means by which we can more efficiently, effectively, and durably help our clients resolve their litigated disputes.

The members of the ADR Section are not insensible to the considerable pressures on federal practitioners during these difficult economic times. Clients are tightening their belts and demanding better services at a lower cost than ever before. At the same

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Message from the Section Chair

by Simeon H. Baum

On its maiden voyage, this copy of the first issue of *The Resolver*, the voice of the Alternative Dispute Resolution Section of the Federal Bar Association, has arrived in your hands (or computer). This issue is a testament to the development, pervasive reach, and significance of dispute resolution processes.



A quarter of a century ago, the ADR field was quite different from today. In the 1980s, only arbitration programs existed in the federal courts; the early 1990s saw the introduction of mediation and neutral evaluation pilot programs into the federal district courts; and by the late 1990s, these programs had been recognized as successful and were implemented nationwide through the ADR Act of 1998. That act expanded the federal courts ADR focus to a wide range of processes and expressed congressional findings that:

- (1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;
- (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and
- (3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dis-

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pute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

Alternative Dispute Resolution Act of 1998; findings and declaration of policy, Oct. 30, 1998, H.R. 3528, P.L. 105-315, § 2, 112 Stat. 2993, amending Title 28, Chapter 44, Section 651 *et seq.*

From the late 1990s on, all 94 federal district courts have been brimming with ADR programs. In the May 2009 issue of *The Federal Lawyer*, we heard from mediators on the circuit court level about mediation programs in the federal courts of appeals. Beyond developments within federal courts, ADR has expanded widely in a variety of arenas that affect the federal practitioner, including securities, insurance, reinsurance, admiralty, environmental, ERISA, employment discrimination, labor, and the array of tort and contract claims that involve businesses and consumers everywhere.

ADR has spread for a reason. Borrowing from Frank Sander's and Stephen Goldberg's coinage, the availability of alternative dispute resolution processes helps users "fit the forum to the fuss."¹ Mediation processes utilize the services of a neutral to help parties engage in effective negotiation and dialogue. Mediators can help parties resolve disputes in a timely, cost effective manner, sensitive to business interests and economic constraints, while validating private norms as well as emotions, recognizing relationships, and enhancing the quality of parties' communications. This process can put the fashioning of remedies into the hands of those who will live with the result. Overall, it is a process that has freedom at its core—a value highly regarded by federalists from the start. Moreover, mediation can preserve confidentiality in sensitive matters, and limit the disruption that comes from protracted litigation.

Mediation works well privately and also has been working hand in glove with the courts in our court-annexed programs, where, parties are tangibly bargaining in the "shadow of the law."² There are times when parties might benefit from other processes—e.g., if a real legal point is at the heart of a dispute, a neutral evaluation might do the trick short of trial. Similarly, just plain negotiation is the granddaddy of all dispute resolution processes. All of us resort to that form of dispute resolution throughout

¹Sander, Frank E. A. & S. Goldberg. *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION JOURNAL 49 (1994).

²We thank Prof. Robert H. Mnookin of Harvard Law School and the school's negotiation project for popularizing this concept.

the various dimensions of our personal and professional lives.

Given the prevalence of ADR, it makes sense to hone one's skills and develop sophistication in the choice and use of the appropriate dispute resolution process. The Alternative Dispute Resolution Section of the FBA offers an ideal forum for developing these skills and for interacting with others who share an interest in this field. For those of you who are interested in what you encounter in *The Resolver*, we welcome you to participate actively in the FBA. Become a liaison to the section on behalf of your local chapter. If you have thoughts on pending or possible legislation that affects the dispute resolution field (like Edna Sussman's thoughts on the Arbitration Fairness Act, in this issue), please feel free to share them with us—publish your piece in the next issue of *The Resolver*. Or, reach out to the section and your chapter and look to put your cause at the forefront of the FBA's legislative agenda. We can take advantage of Bruce Moyer and the FBA Governmental Relations Council to cultivate the best in the ADR field through national legislation, where appropriate. If you have a CLE program on ADR that you would like to promote, please let us know through the ADR Section, and the section can collaborate with your local chapter.

Along these lines, the section is hoping that FBA chapters will host fireside chats or roundtable discussions featuring the circuit mediator for that area. These CLE events—perhaps accompanied by a breakfast, lunch, or cocktail reception—can provide an excellent opportunity not only to enhance the use of those ADR forums, but also to meet with likeminded neutrals and representatives.

With this first issue of *The Resolver* at hand—thanks to the efforts of editor Vickie Pynchon, our generous contributors, and FBA sections and divisions manager Adrienne Woolley (awoolley@fedbar.org), we invite you to join us in the unending way of creative service to your clients, the bar, and society via the path of resolution. ✂

Simeon Baum is the president of Resolve Mediation Services Inc. (www.mediators.com) in New York, N.Y. Since 1992, he has been active as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator, and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Donald Trump's \$1 billion lawsuit over the West Side Hudson River development. Baum has successfully mediated over 800 disputes.

The Fairness Declaration: A Senseless Practice

by Jeff Kichaven and Jay McCauley

A senseless practice in the settlement of class actions threatens lawyers, mediators, and perhaps even judges, with the risk of corruption and—ultimately—prison. The purpose of this article is to describe that practice, discredit it, and urge its abandonment.

The senseless practice is the mediator swearing to a so-called “fairness declaration” in connection with the parties’ seeking court approval of a proposed class action settlement. It is apparently customary in class actions for some courts to invite a declaration from the mediator as to the fairness of a proposed settlement, and for some mediators to submit one if all counsel agree.

Some mediators state that “the reality of the marketplace” dictates that, if a mediator balks, it is likely she will no longer be requested to serve on these remunerative cases. Fairness declarations are irrelevant. Worse, they place us all on the road to corruption. Lawyers should never request them, mediators should never provide them, and—most importantly—courts should never invite them and should always strike them from consideration.

Kullar v. Foot Locker, 168 Cal. App. 4th 116 (2008), minimizes the mediator’s role in the class action settlement approval process, but fails to take the final step and prohibit fairness declarations:

(No) case suggests that the court may determine the adequacy of a class action settlement without independently satisfying itself that the consideration being received for the release of the class members’ claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm’s length transaction entered without self-dealing or other potential misconduct. ... (I)n the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation.” (Slip Op. at 13.)

The emphasis on the court’s independent duty—rather than reliance on the involvement of a mediator—is consistent with accepted federal practice. As the Manual for Complex Litigation, 4th edition, Section 21.644, states:

Reviewing a proposed class settlement for fairness, reasonableness, and adequacy is a time-consuming and demanding task, but it is essential and must be done by the judge. Typically, the parties and their attorneys will be primarily interested in upholding the settlement and may present information in a way that supports their position.

The mediator’s opinions are thus irrelevant because all of the mediator’s information was presented to her by those same parties and their attorneys.

Judge William Alsup got it right when he denied approval of a preliminary class settlement in *Kakani v. Oracle Corporation*, Case No. C 06-06493 WHA (N.D. Cal., June 19, 2007):

It is also no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table. Plaintiffs’ counsel has the fiduciary duty. It cannot be delegated to a private mediator.” (Slip Op.at 16.)

Judge Alsup’s insistence on going beyond information provided by the immediate parties is appropriate. Class actions are generally settled on a claims-made basis, and involve one amount for the plaintiff class and another amount for the plaintiffs’ attorneys’ fees and costs. The amount for the class is subject to a reversion clause, which provides that unclaimed funds remain with the defendant. The amount for the plaintiffs’ attorneys, by contrast, is accompanied by a clear sailing clause, which provides that the defense will not object to the fee request.

The combination of a reversion clause and a clear sailing clause should put the judge on special notice to do what he should do anyway: Give special scrutiny to the percentage taken by the attorneys, and not pretend that the nominal settlement amount equals the amounts that will actually be paid to class members. The fairness determination takes wisdom, not just arithmetic, and certainly not the declaration of someone paid by the lawyers who negotiated the deal.

Let’s consider a specific example—the highly publi-

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cized wage-and-hour class action against the *Orange County Register* brought by its newspaper carriers. The multi-million dollar settlement of this case was front page news in the *Los Angeles Daily Journal* on Nov. 25, 2008. Significantly, plaintiffs' counsel, Daniel Callahan, confirmed that he neither asked for nor received a fairness declaration from the mediator in that case.

So much for the reality of the marketplace that fairness declarations are essential if a mediator wants to get high-end work.

And, there was good reason for the mediator not to give a Fairness Declaration in the *Register's* case. The *Daily Journal* reported that plaintiffs' counsel will receive \$12 million in fees and \$2 million in costs. That looks a lot different if the total settlement is worth \$42 million, as the plaintiffs' press release stated, than it does if the settlement is worth "not more than \$22 million," as stated in the press release issued by the defense.

Maybe the settlement is fair at either valuation, maybe it isn't. But the resolution of these fairness questions is up to the trial judge, not the mediator, who knows only the wildly different numbers that the immediate parties told him. To determine fairness, a judge gives absent class members—whose interests would be adversely affected by an unfair deal - notice and an opportunity to object. Without this due process, the mediator is inherently unable to opine that either the mediation process or its result was fair. If the mediator had provided a fairness declaration, he would just be stretching to allow his good name to beard a deal for his clients that requires due process for potential objectors and a judge's independent scrutiny. It's senseless.

If the practice is just naïve, and courts could just strike these Fairness Declarations, why the urgent tone of this article? Because at worst, the practice is not just naïve; it could easily become corrupt. When a mediator sells willingness to try to sway a judge, rather than mediation skill, the risk of corruption is too big to ignore.

Corruption in the signing of class action fairness declarations has landed other men in prison. The Feb. 28, 2008 press release from the U.S. Department of Justice, www.usdoj.gov/usao/cac/pressroom/pr2008/020.html, confirms that Bill Lerach's expert witness, John Torkelson, was convicted for perjured testimony regarding "the appropriate value of settlements" in class actions.

The press release states, in essence, that Torkelson was paid off. Think it can't happen to mediators? Think again. There are efforts to corrupt neutrals even today. In *Nelson v. American Apparel*, B205937, Oct. 28, 2008 (Ordered Not Published), the California Court of Appeal condemned a proposed arbitration as a "deceptive procedure" which would have raised "considerations of illegality, injustice, and fraud." There were questions raised as to whether a prominent neutral had gone

along with the ruse. Luckily, the neutral "refused to consummate" the plan. (Slip Op. at 12, 13.)

But the effort to enroll the neutral through the payment of a fee was clear. Sadly, *Foot Locker* did not prohibit fairness declarations altogether, leaving the door to potential corruption open. Rogue lawyers continue to have the incentive to pay mediators the big bucks and promise future business if only the mediators will testify as desired.

There is also a risk that the relationship between mediators and judges can become corrupt. *Foot Locker* leaves a trial court free to consider a mediator's "qualifications" (Slip Op. at p. 18) when deciding whether to approve a class action settlement. Which mediator's qualifications will a judge most respect? The most skill? Maybe. But there's also the judge's college frat brother; the judge who used to sit in the courtroom down the hall; the man with political juice who helped get the judge appointed; the contributor to the judge's election campaign; or any other so-called mediator to whom the judge may owe a favor, or to whom the judge may have helped steer this piece of business in the first place.

Justice Miriam Vogel warned against this type of corruption long ago in *McMillan v. Superior Court*, Ordered Not Published, 57 Cal. Rptr. 2d 674 (1996), when she cautioned judges not to rubber-stamp the work of discovery referees whom they have the power to appoint. The same concerns apply to the relationship between judges and mediators whose qualifications they may tout to litigants.

There's only one way to avoid these financial siren songs, the ones that landed John Torkelson in prison. We need to lash ourselves to the mast of ethics and stuff our ears with the cotton of common sense. As a community, we should decide that mediators' fairness declarations are unethical, and abandon the practice. ☞

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Swimming Against the Tide: Downstream Law Firm Disqualification and Mediation Practice

by Robert J. Rose

Alternative dispute resolution is now a substantial part of federal civil litigation. The need for trained neutrals, especially mediators, is growing, both in paid and pro bono capacities. The demand for neutrals cannot simply be met from the ranks of retired judges and attorneys, however.¹ Particularly in federal court litigation—where areas of specialization present unique legal issues—the best-qualified neutrals may still be practicing in their field, frequently as part of a law firm. Existing rules of professional conduct, however, would seem to discourage these best qualified candidates from acting as third party neutrals by setting stringent standards for imputation of conflicts to affiliated lawyers. A lawyer in a law firm wanting to become a mediator, or a law firm wanting to develop an ADR practice group that includes mediation services, faces the difficult question of how to deal with conflicts which arise downstream from participation as a neutral in an ADR proceeding.

While mediation is not generally considered to be the practice of law, the crossover of roles that occurs when a lawyer-neutral subsequently is asked to serve as a lawyer representing a client who was a party to a mediation undoubtedly raises ethical issues. The same is true with even more effect for other ADR proceedings. In the absence of changes in state ethical rules, however, there are strategies that the lawyer-neutral and law firm can adopt that will minimize the chance of downstream disqualification from mediation services, or at least make the disqualification manageable.²

ABA Model Rules of Professional Conduct

The conflicts of interest that arise for both the lawyer and the lawyer's law firm are addressed in ABA Model Rules 1.12 and 2.4.³ The role of the lawyer-neutral is specially recognized in Rule 2.4, which makes it clear that the parties to the ADR proceeding are not clients of the lawyer-neutral.

¹For example, the Federal Circuit limits its mediation panel membership to attorneys who are not in active practice. This essentially precludes all patent litigators, as such cases "would or could be appealed" to the Federal Circuit. U.S. Court of Appeals for the Federal Circuit Appellate Mediation Program Guidelines, ¶ 4 (2008).

²In addition to state bar rules, the lawyer-neutral may also be subject to various codes of ethics, such as those promulgated by the American Bar Association, the American Arbitration Association, or the Society of Professionals in Dispute Resolution.

³ABA Model Rules of Professional Conduct 1.12; 2.4.

The rule imposes a special duty on lawyer-neutrals to inform unrepresented parties that the lawyer is not representing them. Rule 2.4(b) states that when the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, "the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." Further, if a neutral gives such an explanation, it would be a best practice to also explain the policy that the lawyer and law firm uses to handle downstream conflicts.⁴

Rule 1.12(a) deals with one-half of the problem of downstream disqualification: where the lawyer-neutral is asked to represent a party in connection with "a matter" in which the lawyer participated "personally and substantially." In such a case, the lawyer must obtain the highest level of consent under the rules—that of "informed consent, confirmed in writing." The Comments to Rule 1.12 and parallel Rule 1.11 explain that "a matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which "the matters involve the same basic facts, the same or related parties, and the time elapsed."

In a jurisdiction operating under the Model Rules, therefore, it is a best practice for a lawyer-neutral to keep accurate records of the parties and counsel to each ADR proceeding in which the lawyer participates "personally and substantially." The lawyer should enter these names into his or her conflict database. Should a potential conflict arise, the attorney must determine whether it involves the "same matter" as explained in the comments. This is even true when the lawyer participates in pro bono settlement panels.

Rule 2.4 makes it clear that the parties to an ADR proceeding are not clients of the lawyer-neutral. Thus, we would not expect Rule 1.9 governing duties to former clients to apply. Rule 1.9 in fact imposes a more stringent standard of disqualification than Rule 1.12, extending the bar to a "substantially related matter." Matters are "substantially related" if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information that would materially advance the client's position in the subsequent matter would normally have been obtained in the prior representation.

⁴By its terms, ABA Model Rule 1.9 governing a lawyer's relationship to former clients therefore might not seem applicable to our discussion. As discussed below, however, for mediation services Rule 1.9 plays an important role.

Poly Software Int'l v. Su

The earliest case dealing with downstream disqualification is *Poly Software Int'l v. Su*,⁵ in which the court acknowledged that, with respect to the appropriate rule governing mediators, “this case is one of first impression.”⁶ The case has become one of the most cited⁷ and influential decisions on the issue of mediator disqualification.

The *Su* defendants sought to disqualify plaintiffs counsel, Berne Broadbent, and his law firm because of Broadbent’s service as a mediator in a previous copyright case. The facts are important to understanding the court’s ultimate analysis. Wang and *Su* left their previous employer, Micromath, in order to form a new company, Poly Software, to create mathematical graphing software. Micromath then sued the Poly Software partnership alleging that Wang and *Su* had illegally used source code from their employment to create the new software for Poly Software. The parties agreed to submit their dispute to mediation, and chose Berne Broadbent as the mediator. Broadbent conducted a series of private caucuses with the parties, during which both Wang and *Su* were present and openly discussed confidential aspects of their case, including detailed analysis of their source codes and handbook comparisons.⁸

Wang and *Su* later had a falling out, and *Su* left to form Datamost Corporation. Wang then sued *Su*, and retained Broadbent from the first case to act as his counsel in the second case. Suitably outraged, *Su* moved to disqualify Broadbent, relying upon Utah Rule 1.12(a)⁹—corresponding to ABA Model Rule 1.12(a)—governing third-party neutrals; Utah Rule 1.9¹⁰ governing duties to former clients, extending the proscription of subsequent employment to a “substantially factually related matter;” and a model code of ethics for mediators that is, in substance, analogous to ABA Model Rule 1.9’s standard of “substantially related matter.” The court thus had the opportunity to analyze the facts under two separate standards, e.g., “same matter” (ABA Model Rule 1.12), versus “substantially factually related matter” (Utah Rule 1.9). The court treated the “substantially related matter” standard of ABA Model Rule 1.12 as equivalent in scope to the Utah rule.¹¹

⁵*Poly Software Int'l v. Su*, 880 F. Supp. 1487 (D. Utah 1995).

⁶*Id.* at 1492.

⁷Followed by, e.g., *Cho v. Superior Court*, 39 Cal. App. 4th 113, 122-25, 45 Cal. Rptr. 2d 863 (1995); *Fields-D’Arpino v. Restaurant Assoc. Inc.*, 39 F. Supp. 2d 412, 416 (S.D.N.Y. 1999).

⁸*Id.* at 1489.

⁹Utah Prof. Conduct Rules, Rule 1.12(a)

¹⁰Utah Prof. Conduct Rules, Rule 1.9

¹¹*Id.* at 1492, fn. 7, relying upon *SLC Ltd. V v. Bradford Group West Inc.*, 999 F.2d 464, 467 (10th Cir. 1993).

The court began by noting that the *Micromath* litigation, which Broadbent mediated, and the instant dispute possessed a common factual nexus, but they were distinct legal disputes. Most certainly the same lawsuit or litigation is the “same matter,” but so is the “same issue of fact involving the same parties and the same situation or conduct.”¹² On the other hand, where “there is lacking the discrete, identifiable transaction of conduct involving a particular situation and specific parties,” the same matter is not involved.¹³

The “substantially factually related matter” of Utah Rule 1.9 is broader in scope than “same matter,” and is not defined by a discrete legal proceeding. It would include controversies that are similar, but not necessarily identical to the present dispute, and is designed to assure that confidentiality and loyalty owed to a client is maintained.

Applying these standards, the court found that the second lawsuit between Wang and *Su* was not the same matter as the earlier *Micromath* litigation, but that it was substantially factually related to that earlier litigation. The mediator had examined in detail the disputed source code and elicited discussion in private caucus with Wang and *Su* as to which of them might be responsible for the alleged illegal copying. It was, therefore, not the “same matter” under Rule 1.12, but it would be within the standard of Rule 1.9, if that rule applied to mediators. The court noted that a mediator is charged “with receiving and preserving confidences in much the same manner as the client’s attorney” and that mediation works best when parties disclose to the mediator in strict confidence all critical information.¹⁴ The court reasoned that in this respect mediators differed from adjudicators, who are governed by Rule 1.12, and that the standard of Utah Rule 1.9 applying the disqualification to substantially factually related matters was the appropriate ethical rule. “Where a mediator has received confidential information in the course of mediation, that mediator should not thereafter represent anyone in connection with the same or a substantially factually related matter unless all parties to the mediation consent after disclosure.”¹⁵

CPR—Georgetown Commission on Ethics and Standards in ADR

The gaps in the ABA Model Rules identified in cases such as *Poly Software*, and the ambiguity as to which rule should apply to mediators, is the subject of a proposed CPR-Georgetown Model Rule 4.5, drafted by the CPR-Georgetown Commission on Ethics and Standards in ADR.¹⁶ The rule was drafted to be adopted either as a

¹²*Id.* at 1492.

¹³*Id.*

¹⁴*Id.* at 1494.

¹⁵*Id.*

¹⁶Proposed New Model Rule of Professional Conduct

replacement for ABA Model Rule 2.4, or as new subparts to be added to Rule 4, Transactions with Persons Other Than Clients. This rule would resolve the tension created by Poly Software's application of Rule 1.9 dealing with former clients to persons who are clearly not former clients under Rule 2.4 by incorporating the standard of Rule 1.9 and Poly Software into the new rule, with some significant changes. Thus, CPR-Georgetown Model Rule 4.5.4(a)(2) provides that a lawyer who has served as a third-party neutral shall not subsequently represent any party to the ADR proceeding (in which the lawyer-neutral served as a neutral) in "the same or a substantially related matter," unless all parties consent after full disclosure.

The CPR-Georgetown model rule is more stringent than the ABA rule in two important respects. First, under CPR-Georgetown Model Rule 4.5.2, all information revealed in confidence in *ex parte* sessions, or through other confidential means, is to be considered confidential, absent a specific statement or agreement by the party otherwise. CPR-Georgetown Model Rule 4.5.4(a)(3) would extend disqualification to representation adverse to a former ADR party where the lawyer-neutral has acquired such confidential information.

Second, CPR-Georgetown Model Rule 4.5.4(a)(4) extends disqualification to a "substantially unrelated matter" for a period of one year where the circumstances might reasonably create the appearance that the neutral had been influenced in the ADR process by the anticipation or expectation of the subsequent relationship. The comments clarify that this is meant to apply to downstream conflicts, and sets up a one-year bar to representation after an ADR proceeding.

Imputation and Screening

Both ABA Model Rule 1.12 and CPR-Georgetown Model Rule 4.5 provide for imputation of conflict to the neutral's law firm, and both recognize a screening procedure but with significant differences. In keeping with its scope, the CPR-Georgetown model rule imputes conflict arising from "same matter" and "substantially related matter" conflicts, as well as the more stringent "acquired confidential information" conflicts and one-year bar for "unrelated matter" conflicts.¹⁷ In contrast, the ABA Model Rule only explicitly imputes conflicts for "same matters."

The rules differ also in their approach to screening. ABA Model Rule 1.12 allows law firm screening in "same matter" conflicts, while the CPR-Georgetown Model Rule limits screening to "substantially related or unrelated matters,"

Rule 4.5: The Lawyer as Third-Party Neutral, drafted by The Commission on Ethics and Standards in ADR (sponsored by Georgetown University Law Center and CPR Institute for Dispute Resolution)

¹⁷By its terms, section (b) imputes conflict if a lawyer is "disqualified by section (a)," which includes all three types of conflict.

provided further that no acquired confidential information has already been given to other members of the law firm.¹⁸

While a screening procedure will save the firm from having to forego a representation, there are requirements to be met. The disqualified lawyer must be timely screened from any participation in the matter and "apportioned no part of the fee therefrom," and written notice must be promptly given to the parties and any appropriate tribunal.¹⁹

We know from ABA Model Rule 1.0(k) that "screened" denotes procedures that are reasonably adequate under the circumstances to protect confidential information that the isolated lawyer has obtained. The best practice for a lawyer-neutral is to minimize the acquisition of confidential information during the course of the ADR proceeding while not compromising your efforts to help the parties settle the case. This may be quite impossible, especially if courts presume that confidential information has been obtained during caucus.²⁰

The obvious problem in a screen is, how do you prevent a partner from being apportioned a part of the fee, when the partnership agreement provides for division of profits? Helpfully, the ABA comments explain that this does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. The lawyer may not, however, receive compensation directly relating the lawyer's compensation to the fee in the matter.²¹

Pro Bono Settlement Panels

Most courts now offer some type of mediation program such as the California Civil Action Mediation Program, or the Attorney Settlement Officer program in the U.S. District Court for the Central District of California. Neutrals typically receive no compensation for their participation in such programs for preparation time and the first three hours in a settlement proceeding. In the Central District, for example, after three hours of the settlement proceeding, the attorney settlement officer may give the parties the option of concluding the settlement proceeding, continue the settlement proceeding and volunteer his or her time, or continue the settlement proceeding on such terms and rates as the attorney settlement officer and all parties agree in a private, written contract.

The CPR-Georgetown model rule recognizes the public benefit in such programs, and explicitly exempts law firms from the imputation and screening rules when the lawyer-neutral volunteers his or her services at the request of a

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¹⁸Comment 6, CPR-Georgetown Model Rule 4.5.4.

¹⁹ABA Model Rule 1.12(c).

²⁰*See, e.g.*, Comment 8, CPR-Georgetown Model Rule 4.5.2 ("all information revealed in confidence in *ex parte* sessions " is to be considered confidential").

²¹Comment 4, ABA Model Rule 1.12.

Mediation Confidentiality: A Federal Court Oxymoron

by Phyllis G. Pollack

Despite the alleged existence of a federal common law mediation privilege, statutory mediation confidentiality rules, and the actual existence of individual court's local mediation confidentiality rules, federal courts to date have so limited the scope of mediation confidentiality that one might as well call federal mediation confidentiality an oxymoron.

Babasa v. Lenscrafters

A good starting point for any analysis of the federal mediation confidentiality rule is the Ninth Circuit's opinion in *Babasa v. LensCrafters Inc.*, 498 F. 3d 972 (9th Cir. 2007). Although the *Babasa* court focused on whether it had removal jurisdiction under 28 U.S.C. §1446(b), along the way it carved out a huge exception to the principle of mediation confidentiality.

In April 2005, Patrick Babasa and others filed a putative class action in state court against LensCrafters Inc., alleging various California Labor Code violations. After the plaintiffs filed an amended complaint, the parties agreed to mediate. In December of that same year, counsel for Babasa and the other plaintiffs sent a letter to counsel for LensCrafters confirming certain issues regarding the size of the class and the number of potential violations. The letter noted that it was sent “[i]n preparation for the mediation.” It further discussed the amount of potential damages, noting that missed meal periods amounted to \$4.5 million, while potential penalties could soar as high as an additional \$5 million under provisions of the California Labor Code.¹

When the mediation did not resolve the case, LensCrafters filed a notice of removal to federal court, alleging ignorance of the amount in controversy until Nov. 1, 2006, nearly a year after the letter at issue was written. The issue before the court was whether the December 2005 letter—prepared for purposes of mediation and therefore protected from disclosure under California's rules of evidence (Cal. Evid. Code Section 1115 *et seq.*)—was admissible for the purpose of remand to the state court.

The Ninth Circuit affirmed, rejecting LensCrafters' argument that the “... letter could not serve as proper notice of the amount in controversy for removal purposes because

¹As a notice of damages, this correspondence demonstrated that the amount in controversy was sufficient to satisfy the federal jurisdictional requirements of 28 U.S.C. §1332, permitting LensCrafters to remove the case to federal court.

the letter is privileged under state law.” *Id.* at 974.²

Though using the letter as evidence of the amount in controversy, the appellate court side-stepped the confidentiality issue, noting only that California law did not apply. *Id.* at 974.

Citing Fed. R. Evid. 501, the Ninth Circuit determined that “state law does not supply the rule of decision here.” *Id.* Because federal law determines whether this case meets the amount in controversy requirement necessary for diversity jurisdiction in federal court, 28 U.S.C. §1332, then it is also federal law that applies to determine whether the letter constituted notice for purposes of removal jurisdiction. *Id.* at 974–975. The Ninth Circuit held that it did, avoiding the issue whether federal mediation confidentiality law protected the communication from disclosure. In a footnote, the appellate court noted that LensCrafters did not raise the argument that the letter was privileged under federal law or that it fell within a federal common law privilege or federal mediation privilege. Based upon LensCrafters' failure to raise these issues, the court refused to consider them. *Id.* at 975, fn.1.

In short, the court focused quite narrowly: since this was an issue to be decided under federal law, California state law on mediation confidentiality did not apply.

²California Evidence Code §1119:

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential. (Emphasis added.)

The Alternative Dispute Resolution Act Of 1998

After reading this decision, the question arises: is there mediation confidentiality in federal court? If so, what are its parameters? If not, then why not and what rule, if any, controls mediations conducted under the auspices of the federal district and appellate courts?

Technically, the answer to the first question is “yes.” Mediation confidentiality in federal proceedings arises under the Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2998 (105th Cong. 2nd Sess.) (Oct. 30, 1998) codified at 28 U.S.C. §§651-658. In Section 2 of this act, Congress finds among other things, that:

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained

The broader issue was whether to recognize and adopt a federal common law mediation privilege.

neutrals in a program adequately administered by the Court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, mini-trials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently... .

In Section 3, Congress authorizes the district courts to adopt, by local rule, the use of ADR processes that include not only mediation but early neutral evaluation, mini-trials, and voluntary arbitration as well.

Section 4 (28 U.S.C. §652) addresses jurisdiction and confidentiality:

(d) Confidentiality Provisions—Until such time as rules are adopted under Chapter 131 of this title providing for confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule, adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.

While a cursory review of Chapter 131 of Title 28, U.S. Code (28 U.S.C. §§2071-2077) reveals that Congress has yet

to amend this chapter to include an ADR confidentiality provision, both district and appellate courts have amended their local rules to include such confidentiality provisions. See, e.g. Central District of California Local Rule 16-15.8 (confidentiality of proceedings); Northern District of California ADR Local Rule 5-12 (confidentiality in early neutral evaluation); 6-12 (confidentiality in mediation) and 7-5 (confidentiality at settlement conferences) and Ninth Circuit Court of Appeals Rule 33-1 (confidentiality in settlement conferences).

Thus, at least by federal statute and local court rule, mediations are to be kept confidential. Now, things get interesting.

Folb v. Motion Picture Industry Pension And Health Plans Inc.

Several months before Congress enacted the ADR Act,

Hon. Richard A. Paez, U.S. District Judge sitting in the Central District of California, issued an opinion in *Folb v. Motion Picture Industry Pension and Health Plans Inc.*, 16 F. Supp. 2d 1164 (C.D. Cal 1998) (July 8, 1998), *aff'd.*, 216 F.3d 1082 (9th Cir. 2000). Although the narrow issue was whether to affirm the magistrate’s decision to compel production of a mediation brief and communications between counsel who were privy to that brief, the broader issue was whether to recognize and adopt a federal common law mediation privilege.

Plaintiff Scott Folb sued for gender discrimination and retaliatory actions based on his alleged whistle blowing activities. The defendants allegedly relied on a complaint by a co-employee, Vivian Vasquez, that Folb had sexually harassed her. The plaintiff contended that the defendant used this as a pretext for firing him. He alleged that the real cause for his dismissal was his accusation that the directors of the pension plans had violated their fiduciary duties under federal law. During the litigation, the parties attended a formal mediation in an attempt to settle the case. Though no settlements were reached in mediation, Vasquez settled her claims with the defendant plans soon thereafter. Without permission, counsel for the defendant plans shared Vasquez’ mediation brief with outside counsel who was hired to investigate Vasquez’ sexual harassment claim.

Plaintiff Scott Folb subpoenaed outside counsel’s copy of the mediation brief in response to which counsel claimed mediation confidentiality under Fed. R. Evid. 408 and Cal. Evid. Code §1119. The magistrate denied the motion to compel any documents or notes connected to the mediation.

The district court took a more narrow approach, concluding that while production of the mediation brief should be

OXYMORON *continued from page 9*

denied, information relating to settlement negotiations conducted after the conclusion of the formal mediation was discoverable.

To reach this conclusion, the court started with Rule 501 of the Federal Rules of Evidence which provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the

... general rule is that the public is entitled to every person's evidence and that testimonial privileges are disfavored.

Id. Thus, a court must determine whether the public good of recognizing a testimonial privilege outweighs the general duty of everyone to give evidence. *Id.* To determine this and thus whether an asserted federal common law privilege (*i.e.*, here, a federal mediation privilege) should be recognized, four factors must be considered:

To determine whether an asserted privilege con-

Communications to the mediator and between the parties during the mediation, are protected. Also protected are communications made to the neutral in preparation for the mediation.

common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law applies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with state law.

The court cited *Religious Technology Center v. Wollersheim*, 971 F. 2d 364, 367n.10 (9th Cir. 1992) as binding precedent for the proposition that the federal common law controls privilege questions in any federal question case that includes pendent state law claims. *Id.* at 1169-70.

Looking to the U.S. Supreme Court for guidance, the district court, quoting *Jaffee v. Redmond*, 518 US 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996) noted that

... the federal courts are authorized to define new privileges based on interpretation of 'common law principles... in light of reason and experience. *Jaffee*, 518 U.S. at 8.

Id. However,

... that authority must be exercised with caution because the creation of a new privilege is based upon consideration of public policy.

Id. at 1171. Here, one must remember that the

stitutes such a public good, in light of reason and experience, the Court must consider (1) whether the asserted privilege is "rooted in the imperative need for confidence and trust[;]" (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states. *Id.* at 9-13.

Id. at 1171.

Applying these four factors, the district court determined that a federal mediation privilege pursuant to federal common law principles enunciated in Fed. R. Evid. 501 should exist. *Id.* at 1171-1181.

The court defined the contours of the privilege as follows:

The mediation underlying the instant dispute was a formal mediation with a neutral mediator, not a private settlement discussion between the parties. Accordingly, the mediation privilege adopted today applies only to information disclosed in conjunction with mediation proceedings with a neutral. Any interpretation of Rule 501 must be consistent with Rule 408. To protect settlement communications not related to mediation would invade Rule 408's domain; only Congress is authorized to amend the scope of protection afforded by Rule 408. Consequently, any post-mediation communications are protected only

by Rule 408's limitations on admissibility.

Id. at 1180.

In short, communications to the mediator and between the parties during the mediation, are protected. Also protected are communications made to the neutral in preparation for the mediation. But, subsequent communications between the parties are not protected. To gain that protection, the parties must return to mediation! Otherwise, the province of Rule 408³ settlement negotiations would be invaded. *Id.*

The stage is thus set. Do other courts follow suit?

Recent Cases

Only a few courts have followed *Folb*, recognizing the existence of a “federal mediation privilege” grounded in Fed. R. Evid. 501. An often cited case recognizing a federal mediation privilege is *Sheldone v. Pa. Turnpike Com’n*, 104 F. Supp. 2d 511 (W.D. Pa 2000) involving a claim brought under the Fair Labor Standards Act. During the litigation, the plaintiffs, members of the local union, sought discovery of documents generated during the course of a mediation of union grievances. *Id.* at 511-512. The defendant employer sought a protective order, urging the court to adopt a federal mediation privilege. After discussing the four factors considered by *Jaffee*, the trial court adopted the privilege but defined its contours in accordance with W. Dist. Local R. 16.3.5(E) and 16.3.1 which (1) protects from disclosure all written and oral communications made in connection with or during a mediation made before a

³Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

neutral mediator; (2) prohibits the use of any such written or oral communication for any purpose—including impeachment—in any proceeding; and (3) except for a written settlement agreement or any written stipulations executed by the parties or their counsel, bars any party or counsel from being bound by anything done or said during the mediation process. In adopting these provisions, the court stressed that the privilege does not protect from disclosure any other evidence nor any information independently discoverable merely because it was presented during a mediation. *Id.* at 517.

A more recent case discussing the issue is *Sampson v. School Dist.*, 2008 U.S. Dist. Lexis 91421, 105 Fair Empl. Prac. Cas. (BNA) 96 (E.D. Pa, Nov. 5, 2008). In its discussion of the federal privilege, it cites other cases recognizing its existence while at the same time noting that in some of these instances, the “privilege” is actually based on the local rule enacted pursuant to the ADR Act.

Similarly, the U.S. Bankruptcy Court in *Hays v. Equitex Inc.* (In Re RDM Sports Group Inc.), 277 B.R. 415, 2002 Bankr Lexis 468 (Bankr. N.D. Ga 2002), recognized a federal mediation “privilege” while nevertheless stressing that neither the Eleventh Circuit nor any federal district court in that circuit had done so before. *Id.* at 426. That court also relied upon the *Jaffee* factors and adopted the scope of the privilege as set out by the court in *Sheldone*. As the *Hays* court held,

The mediation privilege should operate to protect only those communications made to the mediator, between the parties during the mediation, or in preparation for the mediation. Therefore, the mediation privilege does not apply to shelter from disclosure documents prepared prior to the mediation, merely because those documents were presented to the mediator during the course of the mediation.

Id. at 431, but see *In Re Subpoena Issued to CFTC*, 370 F. Supp. 2d 201, 67 Fed. R. Evid. Serv. (CBC) 117 (D.D.C 2005) (refusing to recognize a federal “settlement” privilege under Fed. R. Evid. 501.)

In *EEOC v. Albion River Inn Inc.*, 2007 U.S. Dist. Lexis 97805 (N.D. CA, Sept. 4, 2007), the court side-stepped the issue whether a federal mediation privilege existed by noting that there was no formal nor court ordered mediation in the case before it—only a third party attempting to help adverse parties resolve their dispute.⁴ Thus, according to the

⁴Note that this would be sufficient under California law for confidentiality to attach. See California Evidence Code Section 1115 which defines mediation as “a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.” *Id.*

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Albion River Inn case, even the local rules governing mediation confidentiality did not apply.

To confuse the issue even more, a more recent decision in the Central District of California (which decided *Folb*) took a different stance. In *Molina v. Lexmark International Inc.*, 2008 U.S. Dist. Lexis 83014, 77 Fed. R. Evid. Serv. (Callaghan) 905 (C.D. CA. Sept. 30, 2008), Hon. Margaret Morrow, U.S. District Judge and past chair of the court's settlement officer program, questioned the existence of a federal common law mediation privilege, stressing the *Folb* court's insistence that its holding be limited to its facts, *i.e.*, to those cases where a third party who did not participate in the mediation sought discovery of the mediation materials. *Id.* at 25-26. The court further noted that no circuit court has ever adopted or applied such a privilege: "indeed both the Ninth and Fourth Circuits have expressly declined to consider whether such a privilege exists." *Id.* at 30.

Factually, plaintiff Rob Molina filed a class action against his former employer, Lexmark International, in Los Angeles Superior Court, alleging violations of the California Labor Code relating to vacation and personal day pay and under California's Unfair Competition Act, Business and Professions Code §§17200-17208. Two weeks before trial in state court, Lexmark removed the matter to federal court. Plaintiff Molina filed a motion to remand, asserting the removal was untimely. *Id.* at 2-10. As in *Babasa*, the issue was whether information learned during settlement negotiations (both during and after mediation) commenced the running of the 30 day removal window. *Id.* at 17-21.

In holding that removal was not timely and remanding the matter back to Los Angeles Superior Court, the *Molina* court explained:

"Confidentiality" refers to a duty to keep information secret while "privilege" refers to protection of information from compelled disclosure"... Communications are confidential when the freedom of the parties to disclose them voluntarily is limited; they are privileged when the ability of third parties to compel disclosure of them, or testimony regarding them, is limited. (Citation omitted). *Id.* at 35.

The court went on to note that numerous courts, including *Babasa*, had concluded that "... Rule 408 does not make settlement offers inadmissible in the removal context as evidence of the amount in controversy." *Id.* at 42-43. The court rejected the argument that either mediation confidentiality or Fed. R. Evid. 408 precluded the use of information exchanged during mediated settlement discussion for purposes of removal, holding that even though parties to a mediation

generally have a duty to keep their discussions confidential, this duty does not prevent the use of mediation discussions for the limited purpose of establishing the amount in controversy. *Id.* at 45.

The court opined that this rule was in accord with the rationale behind both Fed. R. Evid. 408 and mediation confidentiality which is "... to encourage honest assessment and acknowledgement of litigation strengths and weaknesses by limiting the parties' ability to make use of compromise discussions." *Id.*

In sum, even when settlement discussions are protected by the federal mediation privilege, mediation confidentiality, or Fed. R. Evid. 408 or 501, the secrecy surrounding mediation in federal court cases is quite limited. If mediation communications are fair game to assist the court in determining the amount in controversy for removal purposes (*id.* at 56 and *Munoz v. J.C. Penney Corp. Inc.*, 2009 U.S. Dist. Lexis 36362 (C.D. Cal. Apr. 9, 2009), for what other purposes are they fair game? To assist the court in deciding summary judgment motions or motions in limine? Or, in determining whether a party, such as an insurance carrier, acted in bad faith toward its insured? Or, in determining whether to sanction an attorney for bad faith conduct of litigation? In what objective way can courts in future cases make credible distinctions between information the court needs to determine its jurisdiction and that which it needs to determine how to exercise its jurisdiction?

Conclusion

While each court has a local rule providing for confidentiality in mediation and/or other alternative dispute resolution processes, under the case law developed to date, each court will have good grounds to interpret and apply it narrowly based upon *Jaffee's* rationale that "the public... has a right to every man's evidence... and thus [to utilize] all rational means for ascertaining the truth" (*Jaffee v. Redmond, supra* at 9), and *Molina's* conclusions that information disclosed in mediation is "confidential" but not "privileged" and that confidential mediation communications may be used to assist the court in determining the existence of federal jurisdiction.

In short, beware and be wary: "mediation confidentiality" and/or "mediation privilege" in federal court may well be oxymoronic. ☞

Phyllis Pollack is a Los Angeles-based mediator (www.pgpmmediation.com/about-pgp/) who specializes in commercial disputes. Her PGP Mediation Blog (www.pgpmmediation.com/articles/) is a featured blog on mediate.com.



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TIDE *continued from page 7*

court, other public agency, or institution and serves for a de minimis period.²² While the comments to this important provision are terse, we take this to mean that law firms may allow their attorneys to participate in pro bono settlement panels programs, provided that the settlement proceeding does not carry over beyond the initial free three hour period. Receiving compensation, or allowing the proceeding to extend beyond the initial three hour period would arguably take the law firm out of the safe harbor of the rule, and require screening procedures.

It is important to note that the safe harbor for pro bono-de minimis activity does not extend to the lawyer-neutral; it is only for the benefit of the law firm. The lawyer is still individually disqualified under the rules discussed above, even for pro bono activity. As a best practice, therefore, a lawyer-neutral should keep careful and accurate records of the parties

²²CPR-Georgetown Model Rule 4.5.4(d).

and counsel names for all settlement proceedings.

Conclusion

The role of mediators in the civil justice system is evolving, as is our understanding of how to deal with conflicts arising from mediation. Although complex, the CPR-Georgetown rule certainly represents the most complete statement on the subject. Importantly, the CPR-Georgetown rule makes allowance for the important category of pro bono settlement procedures, and it is to be hoped that law firms will permit their attorneys to volunteer and participate in such programs. ☘

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EDITOR *continued from page 1*

time that American business and federal lawyers are facing daunting financial pressures, technology is speeding up—and sometimes eclipsing—the ability of some businesses, and some attorneys who serve them, to survive.

As one of the most-watched YouTube videos on the planet warns us, “Shift Happens.” Among the jaw-dropping statistics cited there:

- The top 25% of the highest IQs in China today is greater than the entire population of North America
- China will soon be the #1 English speaking country in the world
- Young people commencing their careers today will have between ten and 14 jobs by the age of 38
- The top ten jobs that will exist in 2010 did not exist in 2004

Whether these particular statistics have the ring of truth or give you the feeling of wild speculation, there can be no doubt that our shift from an industrial to an informational economy will have vast and lasting consequences on our economy and

culture, the twin spurs of which will fundamentally alter the way in which we resolve disputes. Will trial between adversaries go the way of trial by battle or ordeal by water? Will the common law survive in an age where so few cases go to trial that appellate authority will go from thin to barely perceptible? What role will advocates and mediators play in the legal system as the tectonic plates of the world as we know it shift beneath our feet?

We here at the ADR Section are eager to grapple with the problems and opportunities these changes presage and we'd like you to join us! Let your voice be heard at *The Resolver* by sending your conflict prevention and resolution articles to my attention. We look forward to hearing from you. ☘

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