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Updates on Alternative Dispute Resolution
Effective July 1, 2014, a new disclosure requirement has been added to Ethics Standard 7.








Spotlight



[Unintended Consequences of ADR](#)
The renaissance of alternative dispute resolution (ADR) in California civil law in the last 30 years has generated an extraordinary rippling effect of five unintended consequences.



[When the State Bar Audits Your MCLE Compliance](#)
If you check the box that you have complied when you know you have not, that is lying, and involves moral turpitude, giving the State Bar a basis to suspend you from practice.

News & Updates



[CCCBA Holiday Party \[photos\]](#)
Thank you for joining us at the CCCBA Holiday Party on December 19, 2013.



[Tracking Your MCLE Certificates: CCCBA Can Help!](#)
If you have attend a CCCBA event or Section program, then your MCLE certificates are on file in your online membership profile.

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year - six in print and 12 online issues.

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Inside Guest Editor's Column, February 2014

Saturday, February 01, 2014



Welcome to our February issue of The Contra Costa Lawyer. This month, we are focusing on Alternative Dispute Resolution—a topic that is relevant to almost all areas in the practice of law. It doesn't matter if you are corporate or litigation, whether you focus on family law, personal injury or business litigation, ADR is something that is a part of your practice. It might be in the form of a settlement conference, a mediation or an arbitration, but it is there.

This month we bring you the latest and greatest as it pertains to ADR. The landscape of ADR may be changing, and Peter Mankin brings us up to date on the latest developments on a legislative effort to decrease the confidentiality of mediation. This is an important topic and one that affects everyone who

takes part in mediation, both as parties and as attorneys, and is something we hope you read and consider.

It has been about a year and a half since we at the Lawyer last undertook an ADR issue, and in that time, there have been some significant developments in the case law. John Warnlof and Leslie Fales bring us up to date on these case law developments, while Tom Cain takes a look at communication and speech and the role it plays in conflict.

Another way in which the development (and increasing popularity) of ADR has affected everyone's practice (whether they use ADR or not) is in the way that ADR has changed the development of reported case law. In our spotlight article, Judge Marchiano examines some unintended consequences of the increased use of mediation and ADR, including the way in which it has slowed down the development of case law by settling out cases that would otherwise have resulted in published case law.

Many people think that mediation and ADR are a little "soft" and the focus too much on emotions or resolution as opposed to settlements and agreements. Ken Strongman introduces us to a man who shows us what the real benefits of conflict resolution can be: peace. Doug Noll, together with his partner, Laurel Kaufer, runs Prison of Peace, a nonprofit "group" (if Doug and Laurel can be called a group) that goes into some of California's most dangerous and notorious prisons and trains inmates who are imprisoned for life to be peacemakers. These inmates become mediators within the prison population and the transformations they have made, both within themselves and within their prison community, are nothing short of inspiring. If you want to see the true potential of mediation, this is the article to read.

In the spirit of peacemaking and giving back within our own community, we highlight an organization that has partnered with our own courts to provide volunteer mediation services right here in Contra Costa County. The Center for Human Development operates different panels of volunteer mediators: The main panel, which handles community mediations; the elder mediation panel, which is specially trained to handle mediations with an elder present and which has worked closely with our own Elder Court;

the guardianship panel, which mediates guardianship cases with the courts; and finally the family reunification panel, which works with inmates and their families to help with the transition back to civilian life after incarceration. The work they do benefits everyone in this county.

As you are all aware, it is that time of year again—time to renew your bar membership. For one-third of you, that means mandatory MCLE reporting as well. In this month's ethics column, Carol Langford warns us about the California Bar's new program of auditing, which aims to audit up to 10 percent of the reporting attorneys this year, so if your last name starts with N-Z, this is definitely something you will want to pay attention to!

The financial crisis in the courts is something that we have discussed in many issues. This month, we look at one specific area of impact: court reporters. Wendy Graves gives us the court reporter's perspective on BYOCR—Bring Your Own Court Reporter—and some tips to help make that transition smoothly.

I hope that you enjoy this issue of the Contra Costa Lawyer.

Nicole Mills is a mediator in Walnut Creek, is a past Chair of the ADR Section of the Contra Costa County Bar Association, and is the Co-Editor of the Contra Costa Lawyer. She is also an Adjunct Professor of Conflict Resolution. Nicole Mills can be reached at nicolemillsesq@yahoo.com.

Updates on Alternative Dispute Resolution

Saturday, February 01, 2014



The following discusses recent legislative changes and court decisions impacting Alternative Dispute Resolution.

Ethical Standards for Neutral Arbitrators in Contractual Arbitration

All persons serving as arbitrators under an arbitration agreement are required to comply with ethics standards adopted by the Judicial Council.[1] The standards, which appear as an appendix to the California Rules of Court, require, *inter alia*, that arbitrators make certain disclosures. Effective July 1, 2014, a new disclosure requirement has been added to Standard 7. Arbitrators must now disclose the following: (1) whether they were disbarred or had their license to practice a profession or occupation revoked by a professional or occupational disciplinary agency or licensing board, (2) whether they resigned their membership in the State Bar or another professional or occupational

licensing agency or board, while public or private disciplinary charges were pending, and (3) whether in the preceding 10 years, other public discipline was imposed on them by a professional or occupational disciplinary agency or licensing board.[2]

Mediation Confidentiality

Evidence Code §1119 provides, in part, that written and oral communications prepared for or made during mediation are inadmissible in any subsequent proceeding. In *Cassel v. Superior Court*,[3] the California Supreme Court held that communications between a client and his or her attorney during mediation are inadmissible in actions for malpractice or breach of fiduciary duty. In direct response to *Cassel*, AB 2025, introduced February 23, 2013, sought to create a statutory exception to mediation confidentiality, making such communications admissible in such actions. The issue was referred to the California Law Revision Commission to analyze “the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct ...”[4] At recent meetings in Los Angeles and Davis, the Commission received substantial public comment and is now in the early stages of working toward a tentative recommendation. Once the recommendation is drafted, public comment will be invited. If the Commission determines that changes in the mediation confidentiality statute are desirable, then an assembly member will be sought to carry the proposed legislation. It is unlikely that a recommendation would be forthcoming before late 2014 or early 2015.[5]

Significant Cases

***Sonic-Calabasas Inc. v. Moreno*, 57 Cal. 4th 1109 [163 Cal. Rpt. 3d 269] (2013)**

On February 24, 2011, the California Supreme Court issued its opinion in *Sonic I* holding that an employee’s waiver of the right to a Berman hearing (Calif. Labor Code Sec. 98, et seq.) was invalid and contrary to public policy and principles of unconscionability.[6] Two months later, the U.S. Supreme Court decided *AT&T Mobility, LLC v. Concepcion*,[7] holding that the Federal Arbitration Act preempts state court decisions holding that arbitration agreements with class action waivers are against public policy and unconscionable.[8] On November 3, 2013, the U.S. Supreme Court granted Sonic’s request for *certiorari*, vacated the *Sonic I* judgment, and remanded the case to the California Supreme Court for further consideration in light of *Concepcion*.

Guided by the holding in *Concepcion*, the California Supreme Court held in *Sonic II* that the FAA preempts California state law that categorically prohibits the waiver of a Berman hearing in a pre-dispute arbitration agreement imposed on an employee as a condition of employment. However, the California Supreme Court also held that California courts may continue to enforce unconscionability rules that do not interfere with the fundamental attributes of arbitration. Accordingly, arbitration provisions containing class action or Berman hearing waivers will be examined on a case-by-case basis. If the court finds that the arbitration provision limits an employee’s accessibility to a remedy, is not affordable, speedy or effective, the court is free to find common law unconscionability based upon a determination that the arbitration agreement is unreasonably oppressive or one-sided.

***Chavarria v. Ralphs Grocery Company*, 733 F. 3d. 916 (9th Cir. 2013)**

Applying California decisions concerning unconscionability, the 9th Circuit found that the arbitration provision in the employment contract between deli clerk Zenia Chavarria and Ralph’s Grocery Company was unenforceable. The arbitration provision provided that neither the AAA nor JAMS were permitted to administer any arbitration. The arbitration

provision further provided that the arbitrator, upon commencement of the arbitration, would apportion all costs and fees and, in so doing, must disregard any potential state law regarding cost-shifting. The arbitrator would also be limited to applying only decisions of the U.S Supreme Court that directly addressed cost allocation.

In finding the provision unenforceable, the 9th Circuit favorably quoted the District Court, stating:

The court identified this provision as a model of how employers can draft fee provisions to price almost any employee out of the dispute resolution process. 'The combination of these terms created a policy' according to the court, that 'lacks any semblance of fairness and eviscerates the right to seek civil redress . . . To condone such a policy would be a disservice to the legitimate practice of arbitration and a stain on the credibility of our justice system.' [9]

Strong language, indeed. The 9th Circuit concluded its decision by stating Ralph's had "tilted" the process so far in its favor that "both in the circumstances of entering the agreement and its substantive terms, that it 'shocks the conscience.'" [10]

***Ferguson, et al, v. Corinthian Colleges, Inc., et al.* [733 F. 3d. 928] (9th Cir. 2013)**

The issue before the court in *Ferguson* concerned the validity of the *Broughton-Cruz* Rule. Former students at for-profit schools owned by Corinthian brought a putative class action alleging that Corinthian engaged in a deceptive scheme to entice enrollment of prospective students in violation of California law. The students included a claim for "public injunctive relief." The District Court granted Corinthian's motion to compel arbitration, in part, but denied the motion as to plaintiffs' claim for public injunctive relief. This denial was based upon California Supreme Court decisions establishing the so-called *Broughton-Cruz* Rule that exempts claims for "public injunction" from arbitration.

In *Broughton v. Cigna Healthplans of California* and *Cruz v. Pacificare Health Systems Inc.*, [11] the California Supreme Court found that requests for public injunctive relief under the Unfair Competition law, the False Advertising law, and the Consumer Legal Remedies Act, were not subject to arbitration. However, in 2011, the U.S. Supreme Court decided the previously mentioned case, *AT&T Mobility, LLC v. Concepcion*. [12] There, the Supreme Court held, "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straight forward: the conflicting rule was displaced by the [Federal Arbitration Act]." The decision concludes with the statement "the FAA preempts California's *Broughton-Cruz* Rule that claims for injunctive relief cannot be arbitrated."

The 9th Circuit relied on *Concepcion* in their decision, finding that the FAA displaced the *Broughton-Cruz* Rule and reversed and the District Court's decision as to the arbitrability of the public injunction.

***Peng v. First Republic Bank*, 219 Cal. App. 4th 1462 [162 Cal. Rptr. 3d 545] (2013)**

In *Peng*, the Appellate Court addressed two recurring questions. First, what happens when an agreement that contains an arbitration provision does not have the applicable arbitration rules attached to it? Second, does an employer's unilateral authority to modify or terminate the terms of an agreement make such an agreement illusory? Plaintiff Peng entered into an employment agreement with defendant First Republic that provided, in relevant part, "all claims, except those for workers' compensation benefits or employers

insurance, would be resolved by final and binding arbitration in accordance with the rules of the American Arbitration Association, or such alternate dispute resolution service as agreed upon by the parties.” First Republic did not provide Peng with a copy of the arbitration rules, or specifically identify them to her.

Peng later filed a complaint against First Republic for gender and race discrimination and other claims. First Republic moved to compel arbitration based on the arbitration provision. The trial court denied the motion finding that the agreement was *per se* procedurally unconscionable because it did not include a set of arbitration rules with the agreement. The trial court further found that the agreement was substantively unconscionable based on First Republic’s unilateral ability to modify or terminate the agreement.

The Appellate Court reversed, finding that “The failure to attach the AAA Rules, standing alone, is insufficient grounds to support a finding of procedural unconscionability.”[13] With regard to First Republic’s ability to modify the agreement, the court determined that “where the contract specifies performance, the fact that one party reserves the power to vary it is not fatal if the exercise of the power is subject to prescribed or implied limitations, such as the duty to exercise it in good faith and in accordance with fair dealings.”[14] Therefore, because First Republic had not modified the arbitration agreement, the provision was not deemed unconscionable.[15]

***Mt. Holyoke Homes, LP, et al. v. Jeffer Mangels Butler and Mitchell, LLP*, 219 Cal. App. 4th 1299 [Cal. Rptr. 3d. 567] (2013)**

This case involved an arbitration regarding a former client’s claims for legal malpractice and a law firm’s claim for unpaid fees. There, the arbitrator disclosed that counsel for the law firm had represented a party in a mediation before the arbitrator within the past five years but that the arbitrator was not aware of any relationship with any party or attorney involved in the matter that would impair his ability to act fairly or impartially. The arbitrator denied the client’s malpractice claim, awarded the law firm \$18,000 in unpaid legal fees and \$435,000 in fees and costs incurred in connection with the arbitration.

The adverse arbitration award prompted the client to search the Internet for evidence of arbitrator bias. The client discovered, for the first time, a previously undisclosed resume in which the arbitrator listed a named partner in the law firm as a reference. The Court of Appeal reversed the trial court’s confirmation of the award as a judgment, finding that the arbitrator’s failure to disclose the relationship with the named partner was fatal to upholding the award. The court explained:

An objective observer reasonably could conclude that the arbitrator listing a prominent litigator as a reference on his resume would be reluctant to rule against the law firm in which that attorney is a partner as a defendant in the legal malpractice action. To entertain a doubt as to whether the arbitrator’s interest in maintaining the attorney’s high opinion of him could color his judgment in the circumstances is reasonable, it is by no means hypersensitive, and requires no reliance on speculation. We believe that an objective observer aware of the facts could reasonably entertain such doubt.[16]

The law firm sought review by the California Supreme Court on the issue of whether parties to arbitration were chargeable with information about an arbitrator that is reasonably available on the Internet. The law firm’s request for review was denied with Justice Kennard of the opinion that review should be granted.

Failure to disclose continues to be an attractive basis to seek to vacate an arbitration award. However, if a party or its attorney is aware of a matter that should be disclosed and fails to bring the matter to the attention of the arbitrator or the arbitration provider, such party or its attorney may be estopped from asserting such matter following an unfavorable arbitration award.

In summary, FAA preemption under *Concepcion* continues to meet resistance in California courts and a failure to disclose remains a viable ground for a party to seek to vacate an adverse award.

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Cite checking by **Rebecca Harris**, a law student at JFK University School of Law.

[1] Code of Civil Procedure §1281.85.

[2] This new disclosure requirement is in response to the 2010 California Supreme Court decision in *Haworth v. Superior Court*, 50 Cal. 4th 372 (2010).

[3] *Cassel v. Superior Court*, 51 Cal. 4th 113 [119 Cal. Rptr. 3d. 437] (2011).

[4] 2012 Cal. Stat. Res. Ch. 108.

[5] Conversation with CLRC Representative Barbara Gaal, January 8, 2014.

[6] See *Sonic-Calabasas Inc. v. Moreno*, 51 Cal. 4th 659 (2011) (*Sonic I*).

[7] 563 U.S. [131 S. Ct. 1790] (2011).

[8] See *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

[9] *Id* at. 923.

[10] *Id* at 926.

[11] *Broughton v. Cigna Healthplans of California*, 988 P. 2d. (1999) and *Cruz v. Pacificare Health Systems Inc.* 66 P. 3d 1173 (2003).

[12] *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ____ [131 S. Ct. 1790] (2011).

[13] *Id* at 1472.

[14] *Id* at 1474.

[15] Compare *Wisdom v. Accentcare, Inc.* 202 Cal.App.4th 591 [136 Cal. Rptr.3d 188].

(Held that arbitration provision in employment contract was procedurally unconscionable in light of the fact that arbitration rules were not attached to the contract itself, as well as substantively unconscionable on the grounds that only the employee alone was required to submit disputes to arbitration.)

[16] *Id* at 1313.

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Mediation Confidentiality: How Far Should It Go?

Saturday, February 01, 2014

Mediation has become an important and necessary part of the litigator's toolbox in assisting clients in resolving disputes. This is especially true in the Contra Costa County courts, as well as in most courts in the Bay Area. Mediation is now less of an "alternative" process and more of a common, if not mandatory, component of the litigation process.

Most judges and legal professionals agree that mediation is a beneficial process for all involved. It increases court efficiency by reducing court calendars at a time when court resources have been cut to the bone by budget reductions. Mediation also has direct benefits to clients: It can substantially reduce the high cost of litigation, it saves time and eliminates the risk of uncertain litigation, and it gives clients more say into how their disputes are resolved.



Confidentiality is one of the cornerstones of the mediation process. As said by the Supreme Court, confidentiality is "designed to provide maximum protection for the privacy of communications in the mediation context. A principal purpose is to assure prospective participants that their interests will not be damaged ... by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement." [1] Most mediators and attorneys agree that confidentiality is a positive and important part of mediation.

This article will summarize the details of mediation confidentiality and then discuss the practical and ethical implications of current proposals to limit mediation confidentiality.

What is mediation?

Mediation is defined broadly in Evidence Code Section 1115 as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." The Code specifically distinguishes mandatory settlement conferences as not being covered by the confidentiality provisions

What is confidential?

Section 1119 protects two kinds of evidence from discovery and admissibility. "Anything said or any admission that was made for the purpose of, in the course of, or pursuant to a mediation or mediation consultation" is protected. In addition, any "writing that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation" is also protected.

What about the scope of confidentiality? It is not a "privilege," as some mistakenly call it. Rather, it is a rule of evidentiary exclusion. Section 1119 merely prohibits the admissibility or the discovery or disclosure of the oral statement or writing in a civil action, arbitration or administrative proceeding. Confidentiality does not apply in a criminal proceeding.

Can confidentiality be waived or lost?

Confidentiality is not waived or lost by statements or conduct that would imply *intent* to waive, such as in the case of a privilege. The exclusion can be waived or lost only in the ways outlined in Section 1122. One of two things must occur: either all participants in the mediation must expressly agree to a disclosure; or, if the communication or writing was made or prepared on behalf of some, but not all, of the participants, those persons must expressly agree to its disclosure. Of course, if the speaker or creator of a writing introduces the evidence in court, that would also waive confidentiality.

When does confidentiality start and end?

Confidentiality starts when the first "mediation consultation" starts. This would include the initial contact and any pre-mediation communications with the mediator. This would also include communications with any other parties if they are part of the mediation consultation or mediation itself. Section 1125 defines when the mediation ends, which can be when there is a final settlement, if the mediator provides a writing that states that the mediation is terminated or if there is no communication between the mediator and any of the parties for 10 calendar days. The 10 days can be extended by agreement. As a practical matter, if the parties and mediator want to keep the mediation "open" after a mediation session, it should be documented in writing to ensure that confidentiality continues to apply.

Settlement agreements

If a settlement is reached at mediation, proper steps must be taken to ensure that the settlement agreement is admissible for enforcement purposes. Section 1123 describes the "magic language" that should be included in a settlement agreement. In short, there must be language that the agreement is "admissible or subject to disclosure" or that the agreement is "enforceable or binding." Oral agreements have stricter requirements under Sections 1124 and 1118. Essentially, the oral agreement has to be recorded by a court reporter or audio recording, or the settlement must be placed on the record.

Exceptions to confidentiality: Are there any? Should there be?

California's statutory scheme of mediation confidentiality is very broad. Essentially (as some describe it), the "Las Vegas Rule" applies: "What happens in mediation, stays in mediation." A consistent line of California cases has upheld the strict interpretation of the confidentiality statutes. In 2011, the Supreme Court decided *Cassel v. Superior Court*. In discussing mediation confidentiality, the *Cassel* court stated that "we have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." [2]

The *Cassel* case involved a claim by a client that his attorney committed malpractice during mediation. Mr. Cassel alleged that during the mediation he felt "tired, hungry, and ill," but that his attorneys insisted that he remain until the mediation was concluded. He claimed that his lawyers then continued to harass and coerce him to accept a settlement by threatening to abandon him at the impending trial, misrepresented certain terms of the proposed settlement, and falsely assured him they would negotiate a side deal regarding a reduction of fees if he settled. Mr. Cassel said his attorneys even followed him into the bathroom to "hammer" him to settle. Testimony in the malpractice trial of this alleged conduct during mediation was held inadmissible under the mediation confidentiality

statutes. The court refused to create an exception to the applicability of the confidentiality statutes. The court specifically found that applying mediation confidentiality to legal malpractice claims did not implicate due process concerns or warrant an exception on constitutional grounds.

Justice Ming Chin, in a "reluctant" concurring opinion, expressed concern that the holding would "effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive." He agreed that the court was correct in not creating a judicial exception, but specifically suggested that the Legislature consider the issue of a legal malpractice exception to the confidentiality rule.

A debate has now arisen: One group supports a legislative change to the statute creating a confidentiality exception for evidence of attorney malpractice, and some even advocate doing away with confidentiality completely. Another group takes the position that creating such an exception would be detrimental to the mediation process and should not be created. In 2012, a proposal was made in AB 2025, which attempted to create an exception under Section 1124 for "evidence of legal malpractice, breach of fiduciary duty or State Bar disciplinary action." The Legislature then directed the California Law Review Commission (CLRC) to analyze the issue, essentially to weigh the competing policy decisions: The benefits of confidential mediation versus client protection from malpractice or other attorney misconduct. The CLRC is in the process of holding hearings and receiving input on these important issues.

Opponents to the proposed malpractice exception express concern about the "slippery slope" of confidentiality exceptions and that any exceptions will chill or hinder the important mediation process. They also point out that while extreme examples such as in the *Cassel* case can be imagined, there is no evidence that malpractice in the mediation process is a pervasive problem. Proponents of the exception take the position that discouraging and remedying attorney misconduct is a more important public policy that should warrant a legislative exception to mediation confidentiality for legal malpractice.

The debate illustrates the difficulty of weighing competing public policies. The CCCBA ADR Section Board has unanimously taken the position that exceptions to mediation confidentiality should not be created. The CCCBA Board of Directors has considered the issue and after considerable debate and a close look at important policy issues, decided to support the position that legislative exception should **not** be made, resolving that "The Contra Costa County Bar Association urges the California Law Review Commission to recommend no weakening of mediation confidentiality protections (Evidence Code sections 1115-1128), and to uphold current law." In 2014, the debate will continue in the legal and mediation communities, as well as in the Legislature. If you have opinions on the matter, we urge you to give input to the CLRC and the Legislature.

In the meantime, happy mediating!

Peter A. Mankin has practiced real estate and business law in Walnut Creek for many years, as well as serving as a mediator throughout the Bay Area. He is a former CCCBA President and is currently President of the ADR Section.

[1] *Cassel v. Superior Court* (2011) 51 Cal 4th 113.

[2] *Cassel, supra*, at 118.

Prison of Peace: Teaching Conflict Resolution to Convicts

Saturday, February 01, 2014



What Murderers Can Teach Us about Mediation was the title of Doug Noll's keynote address to the ADR Section's annual luncheon on October 8, 2013. A more descriptive title might have been *What Can Convict Women Serving 25-Life Sentences With Little Possibility of Parole in a Maximum Security Prison Teach Us About Getting Along Peacefully with Our Neighbors?* It turns out, they can teach us a lot.

Doug Noll and Laurel Kaufer have worked with such women, teaching them conflict resolution skills and instructing them on how to teach those same skills to other prisoners. It is hard to evaluate success in such a venture because most attempts at rehabilitation of prisons use recidivism rates to measure success. Here, there are no recidivism rates to measure

because these women will most likely never be released; but that is not to say that Doug, Laurel and the prisoners they work with don't have success. The program has changed the lives of these women and they are now duplicating the work among other prisoners. Thanks to California Prison Realignment, the program is growing and replicating itself in other prisons.

This author caught up with Doug for the purpose of expanding on what he said to the ADR Section and to expose his and Laurel's very interesting work to the wider community.

What is Prison of Peace?

Prison of Peace is a pro bono project that teaches life inmates in California prisons to be peacemakers and mediators within their prison communities. It is currently operating in three California prisons, including the Central California Women's Facility, Valley State Prison and the California Institution for Women. In addition, the project is expanding in 2014 into Los Angeles County juvenile facilities.

How did it start?

The project started with a letter from an inmate at the old Valley State Prison for Women. She wrote 50 letters to mediators across California asking for someone to teach her Networking Group basic mediation skills. The Networking Group comprised of 100 women serving life sentences. They were interested in reducing the violence and conflict in their prison community. At the time, Valley State Prison for Women was regarded as the largest, most dangerous women's prison in the world. The problem was that young women coming in from the gangs were disrupting daily lives. Most of the time, the guards could not prevent violence. The lifers realized that if they wanted peace, they had to create it themselves.

How did you get involved?

As far as we can tell, 49 of the requests were rejected. The 50th letter landed in Laurel Kaufer's mailbox. Laurel opened the curious-looking envelope from the state prison, read the letter, and without even leaving her mailbox, called me on her cell phone. She read the letter to me and asked me what I thought. Without hesitation, I said, "If this is for real, I think we should do it."

Why did you say yes?

There was something about this request that resonated deeply within me. At a practical level, I knew that there would be a lot of sacrifice as this was to be a purely pro bono project. But at a deeper level, I saw this as an opportunity to prove the true power of peacemaking. Ever since leaving the practice of law, I had faced ridicule, skepticism and outright hostility towards the idea of a lawyer turned peacemaker. It was too soft. It was too "Kumbayah." It was completely impractical. It might work for those other folks, but it would never work in my conflict. Objection after objection and scorn heaped upon scorn was my fate for deciding to turn away from litigation and become a peacemaker.

Mind you, I am a secular human being. My concept of peacemaking is nothing like what religious people think peacemaking is about. I also recognize that the term peacemaking carries a lot of baggage. However, it truly does describe the work of transforming conflict. I thought that this project might be the perfect opportunity to demonstrate to all the naysayers that practical peacemaking was powerful. If I could teach murderers to be peacemakers, who could rationally deny the power of the process and the techniques?

What was the first session like?

Laurel and I are both very experienced mediation trainers. Each of us had worked both nationally and internationally in a variety of contexts. However, neither one of us had ever worked in a maximum security prison. In fact, our first visit to Valley State Prison for Women was the first time either of us had been in a prison. Both of us had been civil trial lawyers before turning to mediation, with little experience in the criminal system.

Our first group of women, 17 in all, included a variety of ethnic, religious, socioeconomic, educational and geographical backgrounds. Their ages ranged from late 20s to late 60s. They were all serving life sentences or very long-term sentences. Every one of them had killed another human being.

Being a second degree black belt in a northern Chinese kung fu martial arts style, I was not particularly fearful for my physical safety. I was mostly concerned about whether or not these women were willing to do the hard work it would take to transform into effective peacemakers and mediators. I was not sure it would work. The women were shut down, skeptical and seemingly distant. They proved me to be very, very wrong. They turned out to be some of the most amazing human beings I have ever worked with.

What did you learn about yourself?

I finally learned how to be deeply humble. These women, and all of the subsequent inmates we have trained, have done horrible things. But they have also had horrible things done to them. As a large, dominant, white, Anglo-Saxon, Protestant, male lawyer, I was evil incarnate to these women. I had to learn deep humility to gain their trust and respect. It was and has been one of the most transformative experiences of my life.

How is Prison of Peace set up to replicate itself?

We decided as we designed the curriculum that the project had to be built to become self-sustaining. Thus, we chose to work with lifers, because they would be imprisoned for a long time. The model we have developed takes life inmates, trains them as peacemakers, then as mediators and then as trainers. To become a trainer requires over 300 hours of classroom training, and countless hours of homework, reading and clinical practice. Our trainers instruct the general population in peacemaking skills. Once we have established a training cadre in a prison, we turn the project over to them. We support them with advanced skills training, problem-solving and support.

It generally takes two years to embed Prison of Peace into a prison. In terms of billable hours, if we were billing at \$300 per hour, the cost would be in excess of \$750,000 per prison.

How do you gauge success?

As we were designing the project, we consulted with sociologists at Berkeley and UC Irvine. It became clear that setting up research protocols to measure outcomes empirically and quantitatively would be impossible. There were simply too many variables. Thus, we have used qualitative evaluations from the participants themselves to determine the effectiveness of our teaching. In addition, because the participants must engage in actual peacemaking work and write up each conflict, we have a large set of qualitative data.

The inmates report to us that the violence in their prisons has been reduced. We have received unsolicited letters from prison officials confirming the reduction in violence. We have heard hundreds of stories of how our peacemakers and mediators have worked. From stopping incipient prison gang riots to dealing with the aftermath of rape, our mediators have stepped up.

As an unintended effect of the project, we have seen the personal transformation of many inmates. The power of becoming a peacemaker not only allows them to live a life of service, but requires them to change in dramatic ways internally. We never expected to see the transformations that we have witnessed.

Examples of success—or failures?

Success or failure in a project like this is very subjective. As trainers and coaches, we do not get to witness the inmates working to resolve conflicts in their communities. We only get to see the write-ups and hear the stories after the fact. As with any conflict, there are occasional failures. However, as we experience in the outside world, the successes are far more common.

I find it impossible to describe in words the successes I have heard about. For readers interested in hearing the women speak directly, go to the Prison of Peace website at www.prisonofpeace.org and watch the videos on the Press & Media page.

How is Prison of Peace financed?

Prison of Peace remains a pro bono effort of two lawyers unassociated with any organization, law firm, faith community or group. We pay for everything out of our own pockets, including photocopying expenses, pens, paper pads, flip charts and travel expenses.

We have received some grants, including \$20,000 from the JAMS Foundation, to cover some of our costs. However, we have found that most foundations are not interested in supporting self-help work for inmates serving life sentences. In particular, women serving life sentences seem to be invisible in our society to general and philanthropic foundations in particular. We have a drawer full of rejections.

The Department of Corrections and Rehabilitation is well aware of our project, but because of budget cuts, has no money to support us.

Tax-deductible charitable gifts may be made to our 501(c)(3) fiscal agent, the Fresno Regional Foundation, in Fresno, California.

Do you need volunteers?

At the moment, we do not have the infrastructure or finances to support a volunteer organization. Recruiting, training, scheduling, coordinating and evaluating volunteers is a full-time job by itself. We simply do not have the ability to do that. In addition, this work is extremely intense and requires complete and total dedication. When we say we will show up, we show up. There is no room for error here because the trust is so difficult to gain and so simple to lose. Thus, anyone interested in this work must recognize that it is a demanding calling.

What about the online classes in negotiations?

Because this work takes up so much time, it has cut into our ability to make a living as professional mediators. As a result, we have looked for other revenue sources. Out of this came the idea of developing advanced online legal negotiation training. I created a foundational course that is nine hours long called Negotiation Mastery for the Legal Pro (www.legalpronegotiator.com). I have followed that with a master class webinar series in negotiation. All of the proceeds from the nine-hour course and the webinars support the project. The course and the webinars are all MCLE approved in California. Information about the course and the webinars can be found at www.legalpronegotiator.com.

In 2014, I will be launching a new series of online classes for the general public. These webinars and classes will duplicate what we teach in the prisons. We hope to spread the word about these powerful techniques we have developed and provide another revenue stream to support the work. The website for that project is www.negotiateacenteredlife.com.

Ken Strongman, J.D., MBA (www.kpstrongman.com) is a full-time mediator and arbitrator in the fields of business, construction defects, real estate, intellectual property and employment. He is also a Mediator and Arbitrator for FINRA. He is an adjunct professor at John F. Kennedy University.

Douglas E. Noll, J.D., M.A. is a full-time mediator, specializing in difficult, complex, and

intractable conflicts. He is an adjunct professor of law and has a Masters Degree in Peacemaking and Conflict Studies. Noll was a business and commercial trial lawyer for 22 years before turning to peacemaking.

Conflict Resolution Programs in Contra Costa County

Saturday, February 01, 2014

Community mediation in the U.S. began in the early 1970s. Citizens understood that they could empower themselves by resolving conflicts in their communities with community members, and community alternative dispute centers proliferated nationwide. Today, hundreds of centers in every state offer mediation and a host of other alternative dispute resolution services.

In the late 1970s, there was a new national movement. Courts across the nation generated the idea that many disputes could be resolved through the use of mediation, thus alleviating the courts of a backlog of cases and relieving residents of court costs. Community mediation centers and the courts began a mutually-beneficial affiliation to bring mediation to a great number of litigants, and over the years, the data supported this idea. Using multiple years of data collection for analysis, Judge Magdalena Bowen reported that mediation saves the cost equivalent of 0.7 FTE judges per year based on 90-95 cases a year.[1]

As alternative dispute resolution gained traction nationwide, counties began partnering with courts. Conflict Resolution Programs (CRP) at the Center for Human Development (CHD) has provided services to Contra Costa Superior Court since 2003. Three CRP programs are described here.

Guardianship Mediation

Working with the Probate Department, our volunteer mediators mediate for three hours (additional mediation can be arranged), discussing with the parties the issues that arise in a guardianship case. Our parties are pro per and take this supportive and helpful opportunity to discuss what is in the best interest of the minor(s). Parties include parents, grandparents, uncles, aunts, friends and in one case, a concerned neighbor—who, in fact, became the guardian, keeping the minor from entering foster care.

Our mediators are highly skilled and experienced, with advanced training provided by CRP. Volunteer mediators bring with them a wide range of experiences; their backgrounds include law, probation, education and psychology. Their enthusiasm and long service is obvious, despite the challenges of mediating in high-emotion and high-conflict situations. The program has had a profound effect not only on our mediators, but on the participants as well. Below are quotes from some of our clients:

- *We got to express our feelings and try to make up and resolve problems even though the birth mother wasn't willing to. This gave us a chance to tell her in person we were sorry and wanted to start fresh. –Guardian/Aunt*
- *It was helpful to get points made clearly in this environment. It was stressful knowing the importance of reaching an agreement, but not pressuring. –Parent*
- *I like mediation sort of because it got rid of all our problems, but the bad part of it was it was really long and boring. –Minor*
- *It gave us an opportunity to have unbiased opinions and make suggestions. We spoke our minds. We needed to reflect on past issues, which we did. –Guardian*
- *I liked mediation because it gave me an opportunity to speak and have some more visitation. It gave us a chance to discuss our differences without fighting. –Parent*

- *Mediation made it possible to talk about things that were impossible to tell the other party about. –Guardian/grandfather*

Elder Mediation

CRP responded to the increasing numbers of Americans reaching their 60s and beyond, by developing a specialty in elder and elder family mediation. Although the basic model of mediation is the same, there are a number of additional factors present when mediating with elders—mental and physical limitations, the presence of long-standing family conflicts and potentially life-changing decisions that must be made, to name a few. Because of these additional considerations, we undertake a more extensive case development before the mediation than in the community mediation process, and the mediators on our elder mediation panel must undergo additional, specialized training. In this required, advanced training, experienced mediators learn about special needs and accommodations, sensitivity training in working with elders, cross-generational differences, signs of potential elder abuse and what to do, and working with difficult family issues. Professionals in the field of geriatrics add their expertise to our training.

We were fortunate at the development stage of our elder mediation program to form a partnership with Judge Joyce Cram and many others at the Superior Court as they established an Elder Court, one of the few in the state. Our ability to work closely with the court and county service agencies offered the seniors yet another resource as they sought an effective and compassionate resolution to their problems.

The issues being discussed in our elder mediation program are as varied as the number of people using our services, but there are some common areas of disagreement. For instance, it is not unusual to find that adult children have very different expectations than their parents. Adult children sometimes assume that they will inherit from the elder without ever discussing the issue with them. Another common issue is where the elder wants to live. Not all elders want to continue living in their homes. If the elder is moving to an assisted care facility with limited funds, the fact might be that their home must be sold. Not everyone might agree, especially the adult child still living at home. We see more and more issues that concern assisted care facilities and what to do about the family home. Our focus is on identifying what the elder desires.

It is often asked how old the eldest party was in a mediation. Without a doubt, our oldest party was a 106-year old woman who was living in her home. Because of difficulty traveling to our offices, the mediators went to her home. This is one way our program makes accommodations working with individuals needing a little extra assistance.

Community and Family Reunification

The passage of AB109, or Realignment, has galvanized Contra Costa to look closely at reducing recidivism rates. The Justice System, county departments, faith-based organization and nonprofit services agencies are working together toward the twin goals of ensuring public safety and reducing recidivism rates. In an effort to assist, CRP has partnered with other service agencies in the county offering family reunification meetings for returning ex-offenders.

Under our program, we meet with AB 109-eligible individuals pre-release and describe our program to them. If the individual agrees, we contact pro-social community and family members and invite them to a family meeting, either pre-release or post-release. The family meeting follows much of same process as a mediation. Research repeatedly shows that lowering recidivism rates is possible with programs that help to remove

obstacles from an ex-offender's path and that community and family ties can, and often do, help—providing housing, employment, emotional and spiritual support and child care.[2] However, this can't happen without healing of relationships and continuing communication in families. At these meetings, families focus on the strengths of all members present, how family relationships have been affected by the client's life choices and incarceration, everyone's hopes and goals for reunification and for the participant's positive next steps in life. The family then works together to develop a specific, written plan to support the success of the returning individual. We follow the participants for up to eight months.

Although this is a newer program, the data supports our efforts. In an April 2013 publication, researchers using the Community Mediation Maryland (CMM) Reentry Mediation model as their research focus, stated that those who mediated were significantly less likely to be arrested than those who did not—on average 24 percent versus 34 percent. [3]

Community mediation and the justice system have proven that over time, partnerships do work.

Barbara Proctor, J.D., is the Program Director for the Center for Human Development. She can be reached at barbara@chd-prevention.org. Sign up for our mailing list to be notified of our annual training held in the spring at lark@chd-prevention.org.

[1] *Judicial Perspectives on ADR*, October 2013.

[2] *Engaging Offenders' Families in Reentry*, Department of Justice, 2010

[3] *Reentry Mediation Recidivism Analysis*, Choice Research Associates, Baltimore, April 2013

Mediation, Communication and Corrupt Speech

Saturday, February 01, 2014



The uses and misuses of language are a fascinating part of mediation. If you like people watching, go to an airport or become a mediator. It is fascinating how people use words to mark territorial boundaries, defend against invasion and go in conquest of new domain (including the other side's pocketbook).

The primary purpose of mediation is to open the floodgates of communication. Towards this goal, mediation is confidential (Evidence Code Section 1119). Despite that promise of confidentiality, many attorneys and clients come into mediation prepared only with monologue, which allows only one point of view. Mediators, on the other hand, encourage dialogue, which requires more than one point of view, and allows both sides not only to state their truth, but

to listen to the response, and, most importantly, to hear the other side's truth. Mediators fight against the assumption that there are no common ground or common values.

Corrupt speech is a serious problem that creates barriers to good communication. While there are few "rules" in mediation, the prohibition against interrupting the other side is one of them. Lying is not permitted. Other forms of corrupt speech are name calling, cursing and yelling. Sarcasm is a foul form of speech as it crosses the border into scorn. It says "you don't deserve to be taken seriously."

In conflict, sometimes we ignore or mislabel our emotions. Effective communication, however, requires that we correctly identify our emotions and learn to express them in a constructive way. Experienced mediators help disputants properly label their emotions, the most common of which is anger. Anger hides the shy emotions: sorrow, fear, hurt and loneliness. We wrap these tender feelings in anger because we don't like to admit we are vulnerable. Mediators can help parties not only acknowledge these feelings, but express them in a way that allows the other party to hear them.

By helping parties communicate openly and effectively, mediation offers a clear view of personal values—a subject that is not always relevant in litigation. Some lawyers are shocked, for example, when the other side refers to "truth" or "justice," as if these could somehow be out of bounds, but for many people, these are the elements that are most important to them. In mediation, we can appeal to honor, doing right, paying your bills, taking care of others and buying your peace. These are our common values.

Tom Cain is Program Director of The Congress of Neutrals, a non-profit corporation, associated with John F. Kennedy College of Law. Our mediators have done more than 5,600 mediations for the Superior Court of Contra Costa County. We have trained and mentored new mediators since 2002. Our next 40-hour mediation training begins February 20. Become a mediator! Visit us at www.congressofneutrals.org or (925) 937-3008.

View of the Court: A Freelance Court Reporter's Perspective

Saturday, February 01, 2014



In January 2013, Contra Costa County's Superior Court Civil Division withdrew its Official Court Reporters to cover the criminal courts. After years of budget slashing from the state, our county had to do something. As it was, there was a freeze on hiring, and as Official Court Reporters left, they were not replaced. Our county leaders did what they could to fix a bad budget situation.

At that point, many of the Civil Court calendars began being covered by freelance reporters. Basically, the Civil Division turned BYOCR (bring your own court reporter). So how do you BYOCR? Schedule your court reporter through a court reporting firm ahead of time. They can walk you through the local rules. For Contra Costa, you will need to complete a Stipulation

& Order to Use Certified Shorthand Reporter Pro Tem and Reporter Agreement, Local Court Form CV-310. This requires a stipulation from the parties to allow the Pro Tem Court Reporter's transcript to be used as the official transcript.

What if a stipulation can't be reached? Then form CV-311, Order & Reporter Agreement, is to be used. The court asks that the correct form be filed three days before a trial or hearing. However, in the case of tentative rulings and other matters set not allowing three days notice, the court will accept the Stipulation or Order on the morning of the hearing. The judges have been very good about accommodating the parties and making sure the form is received.

There are many requirements from the court. If it is a trial, realtime is required to be provided to the judge—and the cost carried by the attorneys. At the beginning, freelancers weren't afforded the opportunity to test their equipment ahead of time, and this led to frustration and embarrassment. Fortunately, freelancers found a friend in Valerie Prince at the courthouse, and she was able to help us navigate connecting to the judges' outdated LiveNote systems.

A court reporter is not required to provide realtime for law and motion, tentative rulings and matters that are not trials.

Do you need a court reporter? It's much easier to schedule a court reporter ahead of time. There is no charge for canceling the day before, but it can be difficult for a court reporting firm to get a reporter at the last minute. So if you have a law and motion matter, and don't truly know whether you want a court reporter until you get the tentative, order the reporter in advance, and cancel if you don't need it.

Many matters don't require a reporter. Some of my clients, however, make the majority of their appearances with a court reporter, mostly to protect the appellate record. No record, no appeal.

Wendy Graves has been a freelance court reporter for 30 years, has served as the newsletter editor for the DRA, one of our statewide court reporter's associations, and is Managing Reporter at Certified Reporting Services in Martinez.

Unintended Consequences of ADR

Saturday, February 01, 2014



The renaissance of alternative dispute resolution (ADR) in California civil law in the last 30 years has produced a sea change in how lawyers practice, has altered our legal culture and generated an extraordinary rippling effect of five unintended consequences. I will discuss these unintended consequences from my perspective as a trial judge for 10 years and appellate justice for 15 years after first looking back at what led up to the change.

Let's briefly stroll down memory lane. Remember that 98 percent of all filed civil cases settle at some time before trial. But how long "before" became the crucial question. Before "Fast Track" legislation made judges accountable for case management and early disposition of cases in 1988, the backlog of civil jury trial cases caused many cases to languish anywhere from two to over four years before going to trial. A revolutionary change occurred in 1988 with the enactment of the Trial Court Delay Reduction Act: Trial judges were mandated to resolve 75 percent of assigned cases within one year, 90 percent within 18 months and most of their remaining cases within 24 months.[1]

Semiannual Bench/Bar settlement conferences using panels of plaintiff's attorneys, defense attorneys and judges helped resolve many cases pre-1988, but it was not enough. Fast Track judges, each managing over 600 cases, used issue conferences before trial to try to settle cases, but it was not enough. Having to prepare for trial multiple times with the debilitating cost to the client and the stress of lost weekends for the attorney and staff was more than enough. Under pressure to resolve cases in a mandated timely way, in the early 1990s, courts began to facilitate reference to mediation as an adjunct to direct case management. Initially, time consuming, complex, multi-party business and construction defect cases found their way to local lawyer/mediators who specialized in such cases. At the same time, the cost of preparing and trying cases continued to spiral, especially from escalating expert witness fees and lawyers' thirst to search under every rock with a discovery tool. A new cottage industry burgeoned and cast a shadow on the traditional civil trial model.

Lawyer/mediators who specialized in specific areas of the law realized their personal

relations skills could be applied to a wider range of cases. Retired judges saw a fertile field of cases desperate for early intervention to save litigation costs. Special Masters and providers such as JAMS, Judicate West and ADR Services sprang up with an energized cadre of capable lawyers and retired judges whose sole business was to mediate and settle cases ASAP. Recognizing that mediation was far more cost effective in many cases than waiting for a court room, lawyers and clients turned to experienced professional mediators for resolution of litigation.

In addition to mediation reducing trials, contractual binding arbitration agreements mushroomed in all types of commercial transactions and precluded trials. Corporations and insurance companies started to scrutinize the high cost of litigation and looked for alternatives to filing or defending an action in Superior Court. The convergence of mediated settlements, compelled contractual arbitration and fewer court filings suddenly resulted in civil trial courtrooms becoming available on a regular basis for trials on Monday mornings. And knowing one's case would certainly be tried at a specific time resulted in more cases settling. Moreover, some cases that were tried ended up with unexpected, jarring verdicts. Jury verdicts became less predictable because of the fewer number of tried cases from which to draw predictability ranges. De rigueur mediation spread like a tinder dry forest fire, becoming a way of life in our legal system, but with some unintended consequences.

The first unintended consequence is the phenomenon of the disappearing jury trial. Because of fewer filings, more successful mediations and the open court room, the number of jury trials has declined dramatically in the last 15 years. According to Administrative Office of Court statistics, for the fiscal year 1997 to 1998, Contra Costa County judges tried 29 jury trials, San Francisco tried 139 and Alameda County tried 97. For the fiscal year 2012 ending June 30, 2012, Contra Costa County's civil jury trials had fallen by nearly 60 percent to only 11, San Francisco plummeted to 43, and Alameda County fell by 59 percent to 56 cases. What has the unintended consequence of fewer jury trials due in large part to ADR produced? Let's see as we examine the second unintended consequence.

The second unintended consequence flows naturally from the first. Far fewer civil cases are now reviewed on appeal. Appellants face an expensive gamble, difficult odds, and obtain reversals in less than 12 percent of their cases. Because the appellate process is a funneling up system, with the number of appeals in the courts of appeal dependent on the number of appealed judgments, few civil jury trials are now available to review. The number of appeals pending in the court of appeals is 25 percent less today than 15 years ago. The silver lining is that the lightened workload in civil appellate filings gives appellate justices more time to devote to cases with significant issues, but it has led to a third unintended consequence affecting the development of our law.

Since the California Supreme Court only decides about 110 cases a year, the California Courts of Appeal for all practical purposes are courts of last resort for important legal issues that become binding law on trial courts through the *Auto Equity* rule.[2] Because many cases with important unresolved legal issues are successfully mediated or resolved in other ADR forums such as binding arbitration, the issues in those cases are lost to appellate review.[3] The moth does not return to an extinguished candle. Issues that may have quickly percolated through the system for resolution in the court of appeal 20 years ago, now take much longer because they have not been appealed.

A good example is the Howell doctrine affecting the proper application of the collateral

source rule when the negotiated amount paid to a health care provider by an insurance company is less than the billed amount.[4] The issue appeared in many personal injury cases for a number of years and was the subject of opposing views in legal journals. Because most personal injury cases were resolved by mediated settlement, the trial bench and bar continued to wrestle with how and when a jury should resolve the issue. There were so many ways to skin the cat, that the cat howled for relief from a definitive court of appeal decision. However, it took considerable time for the controversial issue to percolate up to the appellate courts and then finally to reach the Supreme Court because cases in which it appeared were resolved by ADR and never appealed. Another example: Fewer civil jury trials means that the panoply of new CACI civil jury instructions, which guide jurors' deliberations, are not receiving appellate clarification. Critical legal issues are taking longer to be resolved.

The fourth unintended consequence of the success of ADR is the lost opportunity for litigators to develop trial advocacy skills. Twenty years ago, trial lawyers would try at least three to four cases a year. Now most litigators try one or two cases every two or three years. The best that an associate in a firm can expect is working a case up for trial for a partner or perhaps sitting second chair on a rare occasion. The art of effectively trying a case is becoming a lost art. One can only learn what works and doesn't work in a jury trial by trying the case before a jury. Just as the novice tennis player improves by playing frequently, trial skills improve with repetition and through trial and error. A lawyer's comfort level, ability, and confidence in the courtroom expands exponentially from advocacy in front of the finders of fact. A trial advocate's persuasive skills are not developed or erode as fewer cases are tried.

The fifth unintended consequence of ADR is that it has spawned a new field of work for lawyers and an expanding, new field of law taught in all law schools. Retired judges do not retire. They rewire for work as ADR mediators. Seasoned lawyers have rebranded themselves into full time mediators, using wisdom gained from experience to resolve disputes. And this is good. Goliath does not have to die from the hand of David. The combatants who despise one another can withdraw to the mediator's tent and each walk away alive, partially satisfied. Civil litigation largely involves disputes between private parties who should have the opportunity to remove the baggage of self-consuming litigation from their shoulders so that they can go about their lives. ADR provides that opportunity for conflict resolution as it complements the civil trial system. Even the Sermon on the Mount extolled mediation: "Blessed are the peacemakers ..." They are noble words that resound today. ADR, especially mediation, fosters a conciliatory milieu in our legal process rather than a hostile, adversarial atmosphere.

Despite some barnacles arising from unintended consequences, ADR with its benefits has become so ingrained in our civil system that it is here to stay to help advance principles of justice in different forums. The symbiotic relationship between ADR and the court system provides a creative range of strategic opportunities for resolution of legal disputes.[5]

[1] See Government Code sections 68600, et seq. and California Rules of Court, Standard of Judicial Administration 2.2.

[2] *Auto Equity Sales, Inc. v. Superior Court* 57 Cal.2d 450 (1962).

[3] The ability to appeal from an adverse arbitration award is severely limited by Code of Civil Procedure section 1286.2 and *Moncharsh v. Heily and Blase* 3 Cal.4th 1 (1992) and

its progeny.

[4] *Howell v. Hamilton Meats and Provisions* 52 Cal.4th 541 (2011).

[5] See the variety of Superior Court sponsored ADR programs at www.cc-courts.org/adr and the Contra Costa County Bar Association programs at www.cccbba.org/attorney/build-your-practice/adr-programs.php.

When the State Bar Audits Your MCLE Compliance

Saturday, February 01, 2014



In the past two years, California has embarked on a mission to ensure all lawyers are complying with their MCLE requirements. Why the sudden interest in making sure lawyers really do take classes? Well, like with a lot of disciplinary problems, it was found out pretty much by accident.

The State Bar is audited by an independent board on a number of its activities, including discipline and admissions, to see if lawyers can actually govern themselves. In 2011, MCLE compliance was audited and that evaluation confirmed the need for the State Bar to randomly inspect compliance with MCLE obligations. Then-State Bar President Jon Streeter stated that the audit of 635 lawyers revealed that only 539 provided the necessary documentation to demonstrate full

compliance. The rest either could show no compliance or had minor reporting deficiencies.

I think the results were a surprise to the State Bar; they assumed lawyers would want to keep up with current developments in their practice areas. According to Streeter, of the 96 lawyers who could not prove compliance, five were suspended from practice due to their inability to show any compliance at all; the ones with only minor reporting deficiencies received a cautionary letter from the State Bar. Approximately 25 of those with minor deficiencies were sent to the Office of Chief Trial Counsel for disciplinary action.

In 2012, 5 percent of the enrolled attorneys were randomly audited (or roughly 3,000-4,000 lawyers), and Streeter said that the goal in 2013 was to check on 10 percent of the attorneys. In the coming years the State Bar plans to audit even more.

Is it time to automate compliance monitoring? Contra Costa Lawyer co-editor Harvey Sohnen asked this author to opine on what alternatives to the current monitoring system might be feasible. For example, what about taking this away from the prosecutors, and instead furnish MCLE providers with barcodes, have all attorneys submit a copy of their compliance forms for scanning, and have an administrative sanction for non-compliance such as a fine or temporary change of status until the deficiency is corrected? This might save on Bar staff wages and benefits, and monitor all those subject to MCLE, instead of a sample. The author responds to this idea that new technology would be expensive to implement and that with rising fixed costs, she doesn't see this as a Bar priority.

MCLE is required in most states, but not in all jurisdictions; the District of Columbia recommends but does not require lawyers to participate in MCLE activities. Wikipedia states that Kentucky is unique in that it allows all licensed attorneys to complete their annual education requirement without a registration fee through a two-day program known as Kentucky Law Update, offered annually in seven locations throughout the state.

To this author, that sounds like the very best way to ensure lawyers comply.

In California, we have a long history of fighting MCLE compliance rules. We are either mavericks or recalcitrants, but unlike bars in most states, we believed that lawyers would want to comply with a duty to learn more about their practice areas without Bar intervention so that they would avoid a legal malpractice suit. In fact, we claimed that MCLE requirements were unconstitutional, but in 1999, the California Supreme Court upheld MCLE despite Equal Protection Clause constitutional allegations.

We were actually one of the last states to adopt MCLE requirements. They say that when you let the camel's nose into the tent, he eventually takes over and begins to live in the tent. The same could be true of MCLE in this state. Once it was found to be legal, questions arose as to what courses could a lawyer take, and which ones should a lawyer be required to take. Lawyers were once required to take a unit in law practice management and technology, but that was eliminated when it became clear to Bar officials that a lot of the courses offered were in areas such as business development versus handling trust accounts and the like.

Currently, lawyers are required to take 25 hours of classes in just about anything they want as long as the class is by an MCLE-approved provider. Four of those units must be in legal ethics, one in substance abuse and one in the elimination of bias. You can self-study to obtain your units for a maximum of 12.5 units. Those of you who teach as adjuncts or visiting lecturers can claim 12 credits for each one unit of class. So if you teach a three-unit class, you can claim 36 hours. It is a nice bonus, since adjunct teaching even at a top 10 law school does not pay very well. At a U.C. school, you also get certain retirement plan benefits for adjunct teaching. And it pays to be a state or federally employed lawyer or an elected official; they are exempt. Yeah, but that is no big surprise, since the legislature votes on exemptions and they are lawyers.

If a lawyer admits to the State Bar that she has not fully complied, it won't be the best thing that has ever happened in her career, but not the worst either; she could be fined \$75 with a letter telling her to complete the units. But if you check the box that you have complied when you know you have not, you have real trouble. That is lying, and involves moral turpitude, giving the State Bar a basis to suspend you from practice.

So it is key for a lawyer to keep compliance forms given out at MCLE events. This author keeps them in hard copy back to 2000 and also makes sure to sign in at each event. It is not the Bar's job to keep records of your attendance; you have to do that. It is easy to forget the name of a program and when and where it was offered. The people who are putting on the program have a provider number which you will need to know and will surely forget after a year or two.



To find out how many hours you need by when, go to <http://calbar.ca.gov/Home.aspx> and click on "My State Bar Profile." Under the "Report MCLE" section of the page, follow the instructions for finding out how many credits you need. Or call the Member Services Center at 1-888-800-3400. Requirement modifications are available for attorneys with serious medical issues or military deployment.

As Streeter says: "The message is clear. California lawyers must fulfill and accurately document and report their MCLE requirements. No California attorney should be surprised if their compliance certificate is audited."

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Inns of Court: Indian Law

Saturday, February 01, 2014



On November 14, 2013, only a few days after the Federated Indians of Graton Rancheria opened a sparkling new casino in Rohnert Park, Judge Cram's pupillage group (consisting of Nancy Allard, Don Green, Ken Strongman, Rod Marraccini, Lisa Mendes, Nathan Pastor, Wally Hesseltine, Michael Markowitz, Michael Davidson and myself) provided an entertaining presentation on Indian law. Indian law is unique inasmuch as it has a strong historical basis to it while also being a legal system with many different types of courts throughout America. Even with its lengthy history, it is still relevant today and many Indian law issues permeate the legal landscape. Judge Cram's group felt that it was the perfect time to provide an introduction to Indian Law in three easy sections.

Part One

The first section focused on family law matters pertaining to Indian issues. It was based on the Baby Veronica case, which was a controversial adoption custody case that was recently resolved with a Supreme Court ruling. Baby Veronica was a fight between adoptive parents and a birth father with Indian heritage. The Indian Child Welfare Act (ICWA) requires Indian tribes to approve all adoptions from Indian parents to avoid their children being taken from them, as had occurred numerous times in American history. In this case, the Supreme Court ruled that since the birth father had never had an initial custodial relationship with the child, ICWA did not apply. Baby Veronica is with her adoptive parents today, because of this ruling.

In our hypothetical, Commissioner Don Green and I played attorneys, which were the parts we were born to play. Nancy Allard played the birth mother. I represented the birth mother, still pregnant with the child of the Indian birth father. Commissioner Green represented the birth father's tribe, who wanted to assist the birth father in obtaining custody of the baby. In an impressive display of method acting, Nancy Allard became pregnant eight months prior to the Inns meeting. What dedication to the Inns! We discussed the details of ICWA and custodial relationships. It was an entertaining way to delve into this complex legal framework.

Part Two

The second section related to the juxtaposition of civil law and Indian law. There are a significant number of relevant civil law issues that occur on Indian land, including torts, real property issues and tribal sovereignty. Ken Strongman and Mike Davidson talked about the Agua Caliente tribe in Southern California that has an odd patchwork on land in and around the Palm Desert area. They discussed how this tribe's land grew over time and what the tribe can and cannot develop in the area.

Then they ran through some hypotheticals relating to civil law, including a slip and fall at an Indian casino. Do you file the claim in a state court or a tribal court? What if the slip and fall is from an employee? Does the casino have to carry workers' compensation insurance? The Inns group discussed what rights people, including employees of the tribe, have on tribal lands. It was a great history lesson on the growth of tribes supplemented with a lesson on the modern day application of civil law as it intersects with tribal law.

Part Three

The last section related to criminal law proceedings. Lisa Mendes, Nathan Pastor and Michael Markowitz (all criminal law practitioners) discussed the role of state courts in prosecuting crimes committed on Indian land. They talked about the application of the Bill of Rights to Indian tribes through the Indian Civil Rights Act of 1968 (ICRA). This Act requires tribes to apply most, but not all, of the Bill of Rights to its citizens (for example, there is no required separation of church and state). The Act has been updated since 1968 to provide additional protections for tribal citizens, including recorded criminal proceedings and defense counsel.

They also presented changes to criminal law from the Violence Against Women Act reauthorization. This Act increased the ability of tribes to investigate domestic violence crimes. Then the Inns group discussed several hypotheticals about criminal law. For example, the Bill of Rights' right to defense counsel is different from the ICRA's right to defense counsel. Certain crimes do not trigger a right to defense counsel under ICRA if the maximum sentence is less than six months. If a person is found guilty without defense counsel under ICRA, a question arises as to how that conviction relates to future prosecutions against them for crimes not relating to the tribes. When a criminal record mixes and matches within the legal systems, it can get quite complicated.

When it came to education and entertainment, this presentation was so meaty, it could feed a family of four. If you are interested in adding your name to the wait list for Robert G. McGrath American Inn of Court membership, please contact Scott Reep at scott@solanolawgroup.com.

Coffee Talk: What's the most creative solution you've come up with ...

Saturday, February 01, 2014

In a business dispute involving two families from China, where defendant refused "on principle" (read loss of face and status) to pay any money to plaintiff, I was able to encourage defendant to make a substantial contribution to plaintiff's favorite charity, for which defendant would receive a tax deduction. Think about "win-win!"

Malcolm Sher

Have the parties bring in their significant others, and find out what they think that party should or could be doing in six months time.

Tom Cain

As Mediator, I had about 15 people at a final impasse. I presented a mediator designed "Settlement Proposal." Everyone voted by secret ballot on a small piece of legal paper, gave them to me in the 'hat,' with the understanding in advance that unless everyone voted YES, the proposal was not to be adopted. It settled needless to say, to our amazement with all YES on the papers in the hat.

Marc Bouret, Bouret ADR & Mediation Firm

After engagement as mediator, securing commitment of the parties to attempt to resolve their estate dispute in mediation, reviewing briefs, conferring with all counsel and working all morning in joint session reviewing the case with the parties and reaching tentative agreement by mid afternoon on division of titled real and personal property, bank accounts and securities, we reached an impasse! The parties had agreed to cover the conference table with all of the jewelry and tangible personal property left by their parents, and to take turns filling separate boxes designated for each sibling. When almost all of the items had been removed from the table to the box of each sibling, they could not agree upon distribution of an exceptionally lovely piece of jewelry that their mom had had designed and produced by a local jeweler. We had reached an emotional impasse and all of our work toward resolution was about to be for naught. As I sat with the parties at the large conference table with a settlement close but about to blow up, I picked up the piece of jewelry in my hand and suddenly felt as if divinely inspired. I asked the parties: "Could this piece be duplicated?" It could, and the case then quickly resolved by satisfied siblings.

Joel Zebrack

I was asked to present a concept that would allow the United Arab Emirates' Navy, Maritime Police, Coast Guard, Department of Transport and Customs and Immigration Agencies as well as the Abu Dhabi Tourism Authority to maintain the highest level of security while streamlining the entry process for foreign flagged vessels, crews and their guests so that they could visit the nation in order to attend the inaugural Etihad Airways Formula One Auto-racing Championship at the 5-star Yas Marina Circuit. I suggested that the Navy donate the use of one pier at its port facility closest to the sea-lanes in the Persian Gulf, and establish temporary offices on the pier for all other agencies so that

visiting vessels could undergo "one-stop" clearance procedures that could be concluded within an hour or two as opposed to being held at the "quarantine" pier for days while each agency scheduled its inspections.

Fred Carr, Carr & Venner ADR

In family law we deal with highly charged emotional issues of support and custody. In my 20 years on the family law bench and one year in private practice, I have found that the key to successful outcomes is to know as much as you can about the case and the lawyers before the mediation, ask good questions that get to the real heart of the matter then help both parties better understand the other's hopes and fears. Oh, a little something sweet to eat helps as well.

Commissioner Josanna Berkow (Ret.)

In a hotly disputed business dispute between two equally-stubborn business people, where the costs of defense were going to exceed any likely recovery but neither side would ever agree to pay money to the other, each side chose a charity and both contributed the same amount to the charity of the other's choosing. Both sides were happy with writing a check to a charity as long as it was not to the other party. Everybody was happy and two local charities benefitted.

Robert A. Huddleston, Esq., Huddleston & Sipos Law Group LLP

Tell them to focus on the issues and the children; not on each other ... and behave yourself.

Merritt Weisinger

I once presided at a mediation where there were six injured plaintiffs claiming against a total of only \$30,000 in liability insurance. The settlement demands far exceeded the available policy. I prepared a "ballot" at the mediation and asked each of the claimants [with their lawyers] to vote by way of secret ballot as to how they thought the limited fund should be divided up among the claimants. Surprisingly, once they got that there was only \$30,000 available and that no one would get anything unless all agreed to take a certain something, they voted and the results were very close to identical. We made a few minor adjustments to two of the claims and the whole thing was wrapped up in less than two hours!

David J. Samuelson, Bennett, Samuelson, Reynolds & Allard

I represented the Seller/builder in a construction defect case years back. The buyer of the single family home alleged numerous construction defects, including that a large Oak Tree, which was a landscape centerpiece to the house, had died due to the builder's subs leaving concrete debris near the base of the tree. Ultimately, there were the "usual suspects" (seller/builder, subcontractors, real estate brokers, etc.) named in the case, totaling around 10 parties. My client was insured. We proceeded with settlement mediation after some substantial discovery, but instead of having all of the parties and their counsel attend the initial mediation conference, at a substantial expense, we only had the mediator, my clients, myself and the plaintiff (buyer) and plaintiff's counsel. During the mediation we came to a consensus as to what the total settlement amount should be, and we agreed to that amount, subject to the condition that I could now

approach all of the other parties, and get contributions so that we could "fund" the settlement amount on a basis that would be satisfactory to my client and his insurer. We were ultimately successful in getting all of the others to chip in their reasonable share and the case was resolved.

Peter Sproul, Mullen & Sproul LLP

CCCBA Holiday Party [photos]

Saturday, February 01, 2014

Thank you for joining us at the CCCBA Holiday Party on December 19, 2013. Below are photos from the event.

To see more photos, visit our Facebook Page.

[gallery columns="2" ids="7620,7617,7622,7623,7618,7619,7621,7624"]

Tracking Your MCLE Certificates: CCCBA Can Help!

Saturday, February 01, 2014

With the compliance deadline approaching for Group 3 (N-Z), you'll need to have all your MCLE certificates ready. **CCCBA can help!** If you have attended a CCCBA event or Section program, then your MCLE certificates are on file in your online membership profile. Click [here](#) to log onto your member profile to access your Attendance Certificates (choose "My Past Events").

Need more MCLE hours to meet the requirements? Click [here](#) for our MCLE Self-Study offerings. Or to attend an in-person MCLE program, click [here](#) for our event calendar.

Please contact Associate Executive Director Theresa Hurley at thurley@cccba.org or (925) 370-2548 for more information or assistance.

Just one more reason to renew your CCCBA membership for 2014. Renew online today!

Welcome to Our Newest Members!

Saturday, February 01, 2014

Please welcome our newest members that have recently joined the CCCBA:

Janet Ballelos Jonathan Lee Craig Boeger Stephanie Meyer Jason Elter James Ostertag
Valerie Fenchel Elizabeth Parry Fredrick Hagen Jordan Schreiber Jeanette Haggas
Lucinda Simpson Esther Kim Leo Spanos Brady Larsen Sarah Ward

Target Your Search with CCCBA's Job Board

Saturday, February 01, 2014



Whether you are hiring or looking for a job, our Job Board is a great place to target your search. CCCBA members receive special pricing to post jobs, while job seekers can post resumes and create job alerts for free!

Member Comment:

"We have used the CCCBA job board with success. It is a great resource for employers since (1) there is no high priced recruiter fee (which can typically range from 20% – 30% of salary); (2) the cost to

advertise is less expensive or comparable to publications or websites which have legal classifieds; (3) you get a self-selected group of applicants for your practice and geographical area. It is not a cattle call. We received quality applications from good, solid candidates. The CCCBA job board should be on the list of places where you advertise. Be sure to tell your HR manager or office administrator about this resource. You get a great bang for your dollar."

- Audrey Gee, Partner, Brown Church & Gee LLP

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The best and brightest legal professionals in Contra Costa County are our members. Access this targeted and qualified pool of talent by advertising your jobs on our career center.

- Easily post jobs.
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Questions?

The CCCBA Job Board is powered by JobTarget, a company specializing in building targeted career centers for niche markets, like Bar Associations. If you have any questions about posting a job or creating a job seeker account, please contact Dawnell Blaylock at dblaylock@cccba.org.



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The Daily News

ADR UPDATE

Updates on Alternative Dispute Resolution

Effective July 1, 2014, a new disclosure requirement has been added to Ethics Standard 7.

The Daily

ADR UP



Spotlight



Unintended Consequences of ADR

The renaissance of alternative dispute resolution (ADR) in California civil law in the last 30 years has generated an extraordinary rippling effect of five unintended consequences.



When the State Bar Audits Your MCLE Compliance

If you check the box that you have complied when you know you have not, that is lying, and involves moral turpitude, giving the State Bar a basis to suspend you from practice.

News & Updates



CCCBA Holiday Party (photos)

Thank you for joining us at the CCCBA Holiday Party on December 19, 2013.



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