



DR Currents

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FROM THE CHAIR

by Hal Gray

As this is my last Newsletter article as chair of the Section, I'd like to pass along my thanks to all who gave of their time and effort this year. First, to Adam Sutton, who edited our Newsletter – for the first time in memory, we actually published four quarterly editions. (As proof that no good deed goes unpunished, Adam was elected Section Secretary/Treasurer for the coming year at the annual meeting in December.) I would like to pass along my thanks to the members who participated in the four ICLE programs that we co-sponsored this year: Ray Chadwick's program in Augusta in May; the Sixth Annual Arbitration Institute in Atlanta in August; the first-ever ICLE ADR Seminar in Macon in November; and the 19th Annual ADR Institute and Neutrals' Conference in Atlanta in December. I would also like to thank Ray Chadwick and John Sherrill, the immediate past two section chairs, for all of their kind counsel and support.

We are going to continue to expand the reach of our CLE programs in the coming year by adding a seminar in Columbus in February and possibly one in Savannah later on in the year. As ADR (especially Mediation) continues to spread throughout the state, the section needs to reach out to its members and sponsor seminars in the various parts of Georgia, not just Atlanta.

We do need volunteers for the position of Editor of the Newsletter and Webmaster for our web page. Also,

we always need articles for the Newsletter, so if there is something of interest that you would like to share with the members, please send it in!

Serving as Section Chair this past year has been a great honor and pleasure, and I thank all of the members for offering me an opportunity to so serve.

I now will turn over the Section's reins to my friend Taylor Daly who already has exciting plans in motion. I remind you, though, that our Section is only as strong as the members who take the time and effort to participate – and I urge each of you to become involved in 2013.

My best regards.

Hal

Hal Gray is the Managing Partner of Ragsdale, Beals, Seigler, Patterson & Gray, LLP. A graduate of the Emory University School of Law, he has practiced construction law and commercial and real estate litigation in Atlanta for over thirty years. He has been a member of the AAA Mediation and its various Arbitration Panels for twenty-five years and regularly works as a mediator and arbitrator in construction and commercial disputes. He currently serves as the chair of the State Bar Dispute Resolution Section and the Boards of Directors of the Construction Law and Dispute Resolution Sections of the Atlanta Bar. He is a Fellow of the College of Commercial Arbitrators and a member of the Georgia Arbitrators' Forum and the Georgia Academy of Mediators and Arbitrators.

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INCOMING CHAIR NOTE

By Taylor Daly

It is with great pleasure that I serve as chair of the State Bar of Georgia Dispute Resolution Section for 2013. The members of this Section provide a unique and critical role in the justice system in this state and in the country. I am proud to be a member of this section.

I want to thank Hal Gray and the entire Board of the section for their energy and leadership in 2012. Their efforts made it possible for members to have access to many resources helpful to our practices, including the webpage (www.gadisputeresolution.org), numerous ICLE programs and the section newsletter which went out quarterly this year, due to the efforts of Adam Sutton with contributions of articles from many of you. It is the Board's goal to continue these resources and expand our ICLE offerings even further across the state this year. We encourage both the use of and input to these resources by our members.

In 2012, the Section initiated a partnership with Georgia Legal Services to create a pro bono ADR service for legal services cases. An introduction to this program is included in the newsletter. This program provides an opportunity for section members to bring their ADR experience and skills to resolve legal services cases thereby stretching the budget for that organization and providing fair and early resolution of those cases.

To accomplish our goals for 2013 of making resources for professional development and pro bono contributions available to the membership, we are asking for volunteers to assist with the ICLE programs, the webpage, newsletter and as trainers and neutrals for the Georgia Legal Services ADR program. I hope to hear from many of you who are interested in giving a little of your time towards these valuable projects. I encourage input from all members and am happy to take your emails and calls about how we may improve and expand our skills and contributions as ADR professionals. I look forward to serving as chair.



Taylor Tapley Daly is a partner of Nelson Mullins Riley & Scarborough LLP who practices in Atlanta in the areas of commercial litigation, product liability and dispute resolution. A registered Mediator/Arbitrator with the Supreme Court of Georgia since 1994, Daly is a member of the commercial arbitration and mediation panels for the American Arbitration Association.

She serves regularly as a neutral in a wide variety of commercial cases. Daly is a frequent speaker on ADR topics, and is active in pro bono, she serves on the Boards of the Atlanta Legal Aid Society and Georgia Appleseed Center for Law and Justice.

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PAY DAY LENDERS IN GEORGIA, CONTRACT AGREEMENT TO ARBITRATE CAN BE STRUCK AS A SANCTION FOR DISCOVERY ABUSES AND SANCTIONS IN RES JUDICATA

By John Allgood

The Court of Appeals of Georgia has issued one in a series of opinions providing interpretations of Georgia's Pay Day Lending Laws. In this case, *Georgia Cash Am. Inc. v. Greene*, A12A1015 (11/6/2012). The plaintiff in this case had sued Georgia Cash and its president and CEO for claims including that the interest charged on loans were greater than the lawful interest rate. This case was the fourth in a series related to these parties.

The trial court had denied Cash America's motion for a summary judgment on the issue of whether Cash America was the de facto lender of payday loans made to the plaintiffs. Cash America is a Georgia Company that holds a contract with the Community State Bank of South Dakota (CSB) to offer payday loans in Georgia. The plaintiffs had borrowed moneys from Cash America/CSB on Aug. 6, 2004, and subsequently had filed suit alleging conversion of funds through a predatory lending scheme in violation of Georgia law. The loan documents identified CSB as the lender but the complaint alleged that there was a sham partnership promulgated in order to avoid Georgia usury laws and to avoid application under a claim of federal preemption. Cash America was alleged to be the de facto lender and that as a Georgia company, it was prohibited from making payday loans. Further the plaintiffs alleged the loans were null and void as unconscionable contracts of adhesion. See *Georgia Cash America v. Strong*, 286 Ga. App. 405 (649 SE2nd 548 (2007)).

In the 2007 case Cash America was held in contempt for discovery abuses and the court struck a defense asserted by Cash America based on an arbitration requirement in the loan agreement. Cash America moved to Compel Arbitration and the trial court in the 2007 case denied the motion. The appeal of this action was dismissed for lack of jurisdiction by the Court of Appeals. Later the Court of Appeals granted a class action certification to the plaintiffs to represent Cash America borrowers in Georgia.

At the trial level in this case, Cash

America filed a motion for summary judgment on all of the plaintiff's claims and plaintiffs opposed the motion asserting that Cash America was the de facto lender. Plaintiffs also asserted RICO claims. The trial court denied Cash America's Motion and granted a partial summary judgment to the plaintiffs that Cash America was, based on the evidence, the de facto lender.

In this most recent appeal the court addressed the renewal of Cash America's request to require arbitration of the issues. The Court of Appeals confirmed that the trial court had struck the arbitration assertions as a sanction under OCGA § 9-11-37 against Cash America for discovery abuses. When in the subsequent hearing Cash America again filed a motion to compel arbitration based on the language in the loan documents, the trial court ruled that based on its prior order, the motion to compel was moot.

The plaintiffs argue that the trial court's earlier ruling striking Cash America's arbitration defense



was an adjudication on the merits and carries a res judicata effect. We agree.

...

...Cash America cannot move to compel an action that the trial court foreclosed as a penalty. In striking Cash America's arbitration defense, the trial court essentially ruled that Cash America could not compel arbitration. And this court's affirmance of that ruling is binding in all subsequent proceedings. See OCGA § 9-11-60 (h)

The Court of Appeals goes on to find that whether Cash America is the de facto lender for loans made after the effective date of May 1, 2004, of the Payday Lending Act and therefore in violation of the Georgia Code § 7-4-2 and 16-17-2(b)(4), in the absence of an express exemption, is in part an issue of fact.

As noted by this court, [i]n an attempt to circumvent state usury laws, some payday lenders have contracted with federally chartered banks...to take advantage of federal banking laws that allow such banks to make loans across state lines without regard to that state's interest and usury laws in "rent-a-charter" or "rent a bank" contracts."

The trial court granted partial summary judgment finding that Cash America retained 88 percent of the gross revenues and therefore retained "virtually all the benefits, risks and revenues of the loans and was responsible for virtually all the expenses and liabilities" but the Court of Appeals declined to find based strictly on the evidence presented to the trial court that as a matter of law Cash America was the de facto lender.

Under this evidence a jury issue remains as to whether Cash America sought to obtain an amount greater than lawful interest prior to May 2004 and was therefore the true lender.

The Court also affirmed the trial court's denial of a summary judgment as to the CEO's personal liability.

Note to Georgia Arbitrators:

This case denies enforcement of an arbitration agreement in the contract between the parties because the parties had, prior to the assertion of the arbitration provision, been engaged in litigation and at some level apparently in the discovery process. The trial court sanctioned Cash America for discovery abuses by refusing to enforce the arbitration agreement. It is not clear in this decision how far the parties had gone into discovery and whether or not by their actions waived the arbitration provision. Whether a waiver argument could have been made as well, i.e. the parties had engaged too much or too long in litigation to the point that they had waived their arbitration is not clear. Georgia courts have applied the waiver concept to override an arbitration provision where by their behaviors the parties have acted in contradiction to a desire to bring the matter to the arbitration forum. Discovery is often the point in time at which Georgia courts will indicate waiver has occurred but that line is not entirely clear. Nor is it entirely clear whether the party disputing enforcement of an arbitration agreement must show prejudice. While it is difficult to imagine a circumstance that would put the issue of waiver in front of an arbitrator for decision, arbitrators do have the power to determine as a preliminary matter a challenge to their jurisdiction and whether or not arbitration on the merits should proceed or not. The idea of suspending the arbitration provision as a sanction for litigation abuse is beyond the scope of arbitrator authority. However, increasingly the authority of arbitrators to impose sanctions on parties who fail to follow the arbitration process as intended is being recognized in provider rules and by the courts.



John Allgood is of counsel with Ford & Harrison, LLP, in Atlanta. A graduate of the University of Georgia School of Law, he has served for more than 20 years as an independent neutral arbitrating cases in commercial, employment, construction and securities law areas. His practice includes mediation in the same areas, as well as, real estate and anti-trust matters. Allgood has been selected for The Best Lawyers in America in the area of Alternative Dispute Resolution.

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CONFIDENTIALITY? WHAT'S THAT? IS MEDIATION REALLY CONFIDENTIAL?

By Bob Berlin and Carolyn L. Raines

From the Georgia courses on Dispute Resolution to the Newtown massacre, questions are being asked about confidentiality. What does it really mean? Who is bound by it? What does the future hold? As usual, let's start with a definition as per

Webster's:

Confidential: con•fi•den•tial [kon-fi-den-shuh l]
adj.

1. Communicated or effected secretly.
2. Entrusted with the confidence of another.
3. Denoting intimacy or confidence.

American Heritage(Medical):

Confidentiality: con•fi•den•ti•al•i•ty (k n'f -d n'sh - l' -t)
n.

The ethical principle or legal right that a physician or other health professional will hold secret all information relating to a patient, unless the patient gives consent permitting disclosure.

Can we substitute for the Medical definition the following?

n.

The ethical principle or legal right that a [mediator] or other professional will hold secret all information relating to a party, unless the party gives consent permitting disclosure.

What is the purpose of confidentiality in mediation? Before we address this may I invite us to consider what is meant by the word purpose? As defined by *Webster's:*



pur•pose [pur-puh s] noun, verb, pur•posed, pur•pos•ing.

noun

1. the reason for which something exists or is done, made, used, etc.
2. an intended or desired result; end; aim; goal.

Now, how do we connect the two (2) as it applies to and/or effects mediation? Some of us start with an absolute: “What’s said in Mediation, stays in Mediation!” Then, we add exceptions. The Georgia Office of Dispute Resolution, in the programs (Mediators) over which they have authority, require to revealing threats of harm or violence plus child abuse. Others have added, in their Agreements to Mediate, other exceptions; i.e. any kind of abuse, corporate/ institutional exclusions and the like. And, some states have their own ‘uniquenesses’ added. Our state has experienced some mediators and/or parties revealing the internal goings on to an extent that some believe have gone too far and (should not) have been revealed.

Nationally, the Newtown Massacre perpetrator’s (Adam Lanza) parent’s divorce mediator has shared with the national media some of the goings on in their mediation. This has raised the issue of confidentiality to a roar. The following portrays a range of questions and comments regarding this issue. These quotes are taken from an online conversation through the Linked In® group Alternative Dispute Resolution (ADR) Professionals.

“Shocked to read details about the Lanza divorce mediation in Huffington Post. Confidentiality? The Connecticut shooter’s parents discussed some things in mediation and their mediator is talking to the Huffington Post. Why? Was her reporting to the media court-ordered? Did the Lanza’s waive confidentiality? I think it is irresponsible not to disclose WHY she’s talking.” Joy L.

“I’m fascinated by the ‘psychological’ knee jerk reaction to a mediator allowing the penetration of confidentiality. This is a really simple issue. This ‘mediator’ needs to have, whatever certification immediately suspended pending a hearing. I know that, barring a direct awareness of a ‘criminal’ act, my confidentiality is sacred.” Adam S.

“I tend to be a tad demonstrative. Shocked works for me. Disgusted is more how I feel. The mediator

would have served us all had she refused to answer the predatory presses inquires and made a clear statement about the absolute confidentiality of mediation. My training only allows me to break confidentiality if one of the parties threatens violence, or, announced that they intend to commit a crime.” Adam S.

“I have never had a mediation client waive confidentiality, except in a few cases where clients asked me to speak with their attorneys. Authorizations were signed in those cases. Mediation is all about confidentiality. We address confidentiality in our contracts, initial phone calls, our introduction and opening statement and throughout the process. I am also disgusted by this mediator’s lack of ethics, professionalism and it feels like she was seeking notoriety. Perhaps we should respond to the Editor.” Catherine S.

“...In my view, confidentiality is rarely about the potentially devastating impact of some particular disclosure, but more about general anxiety-reduction and the nuances of managing communication. We promise confidentiality, in practical terms, as an inducement to participate and feel safe in an emotional sense...

...My point really is: confidentiality, like much of mediation, is complex, and beware of simple answers.” John S.

“Confidentiality is governed by statute, court rule, contract (our agreement to mediate), and legal evidentiary exclusions. Mediators, be careful what you promise and learn more about confidentiality and privilege.” Ericka G.

“I’ve read this thread with interest. While I appreciate Ericka’s perspective and exclusions to confidentiality, the rule is still ‘Confidentiality unless...’ not ‘Only when X is present, shall there be confidentiality.’ In the case of the Lanza’s mediator, what ‘Unless’ is there extant that would override confidentiality? That there was the potential of violence? Well then she should have come forward a lot earlier. I tend to agree with those who say she was looking for fame if she revealed anything beyond saying, ‘I was the Lanza’s mediator.’ And if she’d done that, it wouldn’t be very newsworthy. Having been on the Sally Jesse Raphael show myself a few years back (not as a mediator), I know first hand the ways the media likes to exaggerate conflict and encourage drama. She may also have found herself, once the interview began, in a position of having to reveal something she shouldn’t have. That’s too bad.” Anna N.

And finally, I believe this a good summing up of the views.

“I find that ethics is an easy subject to talk about in the pub, difficult to teach, and challenging to practice. I think we’ve discussed the dilemma that results from a confidence in which there is a public interest, the complicity of the confidant and the need, indeed duty, to warn. Sometimes there are ways to do that, ways to reveal the sin without exposing the sinner. It’s had to see how anything in a divorce dispute can be in the public interest. Whether it would be interesting to the public is a very different thing. Of interest may be a medical confidentiality case: *Hague v Williams*, 37 N.J. 328 181 A.2d 345. where the court said: “This is not to say that the patient enjoys an absolute right, but rather that he possesses a limited right against such disclosure, subject to exceptions prompted by the supervening interest of society.”

Also see: *Home v Patton* (1973) 291 Ala. 701, 287 So.2d 824. If Paula Levy is now saying that, by speaking out earlier, she could have prevented the Sandy Hook tragedy, the confidentiality rule should come under scrutiny like never before.” Geoffrey H.

All of this being said, what will be John Q. Public’s expectation and confidence in the process the next time he’s invited, encouraged or ordered to mediate a conflict? Where do you stand on this issue?

Robert A. “Bob” Berlin. As president of The New Decision Management Associates, Inc. Berlin has primary responsibility for Mediation, Negotiation and Arbitration services as well as Lead Trainer. He has experience in handling in excess of 4200 civil and family law mediations since 1968. He is a graduate of the Walter F. George School of Law, Mercer University, receiving the LLB (J.D.) and was a senior partner in the law firm of Berlin and Hodges, P.C. and was a Municipal Court Judge and in the Georgia House of Representatives. He is an approved Mediator for the U. S. Postal Service, EEOC and the FBI. He presently serves on the Advisory Committee of the Training & Credentialing Committee of the Georgia Commission on Dispute Resolution.

Carolyn L. Raines. As CEO of The New Decision Management Associates, Inc. Raines is responsible for the operations, management and co-trainer. A graduate of Middle Georgia College she is a registered Mediator with the Georgia Office of Dispute Resolution and has mediated large group conflicts on a national level. She currently serves on the Citizen’s Panel Review Board for the Bibb County Juvenile Court.

MANAGE CONFLICT; DON'T JUST WAIT TO RESOLVE DISPUTES - PART 3

By Barrett Hawks

This is the third of three articles on the subject of proactively managing conflict. The first article advocated proactive early settlement, even with admissions of fault and apologies where appropriate.¹ The second article focused on reducing disputes through wise prevention processes in business agreements.² This article advocates developing skills for recognizing incipient conflict and for avoiding or defusing it. "Incipient" is used here in the sense of beginning to come into being or to become apparent and can be applied to a situation (a budding business conflict) or to relationships between two or more persons (as in incipient antagonists).

Recognizing that only some very basic principles can be conveyed in a short article, references are provided with the goal of making it easier for those interested to undertake more study.

Anticipating and Preventing Disputes:

Several examples of techniques for anticipating, preventing, managing and controlling problems and disagreements, and for the "real time" resolution of incipient conflicts are discussed in the second article and will not be repeated in any detail here. However, in light of the fact that an ounce of prevention is worth a pound of cure, it seems worth referencing some of those techniques again and pointing out that it would be beneficial for them to be practiced more broadly.

The techniques for anticipating and preventing disputes include partnering in ongoing business relationships. In partnering, the parties assume that problems in the relationship (for example a supply agreement) will arise and they agree to resolve them in an attitude of advancing the business transaction or relationship. The techniques also include the development of mutual trust and the development of appropriate mutual expectations to reduce perceptions of injury and conflicts that often arise from disappointed expectations. The appointment of specific champions within each participant-organization also ensures that consistent attention is given to teamwork and group communications. A technique for avoiding internal conflicts that has worked well for some business organizations is to appoint a well-trained "peace maker" to the board of directors or trustees.

Organizational training programs as well as retreats designed to get all attendants on the same page can harness participants to the same objective and the

commitment of senior leadership can assure that the rank and file are committed to the principles of anticipating and preventing disputes.

Proactive legal risk management, using some of the structured and formal techniques used by consultants and professional risk managers, could also be usefully applied by lawyers.³

As referenced, these techniques have been applied in business relationships. However, most can also be applied in any organizational or group setting. For example, the appointment of specific champions of group harmony and the practice of holding retreats to focus on principal strategies can help avoid disputes within organizations ranging from professional partnerships to religious and community organizations. Reflecting the broad opportunity to apply these techniques, the theme of the Spring 2012 Conference of the ABA Dispute Resolution Section was "Leading by Promoting Civil Discourse."⁴

Lawyers can and should play a key role in acquainting clients with these techniques and in helping them to apply them. Richard Susskind dubbed the typical approach of hiring a lawyer only after a problem occurs as "the paradox of reactive legal service."⁵ Once put into place, the techniques for avoiding conflict make it easier to manage those conflicts that inevitably occur.

Sensitivity In Dealing With Emerging Conflicts.

The legal process has been built around adversarial relationships : plaintiff and defendant, prosecution and defense, proponent and opponent. It is therefore natural that the approach of most lawyers to persuasion is based on the notion that the best way to convince people is to develop a superior argument. But, far from the notion that one person is right and the other wrong, we now know that many other factors are at work: implicit biases; different people interpreting the same information in different ways; qualities of the speaker; personality characteristics; and so on. Lawyers recognize this, especially in selecting juries, and seek the advice of other trained professionals (often with psychological skills) to assist them.

In other areas most lawyers practice their conflict management skills only instinctively, and some not at all. Although some become very effective, it would be very useful for all lawyers to have specific training in the techniques for recognizing and dealing with incipient

conflict. Lawyers can be very helpful in creating more constructive outcomes in conflicts or they can make a difficult situation worse. A recent ABA Section of Dispute Resolution program recognized the need for lawyers to gain a better understanding of the psychological factors that influence how people hear presentations.⁶ It is noteworthy that a psychologist was the presenter for this teleconference.

In addition, good communication and problem solving skills involve attentive (and sometimes even sympathetic or empathetic) listening in order to determine and address the underlying problem. A conflict is sometimes communicated in the form of a complaint. What is communicated often is not the real issue but only a part or symbol of a more fundamental underlying conflict. Clarity of communication and the knowledge of how to create understanding are also essential parts of the tool bag for defusing incipient conflict. The Georgia ICLE's annual ADR Institute devoted two hours of its 2012 seven hour program to "Taking the War Out of Our Words." This program advocated not only attentive listening but also non-defensive questioning with emphasis on tone of voice, facial expressions and body language. The presenter has written a thorough book on the subject with accompanying CDs.⁷

The techniques of sensitivity in dealing with emerging conflict may be used in many different settings: at the beginning of a business negotiation or a developing animosity between two corporate directors or between a director and a CEO or other executive(s); a dispute about the policy or strategic direction of a business or non-profit organization, which can ripen into a law suit over breach of fiduciary responsibilities or a contest for control; and disputes between neighbors, competing developers or a dispute about public policy. It is apparent that defusing or resolving these conflicts in the very early stages may often produce the best results for all concerned, and that a sensitive non-judgmental approach should work best in many if not most instances.



The Art of Negotiation:

If one thinks of negotiation not as limited to negotiation about the settlement of a lawsuit or the conclusion of a business agreement but as extending to almost every human interaction—Honey, where would you like to eat dinner tonight?—one can see the huge potential for improving one's techniques. What follows is a brief summary of some techniques of good negotiation and references for further study.

Some Negotiating Techniques-The Primer. The seminal book on negotiating technique by Roger Fisher, William Ury and Bruce Patton⁸ advocates the methods of separating the people from the problem, focusing on interests and not positions, inventing options for mutual gain and insisting on using objective criteria. From our own experiences, most of us can readily identify with the use of objective criteria and focusing on interests rather than positions. Establishing objective criteria at the beginning of negotiations, especially over issues of significant consequence to large groups, has led to durable results, while a solution which focuses only or largely on satisfying the most vocal advocates for change has often led to disillusionment and further disputes over how the settlement agreement should be interpreted. In addition, the development of a solution by one party and given to the group without significant input from the group has often led to the feeling on the part of some that their needs and views were not taken into account. These outcomes have been evident in several situations where a power supplier has internally developed a solution for a group of all-requirements power purchasers which allows limited power purchases from sources other than the all-requirements supplier. If the members of the group are not integrally involved in the development of the solution, they become the next generation of advocates for further change, and often end up in litigation in part because the options have been narrowed by a "Band-Aid" solution in the first place. To be sure, these techniques do not work in every circumstance and criticism of **Getting to Yes** and rebuttal by Fisher are referenced below.

Some Language of Negotiation. In **Getting Past No**,⁹ Ury offers several additional negotiating techniques, including tips on language: listen actively; express your views without provoking—don't say yes "but," say yes... "and;" ask problem solving questions; and many others. Many of the language techniques employed by mediators can usefully be applied by lawyers in their negotiations, unassisted by a mediator.¹⁰ For some useful insight into skills every lawyer should have in the current environment, see an article by Kathy Bryan, CEO of CPR and former head of Motorola's world-wide litigation, on "The New Lawyer And The Triumph of The Soft Skills,"¹¹ in which she concludes that "Zealous advocacy now includes negotiation and mediation prowess."

Miscellaneous. A particularly useful book on negotiation is one used as a case book.¹² It contains a compilation of the works of many authors, some of whom are practicing lawyers and mediators, not just academics. It is divided into chapters devoted to the many facets of negotiation, including styles of negotiation, a negotiation preparation check list, negotiation malpractice, negotiation ethics (including a piece on ethics in settlement negotiations from the Mercer Law Review),¹³ the role of settlement counsel and a piece entitled “20 Common Errors in Mediation Advocacy.”¹⁴ It can be read in its entirety or chapter by chapter or even article by article. Notably, while the book explores the “reality” of rough and tumble negotiation, a survey of 1000 Phoenix lawyers reflected that those surveyed judged 60 percent of cooperative negotiators as effective, but only 25 percent of competitive negotiators as so.¹⁵

The book also contains a challenge to **Getting to Yes**. It is a “...puzzling book...[in which] the authors seem to deny the existence of a significant part of the negotiation process, and to oversimplify or explain away many of the most troublesome problems inherent in the art and practice of negotiation. The book is frequently naïve, occasionally self-righteous, but often helpful.”¹⁶

The comments of this article are offered in the spirit of Fisher’s rebuttal to this challenge. To paraphrase: White is more concerned with the way the world is. I am more concerned with what intelligent people ought to do. One task is to teach the truth, including how people typically negotiate. But because we are incompetent at resolving our differences in ways that efficiently and amicably serve our mutual interests, it is important for lawyers to become more skillful and wise than most people in dealing with differences.

Conclusion:

As lawyers, we can help broaden the development of “upstream” solutions if we give them more attention—in advice to clients, in our CLE programs and otherwise. Most of us could benefit from more training in listening and communication, in how to defuse anger and resentment and in being able to recognize the root cause of a dispute. We should also learn how to get outside of our normal comfort zone for approaching a settlement discussion—learning an attitude of “fixing the problem rather than fixing the blame.”

Undoubtedly much activity in this vein occurs “below the radar,” much of it by lawyers, many of them in small communities, who understand and practice the admonition of Abraham Lincoln:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, a lawyer has a superior opportunity of being a good man. There will be business enough.”



Barrett Hawks serves as a full-time, independent neutral. Before his retirement in 2009, he was a partner in Sutherland Asbill & Brennan LLP where for many years he focused on representing businesses in transactional matters and litigation avoidance as well as on serving as a mediator and arbitrator in a variety of business disputes. He also has significant court room experience, including jury trials. Hawks is designated as a Distinguished Neutral in both energy and commercial matters by the CPR International Institute for Conflict Prevention and Resolution, is certified as a mediator by the American Arbitration Association and is registered with the Georgia Office of Dispute Resolution.

(Endnotes)

- 1 DR Currents, Summer 2012, at p. 11.
- 2 DR Currents, Winter 2012, at p.2.
- 3 See Christopher Honeyman et al, The Next Frontier is Anticipation: Thinking Ahead About Conflict to Help Clients Find Constructive Ways to Engage Issues in Advance, 25 Alternatives 99 (2007).
- 4 <http://www.abanow.org/2012/04/leading-by-promoting-civil-discourse-theme-of-aba-dispute-resolution-conference-in-washington-dc/>. See also Susan L. Podziba, Civic Fusion, Mediating Polarized Public Disputes (2012).
- 5 Richard Susskind, The Future of Law: Facing the Challenges of Information Technology, (Revised Paperback ed., Oxford university Press, 1998), pp.23-27. See also the web site of the National Center for Preventive Law, which is “dedicated to preventing legal risks from becoming legal problems.” <http://www.preventivelawyer.org>.
- 6 The Rules of (Persuasion and) Engagement, 12:00-1:15 p. m., Jan. 15, 2013.
- 7 Sharon S. Ellison, Taking the War Out of Our Words, (Wyatt-MacKenzie Publishing ed. 2009).
- 8 Roger Fisher, William Ury and Bruce Patton, Getting to Yes:Negotiating Agreement Without Giving In (Penguin Books rev. ed. 2011). For those who, like the author, have trouble keeping all this good stuff in mind, see also Roger Fisher and Danny Ertel, Getting Ready to Negotiate: The Getting to Yes Workbook, (Penguin Books 1995). This book is a step-by-step guide to preparing for any negotiation.
- 9 William L. Ury, Getting Past No: Negotiating in Difficult Situations, (Bantam Books, revised ed. 1993).
- 10 Taking the War Out of Our Words, op cit. supra, is particularly good in this respect.
- 11 The National Law Journal, November 24, 2008, at 14.
- 12 Jay Folberg and Dwight Golann, Lawyer Negotiation Theory, Practice and Law, (2d ed. 2011). See also Roger Fisher and Daniel Shapiro, Beyond Reason:Using Emotions as You Negotiate, (2006).
- 13 Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 53 Mercer L. Rev. 807 (2001)
- 14 Reprinted from 13 Alternatives 69 (1995).
- 15 More detail and discussion of the survey results are contained in Andrea Kupfer Schneider, Perception, Reputation and Reality: An Empirical Study of Negotiation Skills, 6 Disp. Resol. Mag. 24 (2000).
- 16 This section is a reprint from James J. White, The Pros and Cons of “Getting to Yes”; with Roger Fisher’s, Comment, 34 J. Legal Educ.115 (1984). See also, additional comments by Fisher in Lawyer Negotiation Theory, Practice and Law, at p. 117.

PRO BONO MEDIATION PROJECT FOR THE GEORGIA LEGAL SERVICES PROGRAM

By Taylor Daly

The State Bar of Georgia's Dispute Resolution Section is pleased to announce the initiation of a pro bono alternative dispute resolution project for cases being handled by Georgia Legal Services Program (GLSP). Following the program started five years ago by the Atlanta Bar Association's Dispute Resolution Section, this program will provide experienced neutrals to assist in resolving legal aid cases where the parties agree to participate in ADR.

The Atlanta Legal Aid Society and GLSP, along with organizations providing similar services, has been significantly impacted by the reduction of funding available from several sources, including the Legal Services Corporation – the federal agency and largest funder of civil legal aid for low-income Americans, providing grants to 134 nonprofit legal aid programs. In the past several years, these organizations have found themselves doing more with less, while still striving to provide quality legal services to tens of thousands of clients annually.

The cost-and time savings benefits that clients often experience through the use of alternative dispute resolution processes applies equally in the legal aid services setting. For legal aid organizations with a heavy case load, a quick and fair resolution of cases can help these organizations to serve more clients.

The State Bar Dispute Resolution Section has committed initially to assist the Georgia Legal Services Program's Gainesville office, which serves 27 counties in Northeast Georgia.

"We look forward to partnering with the State Bar of Georgia ADR Section on this project," said Wendy Glasbrenner, managing attorney of GLSP in Gainesville. "Resolving our cases efficiently, without having to take them to trial, and with results that satisfy both sides is a win/win situation. It makes sense for our clients but also allowed us to maximize our budget."

The section is seeking volunteers both to handle cases as neutrals and to provide training and information to GLSP attorneys about alternative dispute resolution processes and how to identify cases, as early in the course of the case as possible, that may be amenable to resolution through ADR. The volunteers provide their time pro bono for the qualified clients. Types of cases handled by pro bono neutrals in the Atlanta Legal Aid cases to date have included consumer matters, contract disputes, landlord/tenant issues, predatory lending litigation, estate and elder care issues, and medical

care matters.

Speaking about his experiences with the pro bono mediation program for Atlanta Legal Aid, Bill Goodman of Henning Mediation & Arbitration Services, Inc. reports: "It is very satisfying to help individuals to resolve their disputes in ways other than through traditional litigation. Dispute resolution processes often provide quicker, less stressful resolutions than litigation, and as volunteers in the program, we are pleased to provide these services to people who might not otherwise have access to them. This is a great opportunity to level the playing field. Everyone deserves to be treated equally under the law". Taylor Daly, who administers the Atlanta Legal Aid program, reports that "the feedback from legal aid attorneys, their clients and the other parties to the disputes have been very positive and encouraging about the value of ADR in these cases."

In order to expand the current pro bono mediation program to other counties beyond metro Atlanta, we need your help. The time commitment is minimal, but as those of us who have been privileged to be serve in such cases can attest, the reward is unparalleled.

Volunteers must be registered mediators with the Supreme Court of Georgia with a minimum of three years experience. If interested, please complete the following form and return with a current CV to Taylor T. Daly, Nelson Mullins Riley & Scarborough, Atlantic Station, 201 17th Street NW, Suite 1700, Atlanta, GA 30363, taylor.daly@nelsonmullins.com. Please ensure that your form includes your registration number with the Georgia Office of Dispute Resolution. For questions or additional information on the program, please contact me.



Taylor Tapley Daly is a partner of Nelson Mullins Riley & Scarborough LLP who practices in Atlanta in the areas of commercial litigation, product liability and dispute resolution. A registered Mediator/Arbitrator with the Supreme Court of Georgia since 1994, Daly is a member of the commercial arbitration and mediation panels for the American Arbitration Association.

She serves regularly as a neutral in a wide variety of commercial cases. Daly is a frequent speaker on ADR topics, and is active in pro bono, she serves on the Boards of the Atlanta Legal Aid Society and Georgia Appleseed Center for Law and Justice.

STATE BAR OF GEORGIA'S DISPUTE RESOLUTION SECTION

PRO BONO MEDIATION PROGRAM FOR GEORGIA LEGAL SERVICES PROGRAM CASES

Volunteer Form

Please email form and current CV to Taylor Daly at taylor.daly@nelsonmullins.com or mail to Taylor Daly, Nelson Mullins Riley & Scarborough, 201 17th Street, NW, 17th Floor, Atlanta, GA 30363

General Information

Name: _____

Employer: _____

Mailing Address: _____

County: _____

Work phone: _____ Cell phone: _____

Email: _____

Gender: Male Female

Race/Ethnicity: Native American/Alaskan Native Asian/Pacific Islander/Asian-American

Black/African-American/Non-Hispanic Hispanic White/Caucasian/Non-Hispanic Other

What languages, other than English, do you speak fluently? _____

Legal Profession and Mediation Information

State Bar No: _____ Georgia ODR Registration No. _____

For which categories are you currently registered?

General Mediation Domestic Relations Mediation

Specialized Domestic Violence Arbitration

Case/Early Neutral Evaluation

Please check below all areas in which you have law practice and/or ADR expertise:

Banking and Finance

Government

Insurance

Health care

Commercial

Intellectual Property

Community mediation

Juvenile

Contracts

Labor

Construction

Probate

Discrimination

Prof. Liability/Malpractice

Education

Personal Injury

Elder Law

Real estate

Employment Law

Tax

Environmental

Workers' Compensation

Zoning/Land Use

Family Law

domestic violence

custody

grandparent adoption

How many years have you been a neutral? _____

Do you provide services to a court-connected dispute resolution program? _____

Which program? _____