

 PUBLISHED BY THE AMERICAN BAR ASSOCIATION SECTION OF DISPUTE RESOLUTION

# DISPUTE RESOLUTION

VOLUME 19, NUMBER 1

## MAGAZINE

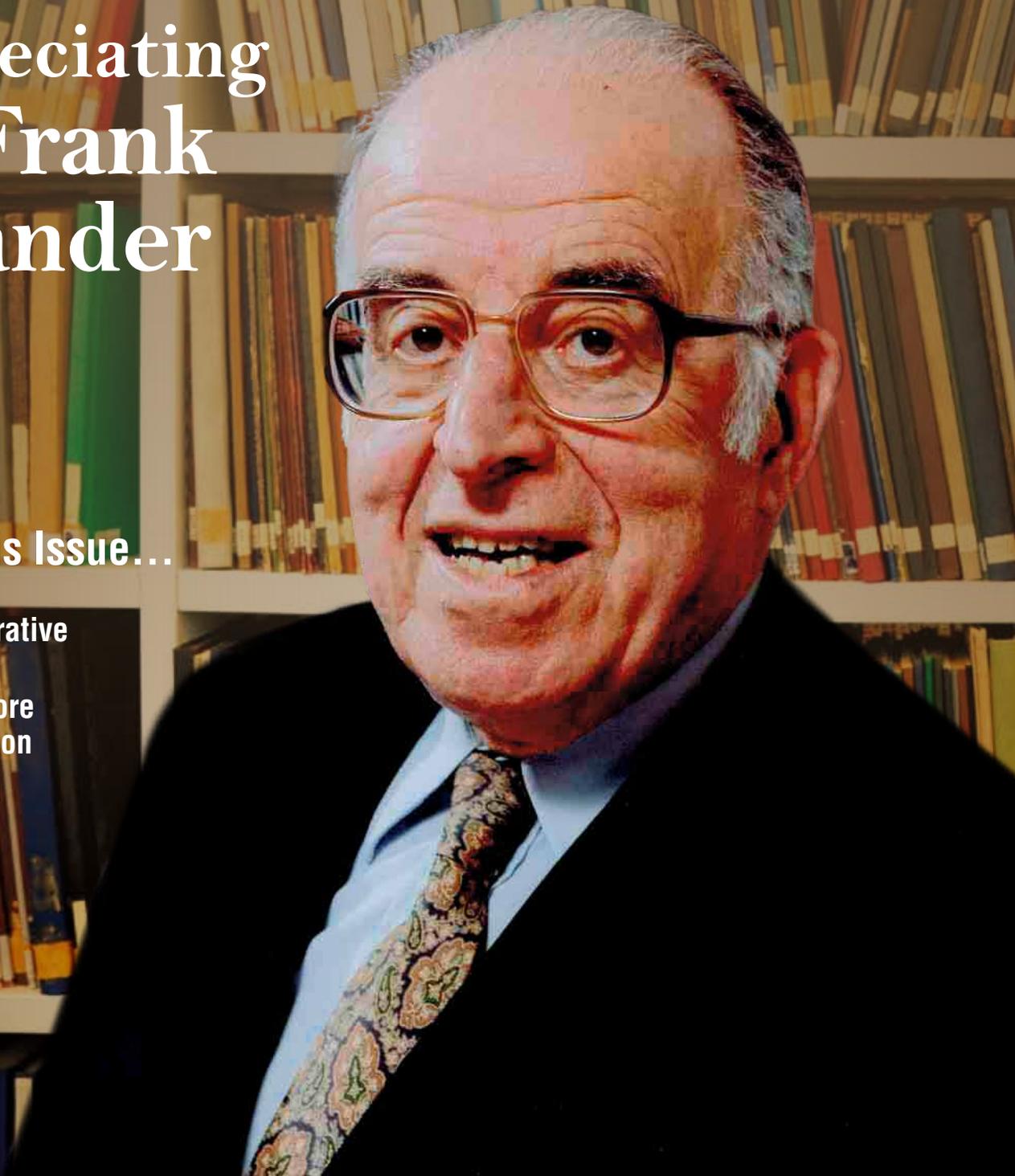
FALL 2012

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Published by the American Bar Association Section of Dispute Resolution

# DISPUTE RESOLUTION MAGAZINE

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*Dispute Resolution Magazine* is published quarterly by the American Bar Association Section of Dispute Resolution (ISSN: 1077-3592). © 2012 American Bar Association.

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Article ideas, letters, and other correspondence can be sent to Dispute Resolution Magazine, ABA Section of Dispute Resolution, 740 15th St. NW, Washington, DC 20005. The phone number is 202-662-1680. The e-mail address is [drmagazine@americanbar.org](mailto:drmagazine@americanbar.org).

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## From the Chair By John R. Phillips

It is an honor to be following Debbie Masucci as chair of the Dispute Resolution Section of the American Bar Association. She has taken the section to the next level and left us with the challenge of maintaining high-quality section activities and benefits, including publications.

In that respect, we are pleased to announce an exciting transition with respect to the editorial board of this magazine. Professor Frank Sander, the wonderful longtime chair of the board, will remain as chair emeritus. In addition to Professor Sander's inestimable contribution, we also want to acknowledge the many and long-term contributions of board members Wayne Brazil, Harry Mazadoorian, Jim McGuire, Richard Reuben and Margaret Shaw. Professor Reuben not only served on the editorial board but worked tirelessly as editor for many years. As a result of these individuals' contributions, *Dispute Resolution Magazine* is now recognized as an independent voice and "thought leader" in our field, pushing all of us in new directions and requiring us to look back to see what we need to do to fulfill (or at least attempt to fulfill) our promises. As distinguished as these board members are in their own right, they collectively determined to make their last issue a tribute to their esteemed but characteristically humble chair, Frank, with Professor Reuben serving as guest editor.

The new board includes Professors Josh Stulberg and Nancy Welsh as co-chairs and new members Jim Coben, Michael Lewis, Bennett Picker, Donna Stienstra and Zena Zumeta. Chip Stewart is currently serving as editor but will be cycling off, and Gina Viola Brown will take his place as editor. Our thanks also go to Professor Stewart for his service. Section Chair-Elect Ruth Glick will be the new liaison from the section council. The same high quality of *Dispute Resolution Magazine* will remain and, no, we are not going paperless, at least in the near future, although all members have access to the magazine online.

I'm also happy to note that the Section of Dispute Resolution has completed and will be making available to section members a new booklet titled "Benefits of Arbitration for Commercial Disputes." This easy-to-read booklet can be useful with clients and ADR professionals alike in identifying all the various benefits of using arbitration as the last resort of dispute resolution rather than entering into the court system. Now, for the first time under one cover, the advantages and attributes of arbitration are explained. Thanks to Edna Sussman, Barbara Reeves Neal and John Wilkinson for shepherding this project. Section members can go to the section web site ([www.americanbar.org/dispute](http://www.americanbar.org/dispute)) to access this new benefit.

Thanks to a collaboration between the Section of Dispute Resolution and Suffolk Law School, our members have another benefit: access to videos for teaching and demonstration. The collection is now available for download and can be used in classrooms, bar association CLE programs and other teaching venues. The files can be downloaded directly to your computer, eliminating the need for DVDs or streaming, and you can scroll directly to the scenes you want without having to search or fast-forward. Perhaps most important, these new videos are free.

The topics include negotiation, styles of mediation, full-length mediations, mediation advocacy and med/arb combinations, and instructions for most of the role plays are available on the website. The section particularly appreciates the efforts of Dwight Golann, who led the project, and Inga Watkins, who assisted.

By the time you receive this, Mediation Week, the third week in October, will have passed. The ABA has recognized this week to educate lawyers, dispute resolution professionals, students and the public about mediation and related forms of collaborative problem solving. Throughout the country, in various ways, state and metropolitan bar associations celebrated Mediation Week, which was launched and supported through the efforts of Geetha Ravindra and Inga Watkins in their role as co-chairs of the section's Mediation Committee.

Make your plans now to join other section members on October 31, 2013, at the Asia-Pacific Mediation Leadership Summit! Plans for a two-day conference at the new Hong Kong Law School, which is co-sponsoring the summit, are being finalized. This will be a high-level, interactive conference with keynote presentations as well as time for creative thinking and networking. Although international mediation is not as widespread as the domestic variety, the forces of globalization suggest that growth is inevitable, and those of us interested in mediation will benefit from understanding how other countries' laws, civil litigation systems and cultures affect expectations about the process. Such knowledge may help us accommodate differing expectations and work together to design mediation processes that will achieve our goals.

If you are interested in attending, please contact the section at (202) 662-1680.

I look forward to a productive and engaging year.

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**John R. Phillips** is Chair of the American Bar Association Section of Dispute Resolution and a partner at the law firm of Husch Blackwell LLP in Kansas City, Chicago & St. Louis. He can be reached at [john.phillips@huschblackwell.com](mailto:john.phillips@huschblackwell.com).

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*My LL.M. education influenced my current job because I started a practice in mediation and arbitration, and I was able to join the Center of Arbitration and Mediation of the Chamber of Commerce of Quito, the most important center of this kind in Ecuador. I discovered a new world for my professional activities and academic development, which I share with others in my country.*



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# Teacher, Mentor, Friend, Leader

By Richard C. Reuben  
and Margaret L. Shaw

It is a rare person who through his own thoughts and efforts can truly be said to have changed this country, and the world, for the better. Fewer still do it with humility and grace.

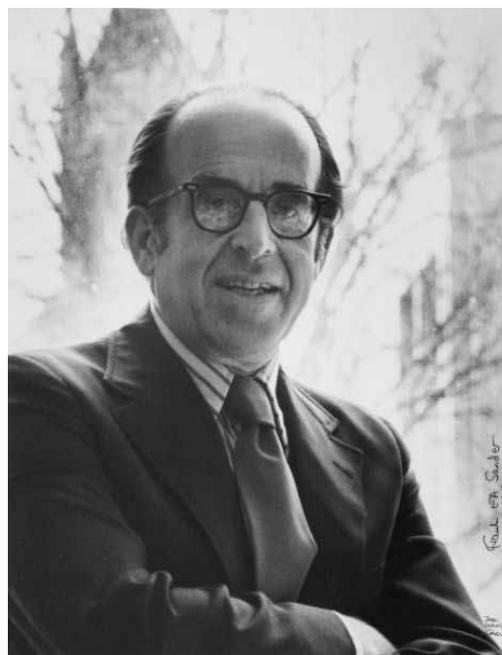
Frank E. A. Sander is one such transformative figure, a man who for nearly 40 years has nurtured the field of dispute resolution that today is credited as being one of the most significant shifts in American law. Inspired by his ideas and efforts, the resolution of legal problems is faster, more humane, more effective, and less costly for those in the United States and across the globe.

In this issue we take the occasion to celebrate this achievement. In these pages we see the history of our field unfold — its founding at the Pound Conference in 1976, its youthful struggle for identity, acceptance and embrace by the legal profession, and now, the challenges of maturity.

Through it all Frank has been a central figure, supporting the field with a gentle, steady hand that demanded honest and rigorous thinking, inspired and supported courageous action, and made sure things got done. An amateur musician in his private life, Frank set the tone for our field, one that allowed it to blend in with the larger symphony of American law. With a father's love and respect, he helped a thousand flowers bloom while at the same time pruning them to keep them out of harm's way. If Frank were a gardener, the dispute resolution field would be his bonsai tree.

This much is easily seen from the perch of our field. But there is, remarkably, so much more to his story. Many of us know that Frank was born in Germany and immigrated to the United States. Less known is that his father had been interned by the Nazis in Germany and his family decided to give their property and possessions to the government so the family could leave the country rather than simply hope for the best. Frank was 11 when they went to England to wait their turn for a U.S. visa and 13 when he came to New York and then settled in Boston.

Frank excelled in school and earned a coveted spot at Harvard University and then Harvard Law School and then as a clerk for Justice Felix Frankfurter at the U.S. Supreme Court. Less known



Frank E.A. Sander, Courtesy of Historical & Special Collections, Harvard Law School Library, Photo by Joan Lebold Cohen.

is that Frank's year at the court was 1953, an epochal term, as all the justices and clerks, led by new Chief Justice Earl Warren, worked hard to forge consensus on what would become the court's, and maybe the country's, signature opinion — *Brown v. Board of Education*.

The decision, of course, opened the door to the struggle for racial, gender, economic and other efforts for equality over the decades that would follow. Even less known is how Frank has continued to work with quiet effectiveness to assure minority access and participation at Harvard as well as in the legal profession at large and in our own world of dispute resolution.

Frank returned to Harvard, which he continues to call home. He married his lifelong love and inspiration, Emily Jones, and raised three children — Tom, Alison, and Ernie — in their home of more than 40 years on Buckingham Street, a few blocks from the law school.

During this time, he also set the course of his professional agenda. A mathematics major



**Richard C. Reuben** is the James Lewis Parks Professor of Law at the University of Missouri School of Law and founding chair of the ABA Section of Dispute Resolution Committee on Public Policy, Consensus Building and Democracy. He served as the editor of *Dispute Resolution Magazine* from 1997 to 2007 and has been a member of the *Dispute Resolution Magazine* editorial board since 1997. He can be reached at [reubenr@missouri.edu](mailto:reubenr@missouri.edu) and [law.missouri.edu/reuben](http://law.missouri.edu/reuben).

**Margaret L. Shaw** has maintained an active mediation practice for more than 30 years. She joined JAMS when a firm she co-founded, ADR Associates, merged with JAMS in 2004. She was also for more than 25 years an adjunct professor of law at NYU Law School, where she taught ADR and negotiation. She has been a member of the *Dispute Resolution Magazine* editorial board since 2004. She can be contacted at [mshaw@jamsadr.com](mailto:mshaw@jamsadr.com) or [www.jamsadr.com](http://www.jamsadr.com).

in college, Frank began his scholarship in taxation but soon shifted to family law, where he confronted the enormous legal and personal challenges that compelled him to think about other, more satisfying ways of addressing these problems — ways that Chief Justice Warren Burger encouraged Frank to give voice to in what became the landmark “Multi-Door Courthouse” speech at the Pound Conference.

The lore of our field holds that Frank’s speech accelerated and expanded a movement around the country that initially came to be known as Alternative Dispute Resolution. Less known, again, is that Frank’s work also provided critical support to Professors Roger Fisher, Arthur T. von Mehren, and others within the tradition-bound Harvard Law School to recognize, study and teach non-traditional ways of solving legal problems. Their efforts spawned the Harvard Program on Negotiation, which became the intellectual beachhead for the nascent field.

Frank knew the importance of Harvard to the establishment of the field and lent his name, offices, energy and intellect to task forces, committees, study groups, initiatives, and all manners of professional development, whether local or international. He even took on a few cases a year as a mediator or arbitrator so he could see firsthand the dynamics and ethical dilemmas that neutrals confronted and identify issues that merited attention.

In so doing, Frank opened the doors of the courts and the legal profession to ADR and was especially effective in working with the American Bar Association. Through the prestigious *ABA Journal*, he introduced the nation’s lawyers to the idea of “fitting the forum to the fuss,” and later shepherded an ad hoc Committee on the

Resolution of Minor Disputes into a Standing Committee on Dispute Resolution, and then, ultimately, the Section of Dispute Resolution.

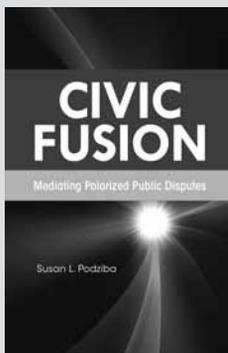
He also came to mentor not only the field’s first-generation academics but its first-generation practitioners, court administrators and even judges. But he also subtly mentored the maturation of the field in meaningful ways, by providing the intellectual backbone of such institutional landmarks of the field as the National Standards for Court-Connected Mediation and, later, the Uniform Mediation Act. He also provided both formal and informal feedback on countless drafts of articles, standards, best practice principles, and other such professional development efforts in the United States and around the world.

His influence continued into the second generation, where Frank has served as the center of gravity for what has come to be known informally as the Senior Mediators Group, continued to mentor even more young scholars and chaired the editorial board of the ABA’s *Dispute Resolution Magazine* for more than 18 years before transitioning to a senior but still active role earlier this year.

As we see in this issue, Frank’s life and work are both inspiring and instructive. Whether it is highlighting the qualities of his leadership, the wise ways he opened the doors of the legal profession to this new way of thinking and mentored young scholars and practitioners, or the endearing memories of him as a father, this edition provides all of us the opportunity to learn from Frank yet again. His wisdom and his example show what difference each of us can make if we are willing to give what we can with an open mind and a generous heart. ♦

## Civic Fusion: Mediating Polarized Public Disputes

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Bringing together the forces of political debate, this book outlines civic fusion and the process of successful public policy mediation. To help mediators understand how powerful the tool of mediation is and help them reach their full potential, this guide outlines what civic fusion is and provides real world examples of cases with positive outcomes. The book examines what mediators aspire to do, what they actually do, and outlines what needs

to be done to bring disparate groups of people together to reach agreements on complicated public policy questions.

To help you understand, achieve and sustain civic fusion, this guide:

- Will help you construct the metaphor of civic fusion and describe how passion, power, and conflict provide the energy for it;
- Discusses three projects: the Chelsea charter consensus process; the construction cranes and derricks negotiated rulemaking; and abortion talks;
- Describes what it takes to build a foundation for civic fusion; and

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# The Pound Conference Remembered

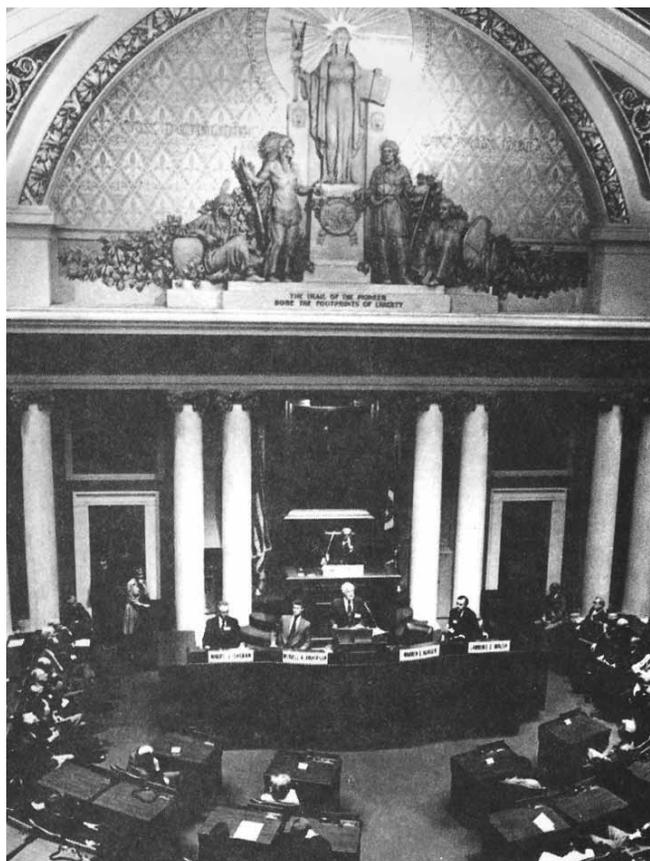
By Earl Johnson

It probably is fair to say that the American Bar Association Section of Dispute Resolution owes its existence to an unnamed mail-order company that mistreated the wrong customer in the mid-1970s. That customer was ABA President Justin Stanley's wife, Melinda.

Frustrated after several unsuccessful attempts to gain satisfaction for a defective product, she asked her big-time lawyer husband to sue. His answer, of course, was that litigating the case would cost far more than what she had bought was worth.

Having to give that unsatisfying answer to his wife bothered Justin Stanley enough that he decided to do something about it. Taking advantage of his position, the ABA president set up a "Special Committee on the Resolution of Minor Disputes," which was charged with finding or devising dispute resolution mechanisms capable of settling "minor disputes" effectively and efficiently, seeking to set up and evaluate pilot programs and then promoting adoption of the successful models throughout the country.

Stanley named Talbot "Sandy" D'Alemberte, then a partner in the Miami firm of Steele, Hector and Davis, as the new committee's chair. Most of the other members were private attorneys from relevant sections of the bar, along with a judge from the Judicial Division: C.B. Dutton (Indianapolis), Philip H. Lewis (Topeka), Ronald Olson (Los Angeles), George H. Revelle (Seattle), and Felice K. Shea (New York). Professor Frank Sander and I were real exceptions on the committee — academics who had an interest in alternative dispute resolution at a time when few law professors did.



ABA, John Ryan, Photographer, Minneapolis, Minnesota, published in *The Pound Conference: Perspectives on Justice in the Future*, edited by A. Leo Levin and Russell R. Wheeler

Frank had practical experience with ADR and had served as an arbitrator in commercial and labor union arbitration cases. Probably the nation's leading academic expert on existing forms and uses of arbitration and mediation, he was a natural choice for the committee. My involvement was more recent and entirely academic. That year I had co-authored a book titled *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* under a grant from the National Center for State Courts.<sup>1</sup>

The most innovative concept to emerge from the original special committee, however, was something my co-authors and I had not found in our survey of existing approaches. That was Frank's idea of a "multi-door courthouse," which

he introduced in a speech at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice — commonly called the "Pound Revisited Conference." The Conference was held April 7 to April 9, 1976, in St. Paul, Minnesota, at the very venue Harvard Law School Dean Roscoe Pound had delivered the original address on the "Causes of Popular Dissatisfaction with the Administration of Justice" 70 years earlier. I was fortunate enough to attend.

The conference was an ambitious undertaking, conceived by Chief Justice Warren Burger and implemented with the assistance of the leaders of the ABA and the Conference of Chief Justices. It brought together 300 leaders of the bench and bar, along with a smattering of academics. The goal was to explore fundamental issues and map out a reform agenda for the rest of the century.

The Pound Conference “Follow Up” Committee didn’t accept Sander’s notion that the public courts should be the locus for the several ADR mechanisms he proposed in his speech. Instead, they favored a free-standing institution — the “neighborhood justice center” — to implement Sander’s vision for offering disputants a “variety” of ADR options for resolving disputes.

As we gathered in the main conference hall that first day, there was an air of excitement and electricity. Given the organizers and the list of attendees, we knew the gathering could be an important event, though of course we didn’t know what the presenters would say or what, if anything, the conference ultimately would yield.

Professor Sander’s speech was one of three presentations at the opening session on “The Business of the Courts.” The other two were by Simon Rifkind, a named partner at Paul, Weiss, Rifkind, Wharton & Garrison, and Leon Higginbotham, Jr., a longtime federal district court judge in Philadelphia who would shortly be named to the 3<sup>rd</sup> U.S. Circuit Court of Appeals by President Jimmy Carter. Four commentators followed, including me.<sup>2</sup>

Professor Sander suggested transforming the courts from a forum that essentially offered a single form of dispute resolution — with cases decided by a judge or a jury — into a facility that provided an array of dispute resolution mechanisms. Furthermore, his proposal implied that those other forms of dispute resolution would be publicly available, just as the traditional courts are.

Perhaps the key element of Frank’s concept was his suggestion, “the grievant would first be channeled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case.”<sup>3</sup> Thus, what later became known as the “multi-door courthouse” would have a single entry point where the dispute would be diagnosed, and the disputant would then be sent to the correct door and the dispute resolution mechanism behind it.<sup>4</sup>

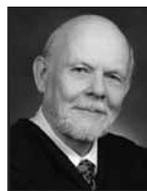
There was a definite buzz about Sander’s speech, which provoked a great deal of interest in the 12 breakout groups into which the 300 participants were divided to discuss the presentations.<sup>5</sup> The responses ranged from those who thought ADR was good but should be brought within the courts to those who considered ADR inferior to the traditional judicial model and proposed curing “popular dissatisfaction” with more judges and larger judicial budgets, not removal to other forums.<sup>6</sup> For example, Dean Dorothy Nelson, who later became a judge on the 9<sup>th</sup> U.S. Circuit Court of Appeals, reported that the breakout group she chaired “sort of liked Frank Sander’s many-doored courthouse...but thought it should be within the court system itself.”<sup>7</sup>

Interestingly, his speech was entitled “Varieties of Dispute Processing”<sup>8</sup> and never mentioned the term “multi-door courthouse”; a magazine editor coined the phrase when he used it in the headline for an article about Sander’s speech. Yet “multi-door courthouse” proved a perfect title for what Sander had envisioned and was forever attached to his influential recommendations for remaking America’s dispute resolution system.

The Pound Conference “Follow Up” Committee didn’t accept Sander’s notion that the public courts should be the locus for the several ADR mechanisms he proposed in his speech. Instead, they favored a free-standing institution — the “neighborhood justice center” — to implement Sander’s vision for offering disputants a “variety” of ADR options for resolving disputes.<sup>9</sup> Indeed, the development of these centers was the number-one recommendation to emerge from the Pound Conference in 1976. As recited in the report of the conference’s “Follow-up Task Force,” chaired by U.S. Attorney General Griffin Bell:

“We recommend that the American Bar Association, in cooperation with local courts and state and local bar associations, invite the development of models of Neighborhood Justice Centers, suitable for implementation as pilot projects. Such facilities would be designed to make available a variety of methods of processing disputes, including arbitration, mediation, referral to small claims courts as well as referral to courts of general jurisdiction.”<sup>10</sup>

Implementation of this recommendation became the first task for the Special Committee for Resolution of Minor Disputes. The goal was to find locations willing to open facilities that offered mediation or med-arb of a broad range of disputes: landlord-tenant, consumer,



**Earl Johnson, Jr.** is a retired Justice of the California Court of Appeal (1982-2007) and is nearing completion of a two-volume history of civil legal aid in the United States. Earlier in his career he was a trial attorney in the Justice Department’s Organized Crime and Racketeering Section, the second director of the OEO Legal Services Program and a Professor of Law at the University of Southern California. He can be reached at [justej@aol.com](mailto:justej@aol.com).

intra-family, neighbor-to-neighbor, community issues, etc. The mediators were expected to be paraprofessionals or trained volunteers from the neighborhood, usually or always non-lawyers. The services were to be free or almost free to the disputants.

Several cities created neighborhood justice centers, usually in a single neighborhood on a pilot basis. In Los Angeles, the LA County Bar took it on as a project and appointed a committee to undertake the task of establishing and supervising a Neighborhood Justice Center. Several leading lawyers and judges served on that committee, which chose Santa Monica as the center's location and obtained a foundation grant to fund the pilot's first years of operation. That Neighborhood Justice Center opened in 1978, and although it was relocated a few years later and given a new name, some 35 years later the LA County Bar still operates a substantial Dispute Resolution Center.

As our special committee dug deeper into the field of possible solutions to the problem of cost-effectively and fairly resolving minor disputes, it became apparent there were at least three distinct motives for providing dispute resolution mechanisms outside the courts, and each had a different constituency. Moreover, only one of those motives had anything to do with the name of our committee — the resolution of minor disputes. Those motives were:

1. To reduce the caseloads in the courts, then perceived as being overwhelmed by a "litigation explosion." The primary constituency behind this motive was the courts — and to a lesser extent litigants who were suffering delays because of overloaded dockets and who felt their cases belonged in the courts more than some others'.
2. To reduce the transaction costs for litigants even for disputes involving stakes that made it economic to have them decided by the courts. Here, the main constituency was institutional litigants with a substantial volume of cases to be resolved each year.
3. To increase access to justice for low-income people and for disputes too minor for courts to handle economically. This one had the least powerful constituency but was the primary focus of the original committee: minor disputes.

In essence, our minor disputes committee, in seeking to find a solution to the "minor dispute," had surfaced a solution that had application to a far wider range of disputes — major, minor and those in between. So it is no surprise that about three years after its formation, its name was changed to the Special Committee on Dispute Resolution. That special committee later became the Standing Committee on Dispute Resolution and then, as the importance of ADR in the general practice of law continued to grow, the free-standing Section of Dispute Resolution.

In 1980, when Sandy D'Alemberte decided to step down, ABA President-Elect Leonard Janofsky, a fellow Californian, asked if I would take over as chair of what at that time was the Special Committee on Dispute Resolution. I declined, telling him it was still important the committee's chair be a private lawyer because several forms of ADR did or could remove lawyers from the process. Janofsky then appointed Ronald Olson, another committee member from California, to head the committee.

I remained on the committee another three years, resigning when I was appointed to the bench. Not many years later, another ABA president handed the committee's reins to Frank Sander. By that time, ADR had high visibility and broad support in the profession, and Frank was its acknowledged guru. The profession was ready for his leadership, which continues to the current day. ♦

## Endnotes

1 Earl Johnson, Jr., Valerie Kantor and Elizabeth Schwartz, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* (National Center for State Courts, 1976).

2 See LEO A. LEVIN & RUSSELL R. WHEELER (EDS), *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (1979). The other three commentators were Harvard Law School Dean Erwin Griswold, Berkeley anthropologist Laura Nader and Judge (and future Attorney General) Griffin Bell. My own commentary focused on foreign institutions and approaches, based on a world-wide access to justice study I was co-directing, headquartered at the University of Florence, which in part touched on ADR in those countries. *Id.* at 119-124.

3 Frank E. A. Sander, *Varieties of Dispute Processing*, in LEO A. LEVIN & RUSSELL R. WHEELER (EDS), *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 84 (1979).

4 For more on this history, see Mariana D. Hernandez-Crespo, "A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo Exploring the Evolution of the Multi-Door Courthouse (Part One)" (2008), <http://www.pon.harvard.edu/daily/a-discussion-with-frank-sander-about-the-multi-door-courthouse/> (last visited October 1, 2012).

5 It also says a lot that Professor Sander was the only presenter whose name was mentioned in the conference's "Epilogue." Levin & Wheeler, *supra* note 1 at 289-294.

6 *Id.* at 130-148.

7 So Dean Nelson's name for Frank Sander's proposal wasn't far from the "multi-door court" the magazine editor had used in later describing Sander's idea.

8 Sander, *supra* note 3 at 65-87.

9 Levin & Wheeler, *supra* note 1 at 301. Possibly because Griffin Bell became the US attorney general the following year, the US Justice Department funded three local Neighborhood Justice Center pilots and others were established elsewhere. *Id.* at 291.

10 *Id.* at 301. Neighborhood Justice Centers are further described in the Follow-Up Task Force's report at 306-308.

# Dedication to Collaboration and Integrity

By Ronald Olson

In the world of “soft” dispute resolution, Frank Sander has been a force. His intellectual leadership, his enthusiasm and his generosity have all been essential in moving the alternative dispute resolution movement from a snowball to an avalanche. It has been my great privilege to teach alongside Frank at the Salzburg Seminar and other venues, to share conferences that expanded the knowledge and interest in alternatives and to advance the alternatives movement among

professionals through our chairmanships of the ABA’s Special Committee on Dispute Resolution, which ultimately became the Dispute Resolution Section of the ABA.

As a professor and associate dean of the Harvard Law School, Frank had credibility that has been instrumental, perhaps essential, in convincing the profession that alternatives to litigation — from mediation to negotiation to arbitration to hybrids such as the mini-trial — are an important part of the dispute resolution process. He and Roger Fisher, another distinguished Harvard professor, led the way for what ultimately became Harvard’s Negotiation Research Project. Their early work attracted other distinguished scholars such as their successor, Bob Mnookin. Always working collaboratively and with the philosophy of “letting a thousand flowers bloom,” Frank and his fellow academics succeeded in helping law schools all over the country shift from neglecting all discussion of alternatives to embedding teaching about them in their curricula.

At the same time, Frank recognized that it was really the practitioners — both lawyers and members of the judiciary — who would help the public and clients see the benefits of alternatives forms of dispute resolution. Frank’s respect for and engagement of these early practitioners showed his ability to reach beyond the ivory tower as well as his constant interest in collaboration.

Any celebration of Frank Sander would be incomplete without some words about him as a human being. Above all else, Frank has been a teacher who has loved his students, whether they were bright-eyed freshmen or cynical seniors at Harvard Law School, emerging leaders from around the world at the Salzburg Seminar or grizzled skeptics at the highest levels of the judiciary and bar. In responding to skeptics, his passion for teaching and his personal good cheer were always evident — and nearly always disarming and effective. Those of us who shared time with him always learned from his example and were inspired to work with him to give alternative dispute resolution the integrity that would make it more effective and our justice system more complete. ♦

## Members of the 1976-1977 American Bar Association Special Committee on the Resolution of Minor Disputes

Talbot D’Alemberte  
Tallahassee, FL

C.B. Dutton  
Indianapolis, IN

Earl Johnson, Jr.  
Los Angeles, CA

Philip H. Lewis  
Topeka, KS

Ronald L. Olson  
Los Angeles, CA

George H. Revelle  
Seattle, WA

David A. Saichek  
Milwaukee, WI

Frank E. A. Sander  
Cambridge, MA

Felice K. Shea  
New York, NY



**Ronald L. Olson** is a name partner in the Los Angeles office of Munger, Tolles & Olson. Mr. Olson’s practice involves a combination of litigation and corporate counseling. He counsels individual executives and boards of directors in a range of matters, including transactions and corporate governance. He can be reached at <http://www.mto.com/lawyers/Ronald-L-Olson>.

# Reflecting on Frank E. A. Sander's Leadership Through His 18 Years Leading *Dispute Resolution Magazine*

By Nancy Rogers



Imagine an American Bar Association section publication being led by the founder of that section's field. Imagine as well that this person is a distinguished scholar, a ruthlessly rigorous judge of quality, a warm and compassionate friend to whom people are drawn, a person who doggedly prepares for each telephone meeting and a positive individual dedicated to making a difference. That is the dream that came true for the Section of Dispute Resolution for the first 18 years of its well regarded *Dispute Resolution Magazine*. That leader, of course, was Harvard's Bussey Professor of Law (now emeritus), Frank E.A. Sander.

Frank's commitment to making a difference is contagious.

Frank's approach to leading the magazine resembles his leadership in general, with one central effective ingredient being great dedication to efforts that can make a difference. Frank agrees to join an activity when he can envision that his participation will accomplish something significant; otherwise, he is disciplined in declining the vast majority of invitations he receives. Frank chaired the new magazine's editorial board because he saw that a high-quality publication could help establish the fledgling field of dispute resolution.

Using the same criterion, Frank earlier committed his time to chair the ABA entity that gave birth to the Section of Dispute Resolution. He joined ad hoc committees that had the potential to set the course of legal policy for the field — initiatives dealing with issues such as mediator qualifications, mandatory mediation and mediation privilege — and informal groups to guide the development and evaluation of the first three multi-door courthouses in Tulsa, Houston and the District of Columbia. He also helped initiate activities that would build scholarship in the field such as a dispute resolution bibliography, the first dispute resolution law textbook, and the *Negotiation Journal*.

Frank's commitment to making a difference is contagious. He joins meetings on time and always arrives prepared. Faced with such devotion by someone so distinguished, those working with him feel embarrassed

to do anything less.

His focus on excellence is equally contagious. A brilliant scholar, Frank knows quality — whether it is in an idea, a prospective article, or a possible speaker — and demands nothing less in his quest to build the field. Anyone supporting something mediocre can expect Frank's incisive questions, such as "What is new in this?" This leads people to consider their ideas before expressing them and makes discussions much more productive.

While devotion to achieving positive change is a key aspect of Frank's leadership, his personality is another vital one. His personal warmth, love of new ideas, inclination toward mentoring others, and sense of humor all make people look forward to sharing time with Frank.

For all these reasons, once Frank is aboard, recruiting other strong contributors is easy. Those invited know that the activity will be significant and of high quality; if that weren't the case, they know, Frank would not have signed on. People know they will enjoy working with Frank, and they know they will learn from him.

*Dispute Resolution Magazine* provides a lens for viewing

these leadership components in action. When the inaugural issue of the magazine appeared in 1994, it already reflected the Sander approach. Though modest in appearance — 12 pages copied on card stock with occasional red highlights and stock art — that first issue was ambitious in terms of quality. The authors were distinguished in practice or academia. Packed in those few pages, the magazine offered two viewpoints on an issue on which the field was split (evaluation and advice by lawyer-mediators), interviews with people who worked in the field, a summary of recent social science research, section news and updates on statutes, cases, conferences, books and articles.

From the start, section member surveys identified the magazine as a hit. In addition, 20 law review articles cited one of the articles in that short inaugural issue.

Over time, the magazine continued as a high-quality publication and its impact increased. Section membership grew from about 5,000 to 19,000, expanding the readership. Soon online legal research companies began including the magazine's contents in their searchable databases. Textbooks and law review articles cited *Dispute Resolution Magazine* articles with some frequency.

While I know of no way to document the magazine's contribution to the growth of the dispute resolution field, it seems to me a likely reality. People commonly remark that they read the articles in *Dispute Resolution Magazine* as soon as the magazine arrives, setting aside other more technical publications to review at some future date (which may never come), after they have caught up on pressing matters. They talk about the articles. Those of us who have worked on the magazine are proud that it does not shy away from the key issues in the field and invites varying viewpoints. The magazine draws people

to section membership, where they become further engaged in the field of dispute resolution. It seems to build a well-informed and growing cadre of enthusiasts.

The magazine has changed somewhat over the years, as editorial board members, editors, contributors, and section staff have made their own contributions. Card stock gave way to glossy paper. A succession of superb

editors improved the content and worked with layout experts to enhance the publication's appearance.

One of Frank's strengths as editorial board chair was his ability to attract the best people to work on the magazine; as a result, the outstanding contributors are too numerous to be

mentioned by name. When Frank asked someone to join the editorial board, serve as editor or write an article, he or she never had to check whether the magazine was a high-quality or important publication. As with other projects mentioned above, if Frank was devoted to something, it was work that would make a difference. For all these reasons and for the touch of kindness that he brought to every interaction, working with Frank was a privilege, for me and for all the other editorial board members I spoke with for this article. Frank's involvement was a guarantee that a project was important and interesting, they said, and they stayed on the board because of him.

During most of the 18 years Frank led the editorial board, he had one of the busiest assignments in the academy — associate dean for Harvard's J.D. program. He also was busy teaching, keeping up a dispute resolution textbook, writing articles, responding to law schools and bar associations that sought him as a speaker, and serving on various initiatives that helped build the field. Yet Frank always joined the monthly editorial board conference calls on time, focused but ready to laugh, and prepared. He posed questions, such as: What are the major issues facing the field? What new challenges are on the horizon? Do we have something in the next issue for people who want to make a living working in the field?

People commonly remark that they read the articles in *Dispute Resolution Magazine* as soon as the magazine arrives, setting aside other more technical publications to review at some future date (which may never come).



**Nancy Rogers** is professor emerita of the Ohio State University Moritz College of Law and was co-chair of the *Dispute Resolution Magazine* with Frank Sander during its early years as well as serving with him on several other initiatives. The author thanks the section staff members and board members who provided information for this article and Richard Reuben, Craig McEwen, and Harry Mazadoorian for their editorial suggestions.

What would the section like to see covered? Who is the best person to write that article? Are there some promising young people whom we might help by asking them to be authors? Where are we on the next issue? Let's review the bidding...

Always the professor, Frank understood that other board members would become more engaged if they were learning and enjoying their involvement as they contributed. That meant he welcomed diversions to discuss an interesting new development or just to laugh.

As he stepped down last summer, Frank spent time thinking about his replacement. He was delighted that two distinguished scholars and field leaders, Josh Stulberg and Nancy Welsh, will co-chair the editorial board.

Frank dismisses any notion that he deserves praise for the hundreds of hours he devoted to leading the magazine during the busiest moments of his career and credits the other editorial board members, section

representatives and editors. His recollection of his decision to accept section chair Bob Raven's invitation to lead the board that would create the magazine reflects his dedication to making a difference and his deep engagement in the issues in the dispute resolution field:

"At the time, the opportunity seemed important and interesting. Once the magazine got going, it largely handled itself. It was fun to discuss the issues of the day with these really good people."

Even if Frank deflects our thanks, he will have our

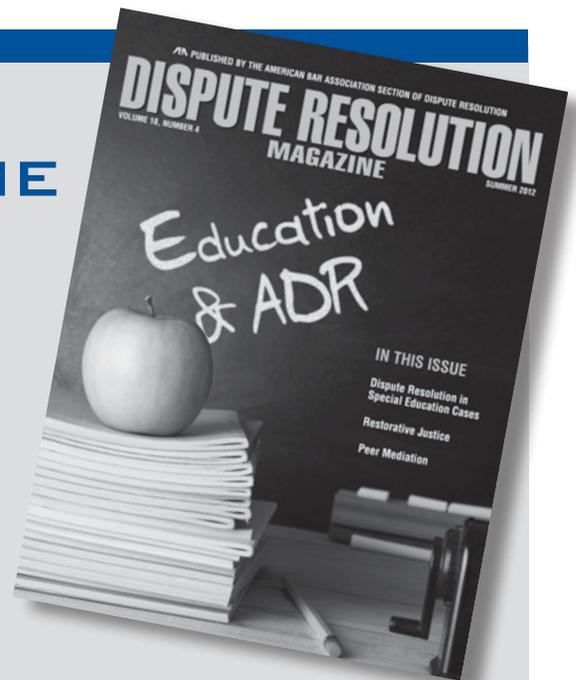
admiration. He has not only written about what will lead to positive change in the dispute resolution field; Frank has worked hard, consistently, and effectively to achieve that change. In his approach to leadership, as to his other work, Frank reminds me of Mahatma Gandhi's simple statement about effecting change: "We need not wait to see what others do." ♦

Always the professor, Frank understood that other board members would become more engaged if they were learning and enjoying their involvement as they contributed.

## Dispute Resolution Magazine AVAILABLE ONLINE

All of the *Dispute Resolution Magazine* issues and great articles, dating back to the first issue in 1994, are now available on the Section of Dispute Resolution web site. The enhanced magazine archive is a member benefit, so you will need to use your ABA member log in and password to access the Magazine web site.

Please go to [http://www.americanbar.org/publications/dispute\\_resolution\\_magazine](http://www.americanbar.org/publications/dispute_resolution_magazine) to visit the magazine web site.



# The Section of Dispute Resolution is pleased to welcome our 2012-2013 Committee Chairs

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(Open to all Section Members)

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Mark C. Travis, Cookeville, TN

### ADVOCACY/CORPORATE ADR

Elizabeth Shampnoi, New York, NY

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Larry W. Bridgesmith, Nashville, TN  
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R. Wayne Thorpe, Atlanta, GA  
Ellen Waldman, San Diego, CA

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J. William Frank III, Racine, WI  
Harrie Samaras, West Chester, PA

### INTERNATIONAL

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Jeremy Lack, Geneva, Switzerland

### LAW SCHOOLS

Mariana Hernandez Crespo, Minneapolis, MN  
Brian Pappas, East Lansing, MI

### MEDIATION

Peter Arcese, New York, NY  
Inga Watkins, Alexandria, VA

### PRO BONO

Richard Birke, Eugene, OR  
Jeffery Krivis, Encino, CA

### PUBLIC POLICY, CONSENSUS BUILDING, AND DEMOCRACY

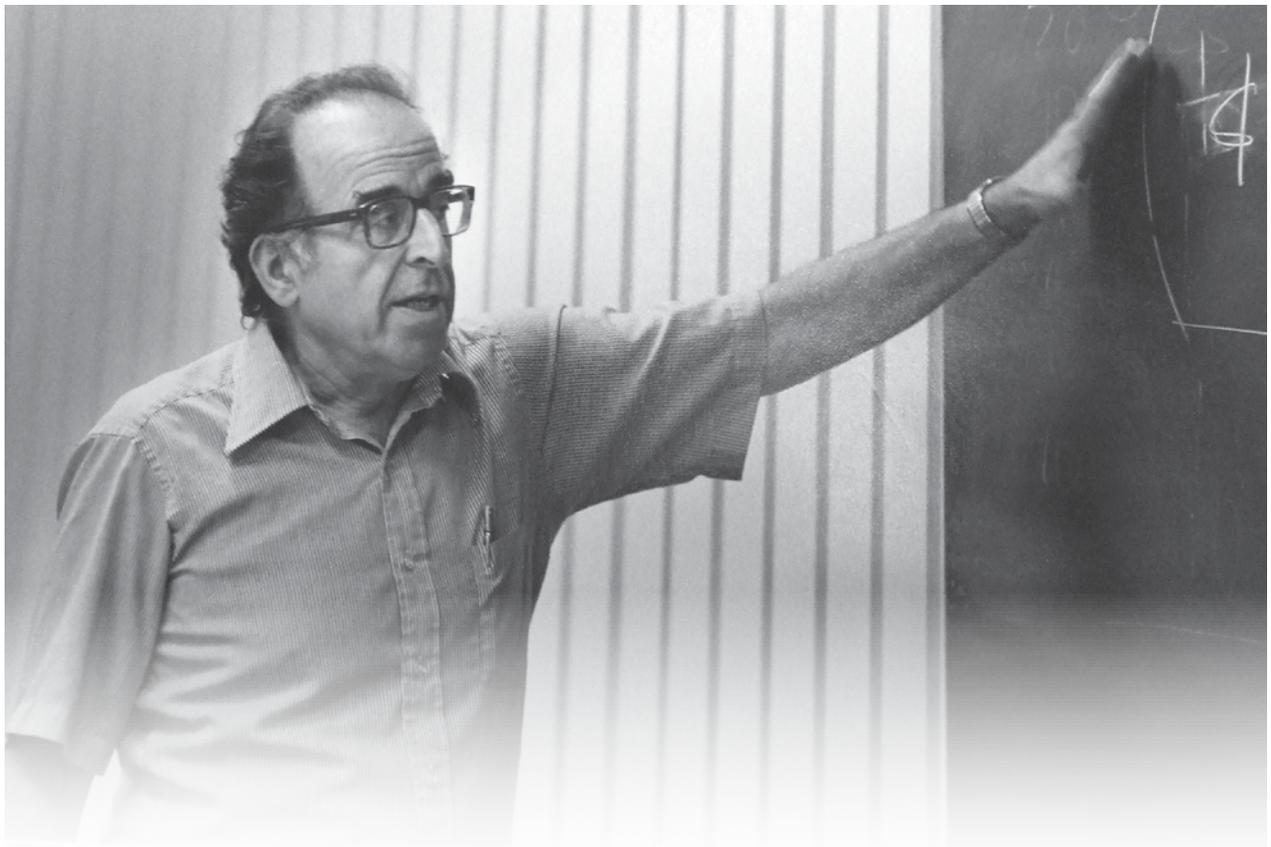
Richard Reuben, Columbia, MO

### SECURITIES IN ADR

Jill I Gross, White Plains, NY

### YOUNG LAWYERS/YOUNG ADR PROFESSIONALS FORUM

Cara H. Johnson, Houston, TX  
Serena K. Lee, Seattle, WA  
Alyson Winter, Pearl, MS



Frank E. A. Sander, Courtesy of Historical and Special Collections, Harvard Law School Library, Photo by Bradford F. Herzog.

# Frank Sander: Mentor to the Field of Dispute Resolution

By David Hoffman and Michael Moffitt

**M**entor, in Greek mythology, was the elder whom Odysseus entrusted with his son Telemachus when Odysseus left for the Trojan War. From this story has come the modern meaning of “mentor” as someone who shares experience, knowledge and wisdom with a less experienced colleague.

In so many ways, Frank Sander has been the mentor to the dispute resolution field. He has coached junior scholars as they navigated the shoals of academic hiring and advancement. He has counseled lawyers and other professionals who wanted to transition their careers into mediation or arbitration. And he has provided thoughtful advice and the steady hand of experience to many of the committees, commissions and organizations within our field.

In this essay, we highlight three aspects of Frank’s mentorship that are especially noteworthy — his curiosity, candor and compassion — and show how they characterized his mentorship of the field at all levels.

## Curiosity

Frank has a razor-sharp intellect, undulled in the 64 years that have passed since he graduated from Harvard College with a degree in mathematics, through his years as a Harvard Law School professor. That he is bright distinguishes him from many, but that he couples this intellect with a profound desire to know more makes him extraordinary. To take an idea to Frank is to invite both keen observation and keener questioning from one who delights in the journey of discovery.

For example, Dwight Golann told us about his early years as an academic, when Frank shared with Dwight questions about the constitutionality of mandatory arbitration and urged Dwight to pursue these questions. Many in the academy guard such lines of research jealously, but Frank’s suggestion resulted in the launch of an academic career that has included Dwight’s winning a CPR Institute prize for scholarship. Frank did not know

the answer to the questions he originally posed to Dwight — he just thought they were good questions and was eager to see someone explore them.

### Candor

Frank's candor — his "frankness," if you will — is legendary within our field. Not one to suffer foolish ideas gladly, Frank

can be counted on to tell us when we are headed in the wrong direction. We need our mentors to be plainspoken at times, rather than simply encouraging, and Frank has a talent for being direct without the least bit of unkindness. In fact, he could be both discouraging and encouraging at the same time. This is an art, and Frank is a master.

When Michael Moffitt was in the entry-level job market for a tenure-track law school position, Frank agreed to serve as one of his references. An experienced professor from a distinguished school called Frank for a reference, and this professor later said to Michael, "I spoke with Frank about you, and he said you were 'solid, quite good.'" Michael must have looked a bit concerned about the lack of enthusiastic hyperbole to which one might ordinarily aspire from a self-selected reference because the professor quickly added, reassuringly, "I know Frank Sander. That reference means the world to me, because I know it is not grade-inflated." Understated, substantive, clear and to the point. That's Frank.

Scott Peppet worked closely with Frank early in Scott's career, and he tells the story of how Frank mentored him through his early work on the ethics of negotiation: "Frank had me read through a pile of [ethics] materials that he had amassed ... As we talked, Frank kept bringing up ways in which it was all a bit more complicated than I was making it. What about this? What about that? He slowly and methodically showed me, without ever saying it, that I had missed some of the most difficult points in the materials." Those who know Scott's work today understand that it represents some of the most creative and careful in the field, undoubtedly reflective of Frank's influence.

For Harvard law students interested in dispute resolution, Frank was often among the most sought-after

advisers for third-year papers. But students lucky enough to have Frank take them on soon learned that the road ahead would not be easy. As Harvard colleague Bob Bordone said, "Students were thrilled to get Frank until they found out how much work he expected. He would

put them through draft after draft until they got it right. That meant not only doing a job for him that he felt

Students were thrilled to get Frank until they found out how much work he expected.

met Harvard's standards but also reflected the best the student could do for him or herself."

### Compassion

Candor can be painful if it is not administered with compassion, and Frank's concern for his mentees is palpable. Like the gardener who is proud of the plants he nurtures, Frank takes obvious pleasure in the success of his mentees, while at the same time refraining from taking any of the credit for their accomplishments.

David Hoffman was one of many lawyers whom Frank coached through the experience of disillusionment with litigation. David turned to Frank when he realized that mediation made more sense in most cases, and Frank provided David with a road map for developing an ADR practice within Hill & Barlow, the Boston firm where Frank had also served as an associate before launching his academic career. In the years that followed, Frank helped David by providing encouragement for his writing (including a foreword for a book David wrote with David Matz), his involvement in the ABA Section of Dispute Resolution, and his teaching (including a recommendation that landed him his current adjunct position at Harvard). At every turn in David's career, Frank has made the time to talk about the next step.

Richard Reuben credits Frank with making it possible for him to become a law professor. "I got to know him," Reuben said, "when I wrote an article on dispute resolution for the *ABA Journal* and told him of my interest in getting into the field. He encouraged me and also sent opportunities my way that helped me establish academic credentials — editing *Dispute Resolution Magazine* and working on the [Uniform Mediation Act]." Later, said Reuben, "when I was having difficulty finding



**David Hoffman** is an attorney, mediator, arbitrator and founder of Boston Law Collaborative, LLC. He teaches the mediation course at Harvard Law School and trains mediators at the Harvard Negotiation Institute. He is past chair of the ABA Section of Dispute Resolution and co-chairs the section's Collaborative Law Committee. His firm, Boston Law Collaborative, won the section's "Lawyer as Problem Solver" award in 2009, and David is listed in the book "Best Lawyers in America" in five categories, including mediation, arbitration, and Collaborative Law. He can be reached at [dhoffman@bostonlawcollaborative.com](mailto:dhoffman@bostonlawcollaborative.com) or [www.BostonLawCollaborative.com](http://www.BostonLawCollaborative.com).

**Michael Moffitt** is the Philip H. Knight Dean of the University of Oregon School of Law. As a law professor at Oregon, he taught ADR and civil procedure and served as the associate director of the school's Appropriate Dispute Resolution Center. Prior to moving to Oregon, he was the clinical supervisor of the Harvard Mediation Program at Harvard Law School, where he also taught negotiation and worked with Frank Sander. He can be reached at [mmoffitt@uoregon.edu](mailto:mmoffitt@uoregon.edu) or <http://law.uoregon.edu/faculty/mmoffitt/>.

After a few 20-hour weekends of wide-ranging discussion but little action, Frank opened the next meeting by saying, “If we’re going to draft a statute, we need to start drafting something that looks like a statute.” Everyone got the message.

a job, he helped me get a fellowship at Harvard that helped smooth that transition. I have no idea where I would be today without his support along the way.”

### **Mentoring the ADR Field**

Frank’s service during the creation of the Uniform Mediation Act illustrates the way in which his mentorship extends beyond people to institutions and projects. He served on the Uniform Law Commission’s drafting committee as well as a parallel drafting committee of the American Bar Association. Many involved in these projects with whom we have spoken described the direct — but always professional and courteous — ways in which Frank framed questions and proposed solutions on some of the thorniest policy problems in this project, which involved more than five years of meetings, drafts, and deliberations. Many who attended recall vividly that the turning point for the effort was when, after a few 20-hour weekends of wide-ranging discussion but little action, Frank opened the next meeting by saying, “If we’re going to draft a statute, we need to start drafting something that looks like a statute.” Everyone got the message.

Frank was a founding member of the Program on Negotiation at Harvard Law School. Marjorie Aaron, the former director of PON, recalls that whenever a difficult policy issue arose, someone inevitably would ask, “What does Frank think about this?” His name was invoked as a means to bring discernment to the conversation.

In 1994, when the Massachusetts Supreme Judicial Court formed a standing committee on ADR, Frank was asked to serve as vice-chair. He was a Harvard Law professor at the time, and he was also involved in national and international conversations about dispute resolution at the highest level. The demands on his time were enormous. And yet he recognized the significance of the effort in the Massachusetts state courts and joined the local judges, lawyers, and mediators in a long and ultimately ground-breaking set of initiatives. He did not consider himself different from any of the other group members, but he was the respected voice of experience in its discussions — in effect, its mentor — as well as an active participant.

Many of those with whom we have spoken have highlighted Frank’s efforts to make the field of dispute resolution more inclusive. Many women, people of color, and other members of under-represented groups have

benefited directly from Frank’s encouragement, guidance and opportunities he helped to create but for which he has never wanted credit. “He wouldn’t speak of it directly, but the names that he would mention for various positions would be the names of women, minorities, social scientists, and others whom he wanted to provide an opportunity to shine,” recalls Nancy Rogers. “You could tell that it was on his mind.”

### **Choosing to Be Mentor**

As an accomplished Harvard professor in three areas — taxation, family law, and dispute resolution — Frank certainly could have lived a more cloistered life, turning out law review articles and books setting forth bold new ideas, such as the concept of the multi-door courthouse. Yet he chose a path of direct involvement in the dispute resolution field, and by doing so, he has advanced careers and the use of ADR in our justice system, thus improving the quality of American life more broadly through the constructive resolution of conflict. It is difficult to imagine where the field would be today, if it existed at all, without Frank Sander’s willingness to serve. For this he is widely and rightly credited as the “father of ADR.” But by these choices, he also shows us more broadly the extraordinary difference one person can make — on colleagues and institutions — if they choose to make the effort.

### **An Acknowledgment and Invitation**

As we gathered information for this article, the two of us surveyed more than a dozen experienced professionals, lawyers and professors. We could not include all the stories we heard, and we know there are many others who could have told stories as rich as the ones told here. We also know there are others who could have written this article with as much appreciation as we did — and perhaps could have done a better job. There is no shortage of people who count Frank as mentor in ways that are both big and small.

These stories are compelling and instructive, teaching us what it means to be a mentor and how to do it wisely. If you are a Frank Sander mentee or have a story about how he inspired you, directed you, or was kind to you, please share it by posting it on the LinkedIn discussion group that the Section of Dispute Resolution Group has created for this purpose. In this way, we can share the inspiration that Frank has so generously shared with us. ◆

# Sowing Mediation Seeds around the World

By Michael Lewis and Linda Singer

**W**e know little about Frank Sander as a professor of tax law or family law (except, of course, that he gained tenure at Harvard teaching those subjects), but because we have had the privilege of teaching a weeklong mediation workshop with him for almost three decades, we know much about how Frank has changed many people's lives in only five days. Perhaps the workshops helped Frank, too: Frank's wife, Emily, liked to say that once Frank switched from teaching tax to teaching mediation, he hung out with much nicer people. (Our students, like us, always loved it when Frank quoted Emily.)

Our joint enterprise began back in the 1980s, when Frank started teaching a mediation course at the law school, long before mediation and conflict resolution became trendy, especially for lawyers. We were living in the Washington, DC, area, and Frank would call and ask Linda, whose extended family lived in Boston, whether it wasn't time for her to visit her parents in Jamaica Plain. Of course, we needed no such incentive. We started to collaborate with Frank on a weekend skills training for his mediation course.

After a few such weekends, Frank told us about Harvard Law School's continuing education program aimed at alumni, called the Program of Instruction for Lawyers, or PIL. Practicing lawyers would come to Cambridge for a week or two to brush up on the latest wisdom in constitutional law, business planning or jurisprudence. Classes lasted one hour, and people could take two or three courses at a time. Frank's suggestion

If one took what has become a regular law school mediation course, crammed it into five days and designed it for adults with extremely varied experiences, you would end up with a rough facsimile of the Harvard Mediation Workshop.

of a five-day all-day workshop on mediation, emphasizing skills as well as theory, was pretty revolutionary. Admitting "non-lawyers," including teachers, clergy, accountants, doctors and hospital administrators, to name a few, was even more so.

The three of us developed a weeklong workshop that was not just training in mediation but a course that exposed participants to Sander-level theory and forced them to consider the issues related to using mediation in various contexts and for varied subject matters. If one took what has become a regular law school mediation course, crammed it into five days and designed it for adults with extremely varied experiences, you would end up with a rough facsimile of the Harvard Mediation Workshop.



The course was limited to 45 participants. How we arrived at that particular number none of us can now remember, but the number has led to group discussions of considerable substance. To afford as much individual practice and feedback as possible, we also broke the large group into four or five smaller groups. Occasionally a professional mediation colleague joined as a fourth teacher, but over the years we began recruiting a fourth and then a fifth teacher from previous workshop participants. This had the advantage of bringing fresh blood into the teaching team but the disadvantage of having to work through the choreography and logistics of the course each time we brought on a new colleague. We hit pay dirt about 10 years ago, when Los Angeles-based lawyer-mediator Greg Derin attended the workshop and indicated he would enjoy teaching with us. For the last 10 years, Greg has been a member of the teaching team and the course has gone as smoothly as ever.

The workshop was a mixture of lecture, discussion, some audio-visual presentation and, of course, actual practice mediating. The mediation simulations were designed to provide participants with hands-on mediating experience in different contexts — primarily business, education and public policy — as well as raise practice and ethical issues. One highlight was an afternoon and evening segment in which the participants, divided into groups of three, received descriptions of three disputes. Each participant spent an hour mediating one of the conflicts, with the other two acting as the parties.

The next morning, we debriefed.

Our general teaching philosophy encouraged participants to “do” rather than talk about doing.

This tended to reduce the amount of pontificating and, we believed, led to better learning. The philosophy perhaps played best in the segment in which we presented ethical dilemmas in various mediations, had the teachers play the parties and forced the participants to mediate their way out of the challenges.

On Friday morning, we shifted to focusing on how participants could use what they had learned in their

professions. For this, we often brought in local practitioners, including our brother-in-law Jim McGuire, who is uniquely qualified to provide advice on how to incorporate mediation into existing law practices, the emerging role of settlement counsel and how to enhance the representation of clients in mediation and other forms of dispute resolution.

The final session of the workshop consisted of topics suggested by the group: sometimes these were ideas we had covered that participants wanted to explore further, and sometimes they were brand-new. (To give us time to prepare, we asked participants to submit their topics before lunch, so we could be ready for the mealtime discussion.) As the years passed, we came to expect some subjects — such as how to handle impasse, how to build a mediation practice, and how to think about liability and insurance — but we often encountered entirely new questions, which made our discussions especially lively.

Frank’s — and Harvard’s — gamble paid off. An increasingly diverse group (still primarily, though not exclusively, lawyers and judges) signed up, and even after we began offering the course two or three times a year, the waiting list grew to four or five years. Our only requirement was the ability to speak and understand English, and people came from all over the world.

What fun we all have had. When asked to play roles, even the most stodgy attendees loosened up; when mediating for the first time, even the most pompous were

humbled. We will long remember the workshop participant who, after about a minute in the mediator’s chair, looked up and said, “I don’t have a clue about what I am doing. This is hard!”

Our general teaching philosophy encouraged participants to “do” rather than talk about doing. This tended to reduce the amount of pontificating and, we believed, led to better learning.

Whatever question was asked, Frank always could be counted on to cite from memory the precise pages of the “Red Book” (Dispute Resolution: Negotiation, Mediation, and Other Processes) in its frequently changing editions, for a fuller discussion of the subject, connecting each practical problem with its theoretical and perhaps historical context. Frank’s quick wit and dry humor also kept us from getting too pedantic; we



**Linda Singer and Michael Lewis** have trained thousands of professionals, students and volunteers worldwide through the Mediation Workshop at Harvard Law School’s Program on Negotiation as well as for the CPR Institute for Dispute Resolution. Singer and Lewis, affiliated with JAMS, were instrumental in forming the Center for Dispute Settlement in 1971 in Washington, DC, which has experimented with, developed, operated and evaluated various ways of settling disputes, primarily through mediation, in neighborhood justice centers, courts and organizations such as schools, prisons and hospitals. They can be reached at [mlewis@jamsadr.com](mailto:mlewis@jamsadr.com) and [lsinger@jamsadr.com](mailto:lsinger@jamsadr.com) or at [www.jamsadr.com](http://www.jamsadr.com).

sometimes sounded more like the Marx brothers than a Harvard Law School teaching team. For the few free evenings, Frank provided all of us with the latest version of “Sander’s Good Eats,” which we could count on to guide us to a full range of Cambridge and Boston’s best restaurants.

The big highlight of the course was the evening when Frank and Emily opened their Cambridge home to the workshop participants for an intimate party. Because the teaching team usually was busy right up until party time, most of the preparations fell to Emily, who always provided fabulous food and flowers and graciously welcomed the participants. Equally welcome were spouses and partners; in Harvard parlance, “the person without whom we couldn’t understand you.”

When participants invited us to give the course in other parts of the world, Emily accompanied us, painting beautiful watercolors of the varied sites while we taught. Our foreign ventures began in Toronto, where we conducted courses for the Ontario Advocates’ Society for a few years. One participant of the course at Harvard arranged for us to teach in Vancouver, and we will never forget the post-teaching sails there that began at 9 p.m. We taught in Australia, and we taught in New Zealand. In each location the courses went well, in the process giving us an excellent opportunity to learn about those countries so far from us. In Norway, we taught three summers in a row, the first time in a resort outside Bergen and then in the Lofoten Islands, north of the Arctic Circle, once home to major cod fisheries. On the one afternoon we had free there, we were fortunate that the sun appeared. In the third year, when we taught in a town close to the Swedish border, the

site of the world’s oldest copper mine, none of us remembers seeing the sun at all.

The workshops outside the United States allowed Frank to do what he continues to do best — get people to consider whether including mediation in their legal scheme made sense, not to follow some rote pattern dictated elsewhere. With the Australian federal judge who described sitting outside with aboriginals to discuss land claims and with the Norwegian judges who were mediating in their courthouses, Frank’s overriding goal was to prompt people to think critically about what they were proposing.

When the Program of Instruction for Lawyers wound down, both the mediation and the growing number of negotiation courses migrated to the Program on Negotiation. Through the auspices of the Harvard Negotiation Institute, the course continued twice a year through June 2012. Sadly, this year Frank decided to take

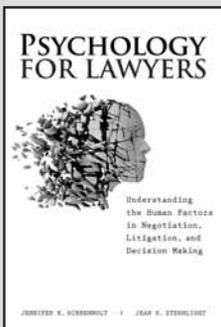
a well-deserved retirement from all teaching.

What does this teaching leave behind? Every year, when we attend the ABA Section of Dispute Resolution’s

Frank’s quick wit and dry humor also kept us from getting too pedantic; we sometimes sounded more like the Marx brothers than a Harvard Law School teaching team.

annual meeting, we are overwhelmed to see former students and hear them say that the course Frank initiated at Harvard changed their lives. Perhaps even more important, Frank planted seeds that have germinated throughout our legal culture and in many countries of the world. In recent years, fewer than half the participants in the mediation workshop have come from the United States, and many former students are working hard to introduce mediation into different, not always receptive, legal cultures. In doing so, they take their inspiration from Frank. ♦

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those aspects of psychology that will be most useful to practicing attorneys, including issues such as perception, memory, judgment, decision making, emotion, influence, communication, and the psychology of justice. The second part applies the insights of research to tasks that lawyers face on a regular basis, including interviewing, negotiating, counseling, and conducting discovery. In addition, the book offers practical suggestions for improving your practice—suggestions that are grounded in the science of psychology. In short, by learning more about psychology and how to apply it, lawyers will be more effective, more successful, more ethical, and even happier.

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# Sander Family Dispute Resolution

By Alison Sander, Tom Sander and Ernie Sander



*Emily, Alison, Frank, and Ernie Sander*

In the spirit of “success has a thousand fathers,” the multi-door courthouse might never have happened if Frank Sander hadn’t presided over a family that required him to mediate TV time battles, use of the family car and curfews.

The story Dad usually tells is that he got bitten by the dispute-resolution bug during a sabbatical in Sweden in 1975. But we think that transformation actually occurred much earlier, right in our family home. Amid door-slamming, name-calling and silent treatments — that’s where he learned that litigation often wasn’t the best answer to domestic strife.

Our mother, Emily, of course, also had a profound influence on Dad’s career choice. She brought to the

marriage a lifelong Quaker affiliation, several decades working as a social worker and an innate ability to melt any family tension with tender loving care. Emily is certainly another reason our father ultimately found his *métier* in mediation and alternative dispute resolution after earlier forays in tax and accounting.

As a budding mediator, Dad was often just as interested in exploring our positions as he was in issuing final rulings. We all vividly remember the family’s first European trip. By the time we rolled into London, we’d been traveling for two months, and we (the kids) had tired of visits to see priceless objets d’art and “exquisitely” furnished stately homes. So the kids were finally given a voice. The result? We spent half of our first day in London in

a hotel room debating all the options. It was the only way to ensure a democratic decision.

Some kids grow up hearing their dads talk about ERAs or PTAs. For us, it was ADR — and “a forum to fit the fuss,” “BATNA” and “high-low arbitration.” For one of our dad’s birthdays, we ordered him a monogrammed dress shirt with the letters “ADR” on the breast pocket — or so we thought. When he opened the package and found a shirt monogrammed “ADL,” he looked understandably befuddled. It took a few more years for ADR to become recognized enough in the world to justify its own T-shirt.

Another Sander family ADR story: In 1975, our family was at the Salzburg Seminar for a four-week

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course on American law. Chief Justice Warren Burger gave a pre-lunch talk, and for some reason, Tom, Frank's oldest son, who was then 14, decided to attend. Much of the talk was over Tom's head. At lunch, Tom happened to be seated with our father at the head table, which also included Chief Justice Burger.

During the lunch, Burger, who remembered Tom as the only kid at his speech, leaned over and asked Tom, "How'd you like my talk?" The only thing that Tom could think to say was, "I claim the Fifth Amendment." Thankfully, Tom's sassy retort didn't derail our father from getting invited by Burger to deliver the leading talk on dispute resolution at the now-famous Pound Conference the following April that played a significant role in future discussions about ADR. By the way, our dad never expected the talk to catch a wave, as it did, and he credits the ABA and former Attorney General Griffin Bell with helping drive interest in the subject of his talk.

But it wasn't all about dispute resolution for our dad. He has other passions. Like food. We knew other dads who couldn't tell a blender from a Cuisinart, but ours wasn't one of them. We grew up to the smells of freshly baked potato bread and popovers, two of our father's culinary specialties.

And we learned at an early age that it's perfectly normal to go to extreme lengths — even to take some risks — to get a great meal. We remember one time on a German train that was making a scheduled stop around noon. As our family waited anxiously in our train compartment, with five minutes until the train was to depart, Dad set off to scout the entire train station for the most interesting food for lunch.

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Emily and Frank Sander

As the train's whistle blew and doors closed, we began to panic — Dad had all our tickets, currency and passports. A minute later, he came loping in from an adjacent train car he had just barely managed to board, juggling Himbeersaft drinks, Landjaeger jerky and three kinds of sausages.

Though you won't find it on Amazon, our father has long kept a restaurant guide to Boston ("Sander's Guide to Good Eats") that was something of a hot property among colleagues and new students at Harvard Law School. The guide, with notes scribbled in the margins containing the latest intelligence on whatever new restaurants Frank had recently tried, has been through multiple printings.

The three of us tagged along for many of these outings and ate lots of great meals as a result. When we were in high school, Dad would grill our dates not on politics or their career plans but on each course they had just consumed and how the restaurant they selected should be rated.

In another instance of Dad mixing food with work, in the '90s, he discovered a bakery on the South Side of Chicago that made Baltic bread. He quickly became the bakery's distribution arm at Harvard Law School, handing out loaves every month to a handful of professors and other staff who shared his love for the grainy dark bread. If an order went awry, Dad would send his daughter, Alison,



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Some people have quipped that Harvard Law School is the only place where everyone — faculty and students, no matter how talented — feel that they don't quite measure up or belong. Our father, with his sensitivity to the experience of being an outsider, helped warm the ambiance.

then a student at the University of Chicago, to follow up in person.

Music is also a big part of our dad's life. For years, Dad played the flute in music trios and quartets with friends and colleagues, and he frequently went to classical concerts. We all remember coming down to his study at home and seeing him reading a scholarly paper or balancing the checkbook with his head transcendently bobbing to the strains of Mozart, Handel or Bach.

He was an analog version of Shazam well before Apple began selling the digital app. He had probably 300 albums of classical music, and if we put on any one of them, he would be able to identify the composer, piece of music, key and opus number in about 10 seconds. Once he was visiting a friend at Columbia Law School who had just moved to a new office. He asked the friend for the new office number, and the answer came back "375." To which our dad replied: "Ah, that's easy to remember — that's the Köchel number of Mozart's Serenade for 8 Woodwinds." The friend was speechless.

Tom remembers playing harpsichord several rooms away from our dad's home study, thinking he was in his own world, only to hear a booming voice emanating from the study chiding him — "B FLAT!" (Dad would issue these instructions from memory, never with sheet music in front of him.)

Despite being someone who spent most of his adult life in rarefied worlds like Harvard, the Supreme Court and Hill & Barlow, Dad was always interested in people from all walks of life. On one plane trip, he wandered to the back of the plane and spent 30 minutes talking with one of the flight attendants about the attendant's grueling travel schedule.

A similar scene has played out with mailroom workers, hotel desk clerks and restaurant waitresses. One time

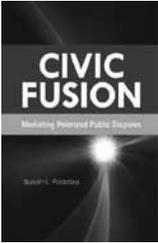
in Italy, thanks to the rudimentary Italian that Dad had learned just for the trip, a garage attendant invited us to his home for lunch while our car was being repaired.

Perhaps from Dad's experience having to flee Germany as a preteen, he has long had a deep appreciation for the challenges of being thrust into new settings with new people. He was especially effective at helping Harvard Law school visitors, new students, executive education students and new faculty feel welcome. Some people have quipped that Harvard Law School is the only place where everyone — faculty and students, no matter how talented — feel that they don't quite measure up or belong. Our father, with his sensitivity to the experience of being an outsider, helped warm the ambiance.

And that's not the only way he tries to walk in other people's shoes. He's famous for the level of detail he offers in his directions, always trying to warn the recipient about ambiguity and potential wrong turns. If he's giving directions to his current home at Newbury Court in Concord, he's apt to say something like: "Take a left-hand turn at Route 2 onto Old Road to 9 Acre Corner, and then you'll see three left turns. Don't go down the first left turn or the second, even though it says Newbury Court on the second. Wait until the third, and turn into the parking lot."

We are proud that Dad contributed so much to such an important field and that he was also present as a father and loving spouse — that he still found time to help us with math homework, clip newspaper articles for us, write us so many postcards, and, of course, track the best cuisines in the greater Harvard Square area.

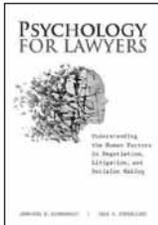
So behind the multi-door courthouse is a multi-faceted dad. The ADR community has greatly enriched our father's life, and we are thrilled to have been asked to contribute this piece. ♦



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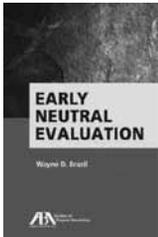
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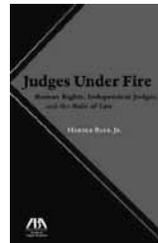
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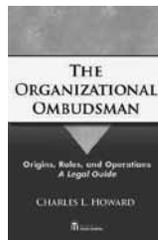
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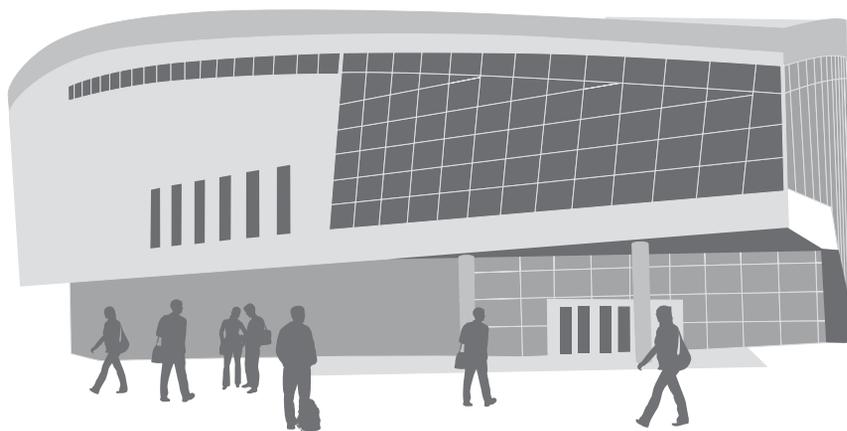
# Mediation Narrative: Dimensions of Understanding

By Eric B. Galton

“Toilet stalls! If I hear any more discussion about toilet stall dimensions, I will just shut the college down,” the university president snapped at me, the mediator whom the federal judge had foisted on him.

“Did you come all the way from liberal Austin to discuss toilet stall dimensions?” he barked, his eyes like lasers piercing holes through my head.

In a way, I could feel for the university president. The federal judge had not only ordered mediation and appointed the mediator but had issued an order specifying that mediation take place for five days, from December 18 to December 23, and requiring the university president, the university comptroller, the university architect, the university engineer, and all 175 students with disabilities who had sued the university to attend the entire mediation. No one would be released from the obligation until the matter settled or the mediator declared an impasse.



## Another Time, Another Place

I flashed back to my release from the hospital for the second time in five weeks. My otherwise perfect hip replacement had developed a complication — an incision infection that fortunately had been caught before it had migrated into my new appliance. Antibiotics had been pumped into my veins, and the surgical “clean-out” had worked. But I still couldn’t put any weight on my leg, my energy was spent and my recovery was set back four weeks. I was using a walker again, and I was back in my “sick chair.”

This was actually a lovely, cushioned chair. It was propped up against the couch so that when I got up, it wouldn’t move, potentially causing me to damage my new appliance. My “grabber,” a cane with a claw at the

tip, rested in the chair’s side cushion in case I dropped something — which I did all the time. I was still under “hip restrictions” and couldn’t bend down. The remote was under the other cushion. I was not fond of television before my surgery; I really hated it after. The month was May, with the election still six months off. The shrieking faces on cable news already seemed worse

than any horror movie I had ever seen.

I sat alone. My family would be away for four more days. Did I want to get up and use my walker to go into the kitchen? Did I want to go to the bathroom and use my elevated toilet seat? These became the

all-consuming questions of a man who in a much prior life had been an athlete. I decided I was not terribly hungry and I could hold out on the bathroom for another hour. I adopted a mediator’s default position: immobility. Worse, I thought the problem was only in my leg, but it was in my head and heart as well.

## Coffee Talk Mediation

The university case reminded me of a national class action mediation involving a Fortune 500 company. The topic under discussion was the elevation and dimensions of ramps.

The excellent lawyers brought their engineers to the mediation sessions, and the mornings were always devoted to the specifics of vectors, angles, placement of the ramps, and aisle widths and barriers inside the company’s stores. The engineers on both sides were good problem solvers by nature. But the conversations were granular, specific and unbelievably dull. We drank excessive amounts of coffee during those morning sessions, causing me later to dub this the “coffee talk” mediation.

I stayed with the conversation only because the big picture was so important and both sides were absolutely committed to a fair resolution. But I could understand the university president's perspective: would three inches in aisle width really make that much difference?

On this topic, I had gained some insight of my own. Four weeks before my hip replacement surgery, I had flown to Washington, D.C., to accept the presidency of the International Academy of Mediators. I was walking with a cane, and every step hurt. I had been walking with a profound limp for months, torturing my quads and hip flexors.

My plane landed at the end of the terminal, far from the baggage claim area. I could see no carts. I thought about how many steps I would have to maneuver and how long it would take. Suddenly, distance — no matter how small — really mattered. Somehow, I made it to the baggage claim, got outside, and headed to the cab stand. On the way, however, I encountered a barrier that was just a few inches too high for me to step over. I didn't know what to do. The place was crowded with people, and I had suddenly become an annoyance - an obstruction. I saw a man in a suit grimace as he navigated around me in a hurry. The real world moves in fast-forward. This was no place for the slow.

An airport policeman assisted me; I was creating a problem. I had already sweated through my shirt. Really, it was not that hot in Washington yet.

Those months of "temporary disability" taught me many things. Among them: a few inches really do make a difference.

### A Little Experiment

The university president taught physics, and it occurred to me that maybe I could transform his anger with a little experiment. The idea was risky, especially since the mediation had just begun, and we had not yet developed a relationship or any measure of trust. However, I sized him up as a direct, honest, brilliant man who was simply frustrated by the situation. He didn't normally bark and was thoughtful, according to two students in the other room. He didn't, understandably, want to spend five days of his winter holiday at the university. He also had not liked the story about the case in the newspaper the day before, which had made him out to be uncaring and thoughtless. And, bless his heart, he would not move on any other topic until I answered his question about toilet stalls.

I am not a mediator who thoughtlessly takes unnecessary risks, but I also believe that when certain moments present themselves, one must respond with courage,

The university president taught physics, and it occurred to me that maybe I could transform his anger with a little experiment.

conviction, and a silent prayer; "*Dear Lord: Please don't let this be wrong.*"

So instead of answering the president's question, I looked directly at him and posed one of my own: "I know we only just met, but can I ask you a delicate, personal question?"

"You can ask me whatever you want," he said in a low-throated voice.

"*Deep breath, Eric. Just ask the question,*" I told myself.

"Do you like to shut the bathroom door when you take a crap?"

"You came all the way from Austin, Mr. Galton, to ask me that question! Of course I close the door! What difference does that make!" he shouted.

"Well, Mr. President, I was hoping that might be your answer," I replied. "I hope you don't mind engaging in a little experiment."

### On the Road to Recovery

After my hip replacement surgery, I lived for physical therapy despite the torture. Every painful stretch, every small step, every bit of progress was going to return me to the land of the living.

I threw out all my hospital clothes. I put the sick chair in the corner. I put my walker in the garage, and I went back to using the cane. I could put 50 percent of my body weight on my leg. Even better, I was back at work, doing what I love, which is mediating.

Despite my progress, getting ready for work was still an adventure: I had to shower in a seated position. I could dress myself but still couldn't get my socks on. I drove to work sockless.

I had a "handicapped" placard for my car that would be good all the way through the end of November, practically the end of football season. I used to think that there were too many handicapped parking spaces, but I quickly found out that wasn't the case. Some stores and malls just don't have enough. I still had to think ahead about where I would park and how far I would have to walk.

Stairs were deadly. The nine stairs from the parking lot to my mediation center were about as many as I could manage. My office itself presented other challenges: the toilet was too low, so I had to remember to use my bathroom at home just before leaving. The office lock was at the bottom of the door, out of my reach, so I always let



**Eric Galton** is a founder of the Lakeside Mediation Center in Austin, Texas. He is president of the International Academy of Mediators and his recent book with Lela Love, *Stories Mediators Tell*, was published by the ABA. He can be reached at [eric@lakesidemediation.com](mailto:eric@lakesidemediation.com).

out a relieved breath when I saw the lights on and knew my assistant had opened the building.

In the first mediation after my surgery, the lawyers didn't know I had had a hip replacement. They saw my cane and my slow walk, which triggered the inevitable "What happened to you?" I answered that I was all right, and we started the mediation.

I had never been happier to be out of my sick chair and in my mediator's chair. During the general session, I almost forgot I was still somewhat disabled.

But I was slow getting out of my chair; and even though the office was ADA compliant. I couldn't handle the doors easily. I used to march in and out of rooms. I couldn't do that anymore.

Somehow I felt I was a better, more complete mediator. I can't quite figure it out. With the help of the mediation gods, all four of my cases that week settled. I was becoming me again.

### **A Very Tight Fit**

"Experiment?" the university president asked.

"I've arranged for one of the students to loan you his motorized wheelchair. The experiment is quite simple. You get in the chair. You go to the men's room down the hall. You get into one of the toilet stalls. You shut the door. We stop talking about toilet stalls. Simple, actually," I responded.

Regrettably, the scene that followed predated cell phones with cameras. The president, settled into the wheelchair, proceeded down the hall, with students, lawyers, and engineers in tow. He navigated the hallway easily but took five minutes to figure out how to enter the restroom. He found an empty stall and managed with some difficulty to turn his chair around, but then he bumped into one side of the stall.

"Tight fit," he said, "but I'll get it next time."

Six attempts later, the university president backed the chair into the stall. But despite many valiant attempts and different methods, he could not close the stall door.

He sat in the chair and put his head down. Then he raised his head, smiling.

"We've got to fix these toilet stalls!" he said. "I'm sorry I didn't get it before. What else do we have to fix?"

Suddenly, doorknobs and entry-level door pressure were important. A brilliant English major advised the university president that his motorized wheelchair could not climb the hill to the English department. The university president learned that although there were seats at the football stadium for students with disabilities, the students felt isolated because there was no seating nearby for their able-bodied friends. Once the situation became clear, the university president became the scientist and empathetic human being that

he was. Subject to budgetary restrictions and engineering feasibility, he wanted to fix everything. The absence of access, he realized, was bad for the university and did not reflect its core principles or values. Two days later, a 40-page mediation agreement memorialized all the physical changes, a new understanding and new lines of communication between the administration and its students with disabilities.

### **Reflections**

"In another four weeks, you won't need your cane. You are making great progress, Eric," said Patty, my physical therapist.

"I hope so," I responded, holding back my emotions.

I had been down on myself. My situation, unlike those of so many I have met and served, had always been temporary. In all, I was and would be "disabled" for only six months. Just half a year. What business did I have falling into such a bad state when there were people who would wake up every day of their lives knowing they must manage and navigate a world that does not fully appreciate the challenges they face?

In my advanced trainings, I often tell mediators they should never tell someone who has experienced a misfortune that they know how that person feels — unless they have actually been there.

I realized that I haven't been there. I merely visited, and I spent all my time looking for a way out. At least I had a way out.

So has this experience made me a better mediator? I think it has. I always felt that I was empathetic and could see the issues in dispute from different perspectives. But life and experience are, in the end, the greatest teachers.

We live in a fast and impatient world. In some venues around the United States, lawyers encourage mediators to skip the general session. The rationale is that everyone knows the case, so what could they possibly have to talk about?

Everything, really, would be my answer. The painful gridlock we feel in society today is a byproduct of our inability to patiently communicate and empathize. Large problems need a process that encourages and allows people to walk in each other's skins. Happily, if encouraged and in a safe place, humans have the ability to do this. Such a process is the opposite of touchy-feely; it involves courage, conviction and openness.

As for me, I will not be using my handicapped parking placard during football season, despite the legendary parking problems at Austin's Royal Memorial Stadium. Someone who truly needs that space should use it. There are never enough spaces. Distance and barriers do matter.

The long walk to the stadium will remind me of what I have left behind. But I will never forget what I have learned along the way. ♦



# New Beginnings in Commercial Mediations: The Advantages of Caucusing Before the Joint Session

By Michael Geigerman

**M**ediation professionals have long debated whether mediators should caucus or use joint sessions. Those advocating joint session emphasize the importance of enhanced understanding and relationships, while those favoring a caucus model emphasize case management. Of course, many mediators use a combination of joint sessions and caucuses. This article, however, proposes a third approach: the Caucus First Model (CFM). Specifically, the author suggests that when one or more parties are known to lack mediation experience, the mediator should begin commercial mediation sessions by caucusing with the parties.

The vast majority of plaintiffs in insurance-driven tort-based claims, as well as many participants in business and contract disputes, have not had experience with mediation. Depending on what is presented in the initial caucus, the mediator can decide whether and how to continue with a joint session and/or a combination of the joint session and caucuses. This party-directed intervention gives the mediator an opportunity to assess the intrapersonal dynamics that are likely to influence each side's perception of the dispute and ability to move toward resolution. The CFM also provides parties who

are inexperienced with mediation the opportunity to assess the trustworthiness and competence of the mediator. Ultimately, the CFM can help the mediator and parties take the path to resolution that is most effective and efficient.

## Differing Views about Caucusing

Mediator David Hoffman is an advocate of the flexible use of caucus. He describes its pragmatism and efficiency while also identifying how many of the goals of the joint-session model may be achieved through caucusing.<sup>1</sup> Hoffman suggests that the choice between favoring caucusing or joint sessions hinges on whether a continuing relationship is expected. In most tort cases and many



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contract disputes, the only continuing relationship will be between opposing counsel.

Gary Friedman and Jack Himmelstein view the joint session as the only viable option to promote “understanding” and avoid mediator misconduct.<sup>2</sup> In their view, direct communication in the joint session avoids distortion of the flow of information and enhances dialogue between the parties.

Nevertheless, there is a perceived decline in the use of the joint session. The American Bar Association’s Section of Dispute Resolution Task Force on Improving Mediation Quality (ABA Task Force) commented on the popularity of the opening session as follows:

Only about two-thirds of lawyer participants in our survey agreed that opening statements are useful in all, almost all or most cases; a substantial minority thought they were effective in half or fewer cases.

In focus groups with attorneys, the ABA Task Force reported that in high-conflict cases with “angry” clients, “explosive opening statements can generate more hostility, and grind the opposing parties more firmly into their opposing views, thus impeding settlement.”<sup>3</sup>

Citing an unpublished survey, Hoffman indicated that the vast majority of experienced commercial mediators used a caucus model almost exclusively, a finding that has been confirmed to this writer at mediation conferences. Geoff Sharp reports the loss of joint session practice in Los Angeles, and advocates from around the country have told me they prefer to use the joint session only as a “meet and greet” opportunity.

Experienced mediators are retreating from the joint session even if they have been trained in a model of mediation that begins with joint session (which I will refer to as the Joint Session First Model, or JSFM.) The decline in the use of the JSFM and the joint session generally is not surprising, occurring at least in part because counsel and mediators have seen too many first-time clients suffer from the forced use of the JSFM. A plaintiff who has brought a discrimination case against his former employer, for example, may not want to be in the same room with that boss and/or the attorney who

recently deposed the plaintiff. Efficiency and bad experiences have trumped the use of the joint session.

Still, the joint session can be an integral part of the commercial mediation process. Tracy Allen and Eric Galton have identified numerous advantages: For the parties, these include direct communication, the opportunity for apology and forgiveness and a chance to learn new information. For counsel, among the benefits are experiencing direct, unfettered communication, demonstrating preparedness, testing theories and reacting to arguments. For the mediator, the rewards include being able to see firsthand how parties and counsel interact.<sup>4</sup>

If problems visited upon the novice in a joint session can be minimized through proper preparation in the CFM, mediators and advocates will more likely use the joint session later in the mediation process. Participants, advocates and mediators will then enjoy the best of both worlds. The CFM may actually reverse the decline of the joint session by increasing its effectiveness.

### Research Supports Pre-Mediation Consultation

Effective communication is an essential component of self-determination, understanding and settlement, and if disputants are too worried about the mediation process to

absorb relevant facts or become unwilling to communicate their interests, needs and wants, self-determination will be hindered. Research supports the use of caucusing to identify issues, solve problems and reduce the possibility of adverse selection.

Studies have shown, for example, that caucusing first improves the quality of settlement and

reduces conflict in employment mediations. Emily Calhoun recommends the “first-phase private caucus” in employment discrimination disputes for the specific purpose of “cultivating the group presence.”<sup>5</sup> She identifies coaching, providing technical assistance, agenda-setting, sparking creativity and educating parties as additional benefits. Calhoun asserts that private caucuses before the joint session in the area of discrimination disputes prepare a disputant to participate in the mediation more thoroughly as an informed bargainer and effective problem solver.

Based on a field study of 540 employment disputes, Roderick Swaab concluded that mediators who use the caucus prior to the opening session to affirm parties’

In focus groups with attorneys, the ABA Task Force reported that in high-conflict cases with “angry” clients, “explosive opening statements can generate more hostility, and grind the opposing parties more firmly into their opposing views, thus impeding settlement.”

public image and status (or “face”) by establishing trust – but not to resolve the dispute by having a substantive discussion – reduce conflict and improve the quality of settlement.<sup>6</sup>

Swaab and Calhoun limited their analyses to employment disputes, and the role of counsel was not identified. Gregorio Billikopf has applied it to “interpersonal organizational conflict while conducting transformative mediations.”<sup>7</sup> This author acknowledges these insights and proposes expanding the concept of CFM to commercial mediations.

### **Pre-Mediation Consultation Is Often Not Realistic**

We know from these studies that pre-mediation preparation and individual meetings with the parties enhance the mediation. Prior to the date set for the mediation session, mediators may try to meet with the participants to discuss the process, procedures and expectations. The ABA Task Force supports early intervention, concluding that pre-mediation discussions are not only useful but that many users want them to discuss process issues:

such as whether opening statements would be useful in a particular case, or about which issues in the case would best be handled in joint sessions and which in caucuses.<sup>8</sup>

Unfortunately, pre-mediation consultation is not always practical, economical or possible. The pre-mediation in-person consultation does not occur in the typical one-day mediation, as it will often exceed the cost and time commitment that the parties are willing to dedicate to the process. In our fast-moving society, a phone call between counsel and the mediator also often replaces the pre-mediation consultation, so preparing the inexperienced party then is impossible. When it does occur as a face-to-face meeting, the client seldom attends. While pre-mediation briefs are helpful, in those briefs counsel is unlikely to address fundamental problems that his or her own side may have with the client or the case.

### **CFM to the Rescue**

In most commercial mediation cases, parties do not have the economic resources and time available for an in-depth pre-mediation consultation. The attorneys may not take the time to prepare the case and their clients for mediation, and so the mediator is often the one who has to get the client ready. These are the types of cases for which I recommend the Caucus First Model, which can provide the “boots on the ground” necessary for comprehending what issues are really in play. Ultimately, the CFM meets the ABA Task Force recommendation by giving the mediator the “appropriate” amount of influence necessary to set the content and tone of the opening statements so as to maximize their productivity.

In the CFM, the mediator first meets with each mediation group in caucus to discuss in-depth the process and procedures that will be followed as well as practical issues that may arise.<sup>9</sup> When dealing with an inexperienced participant, the focus should not be centered on the substantive areas of dispute but on developing a trusting relationship. Following the mediator’s initial caucus with each side, unless he or she has determined that a joint session would be ill-advised, the mediator will bring the attendees together in a joint session to present their respective views.

With the other side absent from the initial discussion, each party is much more likely to engage the mediator in discussion. An interactive discussion covering the same points customarily used in the JSFM is entirely appropriate.

The mediator should provide a detailed roadmap of the joint session and beyond and describe the types of opening statements that may occur in the joint session. This will include the many different styles on the continuum from aggressive to collaborative. Parties, especially inexperienced ones, need to understand that there may be more than one intended audience in joint sessions and that statements made in these sessions may be messages intended for internal consumption by the other side. Previewing issues in the CFM reduces the likelihood that a difficult opening may cause problems.

One practical issue the mediator may want to address in the initial caucus is the recognition that an injured party may find numbers hurtful or offensive. Parties may also appreciate knowing how they may signal their desire to keep information confidential from the other side and that they may keep sensitive information from the mediator.

Venting is a critical part of the negotiation process. Theoretically, once feelings are vented and “out of the way,” parties will engage in more rational exchanges and ultimately reach settlement. In many cases, it is more advantageous to vent feelings to a neutral. The CFM provides the proper timing and setting for parties to air their feelings within the initial caucus and avoid the potentially destructive consequences of venting during joint session.

Party participation in joint sessions varies. In some settings, parties seldom speak in joint sessions unless the party is exceptionally articulate or knowledgeable or can make a compelling presentation. Giving participants an opportunity to be heard at the onset, in caucus, provides validation and avoids the negatives caused by difficult opening session conversation. The CFM reduces the risk that the party participant will be reluctant to further participate if the joint session has harsh overtones. In the CFM, there is less pressure on the inexperienced party to remain silent.

## Face Theory and the CFM

The underpinnings of CFM may be found in “face theory.” The concept of face has been defined as “the positive social value a person effectively claims for himself by his or her self-presentation,” which includes, inter alia, a person’s public image, reputation, and status in a social interaction. According to Erving Goffman’s version of face theory, managing face is an underlying subtext in most social actions.<sup>10</sup>

Goffman’s conclusions tie “face” to the English folk term, which associates face with the notions of being embarrassed or humiliated, or “losing face.” In mediation, both sides can be victims of “facial attacks.” The respondent is a victim who is alleged to have failed to comply with a societal obligation, and the petitioner is a victim because rejection of the claim by the respondent is seen as denial of the right to restitution. Swaab proposes that “face time” should come from the mediator and that doing so enhances the opportunities for settlement.

When the mediator is able to caucus with the parties before they come together, Swaab has found, the parties will receive positive face time immediately rather than having it delayed or injured by a damaging opening session.

The significance of the intersection of the CFM with face theory is that it puts face first. Scholars have found that an empathetic, trusting relationship between the mediator and the parties may be the most important factor in creating the ideal environment for settlement.<sup>11</sup> The CFM allows the mediator to accelerate development of that trust.

## Benefits of the CFM

The CFM has the greatest beneficial influence on the first-time client but also positively impacts the roles of all participants.

*The CFM and the first-time client:* The most needful individuals in tort-based mediations (such as medical malpractice and personal injury) are invariably the anxious and unsure first-time clients. They arrive with nothing to compare the mediation with except perhaps a TV courtroom drama, a prior distasteful deposition experience, a divorce court fiasco or an aggravating experience in traffic court. Business owners may enter the dispute worrying about the viability of their company.

The first-time plaintiff client is consistently outnumbered by legal and insurance professionals. When insurance coverage is involved, the defendant seldom attends, since the insurance company representative often is the defendant’s placeholder. In the CFM, the novice is brought into the process in a safe place, not just brought into a conversation where a safe place is mentioned. Placing the only non-professional in this

difficult situation without prior explanation can be unfair, unnecessary and destructive. Beginning the process in a secure environment reduces formality and makes the mediation less intimidating.

*The CFM and other clients:* Experienced participants want to take the temperature of the other room and make sure they can effectively communicate their position. The CFM provides the opportunity to explore the appropriate methodology to share information.

*The CFM and counsel:* Throughout the CFM, counsel can take the measure of the mediator, observing his or her interpersonal skills and assessing how best to work with the facilitator. After listening to the mediator and client in the CFM, the attorney is more likely to fully appreciate and address the client’s objectives in the joint session.

The CFM also helps counsel use time wisely. Information can be gathered while the mediator attends to the other participants before the first joint session. Assuming that the CFM and the joint session take place on the same day, this work includes securing missing information, identifying legal authorities, framing an apology, securing structured settlement, researching other pertinent data, contacting a lien holder or further preparing the novice client for the joint session.

*The CFM and the mediator:* The CFM allows the mediator to conduct an early assessment of the direction the parties are headed. Whether a participant is nervous, fearful or facing reputation concerns, has experienced a loss of trust, or needs an apology, these issues may be placed at the beginning of the queue. Queuing is strategically important for the mediator. The earlier the mediator learns what is driving or impeding the process, the sooner he or she can recalibrate the mediation to accommodate those needs.

The CFM also allows the mediator to determine whether a joint session is appropriate, a determination that can be made before any damage from a joint session occurs. Likewise, the mediator can determine early on if the principals or attorneys should convene alone or with the mediator.

## Risks Associated with the CFM

The mediator should advise the parties about the use of the CFM in the engagement letter, especially when initiating use of this methodology. Further, the mediator must be mindful of the time spent with each side in the initial caucus, pausing to advise the other side when significant delay occurs in one caucus. In this writer’s experience, when properly managed, the amount of time spent with one side does not impact the parties’ perceptions of the mediator’s neutrality.

## Conclusion

It is illogical to expect an inexperienced participant to communicate effectively with a contesting party, represented by a professional, without some initial bridge-building. The CFM provides the confidential, supportive, respectful and safe environment necessary to foster settlement. Working with the client in the initial caucus will encourage the client to be less defensive, more flexible, and more creative. Caucusing at the outset gives parties an opportunity to tell their story and be heard, explore needs and vent privately. A party who feels heard and comfortable is better able to listen to the other side and connect in a more positive way during the joint session. When the CFM model is used to open the mediation, it increases the success, efficiency and cooperation of the subsequent joint session and the entire process.

For counsel, the CFM provides the opportunity to evaluate the mediator at the outset and reassess the client's needs and objectives. For the mediator, it provides assessment and trust-building at the earliest possible moment. For the process, the words of the German scholar and poet Karl Wilhelm Friedrich Schlegel ring true: "Combine the extremes, and you will have the true center." ♦

## Endnotes

1 David. A Hoffman, *In Practice: Mediation and the Art of Shuttle Diplomacy*, 27 *Negot. J.* 263 (July 2011).

2 GARY FRIEDMAN AND JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2008).

3 ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, *FINAL REPORT 12* (2008).

4 Tracy Allen and Eric Galton, *The Joint Session: What's in It for You*, *Presentation at Ninth Annual Dispute Resolution Conference*, (2007). Accessed at: [http://www.mediate.com/GeoffSharp/docs/ABA\\_Presentation%20%282%29.pdf](http://www.mediate.com/GeoffSharp/docs/ABA_Presentation%20%282%29.pdf).

5 Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 *HARV. NEGOT. L. REV.* 187, 189, 210 (2004).

6 Roderick Swaab, *Face First: Pre-Mediation Caucus and Face in Employment Disputes*, *Presentation at the 22nd Annual International Association of Conflict Management Conference*, Kyoto, Japan, 5 (June 2009).

7 GREGORIO BILLIKOPF, *PARTY-DIRECTED MEDIATION: HELPING OTHERS RESOLVE DIFFERENCES 37-39* (University of California 2009), accessed at <http://www.cnr.berkeley.edu/ucce50/ag-labor/7conflict/PartyDirMediation.pdf>.

8 ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING MEDIATION QUALITY, *supra* note 4 at 7.

9 A framework for the initial discussion may be found at the author's website: <http://usam-midwest.com/images/Articles/NewBeginnings.pdf>.

10 STELLA TING-TOOMEY, *THE CHALLENGE OF FACEWORK: CROSS CULTURAL AND INTERPERSONAL ISSUES* 309 (1994).

11 Steve Goldberg & Margaret Shaw, *Further Investigation into the Secrets of Successful and Unsuccessful Mediators*, 26 *ALT. TO THE HIGH COST OF LIT.* vol. 8 at p. 149 (2008).

# Help Us Learn More about the Practice of Dispute Resolution

Too often someone asks how parties or their counsel select a mediator or arbitrator or what kind of cases our Section members are typically involved in. We all hear anecdotally about the criteria used for selection but we have no objective understanding of what is important. We are also interested in the variety and scope of cases for which our members provide services.

Please take just a few minutes to complete a quick survey that will inform all of us about how mediators and arbitrators are selected and the types of cases being resolved through the many available dispute resolution processes.

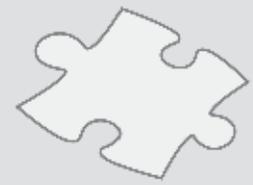
Everyone who completes the survey will have the option to be entered into a drawing for a **free Section of Dispute Resolution spring conference registration.**

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To start the survey, please go to the Section's web site ([www.americanbar.org/dispute](http://www.americanbar.org/dispute)) and click on the "Practice Snapshot Survey."



# Ethical Guidance in Mediation



## *Confidentiality*

By Kimberly Taylor and Roger C. Wolf

**T**he Committee on Mediator Ethical Guidance is frequently asked to address concerns relating to confidentiality in mediation. Consider *SODR 2007-1*, one of the first inquiries the Committee received about confidentiality in mediation: In the course of litigation, an attorney receives a set of interrogatories directed to his client, a party, calling for all information about a certain subject known to the client and its employees and agents, including its attorneys. A law firm partner of the attorney is a mediator who recently mediated a case involving persons not involved in the described litigation. During the course of that mediation, the attorney-mediator received information that would be responsive to the interrogatories. Must the attorney-mediator disclose the information acquired during the mediation that would be responsive to the interrogatories?

The Committee concluded that absent a separate legal requirement, such as a court order or local law to the contrary, the Model Standards of Conduct for Mediators protected/prevented the mediator from disclosing the information.

Model Standard V(A) provides, “A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.” The mediator’s duty is straightforward. Since neither of the exceptions — party consent or a requirement of law — applies, the mediator must maintain confidentiality.

In two related inquiries, *SODR 2008-1* and *SODR 2008-2*, the Committee considered whether an attorney-mediator has an obligation to advise parties at the outset of a mediation that he or she might subsequently be required to disclose confidential mediation communications. The Committee was asked to consider this in the following hypothetical: After the termination of a mediation, the attorney-mediator in that matter later represents a client who is the subject of interrogatories that call for the disclosure of facts about which the attorney-mediator has knowledge based on his or her

service as mediator in the prior matter. Here, the Committee determined that an attorney-mediator does not have an ethical obligation to disclose to parties who are about to participate in a mediation that there is a risk that some time in the future the attorney-mediator may not be entitled to maintain the confidentiality of the statements made in mediation by the participants, unless the mediator can reasonably anticipate the scenario set forth in the hypothetical. The attorney-mediator should, however, be mindful of potential conflicts of interest arising from the subject of the mediation.

The Model Standards, unlike some state codes of ethics, do not create an affirmative duty to describe for parties in a mediation any specific exceptions to confidentiality. The Standards do, however, provide in Standard V(C) that, “A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.” This standard suggests that the mediator has an obligation to consider with the parties their expectations with regard to the scope of confidentiality and any exceptions to confidentiality they may agree are appropriate in that particular case. Standard V(D) confirms this mediator responsibility, noting that, “Depending on the circumstances of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.”

Thus, while the attorney-mediator in the scenario presented has no explicit ethical obligation under the Model Standards to disclose the particular risk described in the hypothetical or to discuss every conceivable scenario in which the expectation of confidentiality may be challenged, the mediator and the parties should consider developing at the outset of a mediation their own confidentiality agreement based on the needs and

expectations of the parties and/or on the individual mediator's standards of practice.

While the Committee concluded that the facts presented by the hypothetical were so attenuated that the attorney-mediator had no obligation to disclose, it did discuss two other sections of the Model Standards and their implications in this situation. The Model Standards support party self-determination throughout the mediation process, including mediator selection. As stated in Standard I(A):

"A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection process, design, participation in or withdrawal from the process, and outcomes."

The Standards also explicitly require that the mediator promote the integrity of the process by avoiding conflicts of interest. Standard III requires a mediator to avoid involvement with the subject matter of the dispute if it reasonably raises a question of the mediator's impartiality and also requires the mediator to disclose, as soon as practicable, all actual and potential conflicts of interest. This duty is ongoing such that if a mediator learns of any fact after accepting a mediation that raises a question about a conflict of interest, the mediator must disclose that information and can only proceed with the parties' consent. If the conflict might reasonably be viewed as undermining the integrity of the mediation, the mediator should withdraw regardless of the parties' desire or consent.

The Committee determined that the mediator in the hypothetical situation had a duty to disclose any potential or actual conflicts of interest relating to the subject matter of the mediation that he or she reasonably knew before or became aware of during the mediation. If, for example, the attorney-mediator knew there was possibly a related case in the firm that could potentially lead to the need to respond to interrogatories, this should have been disclosed to the parties. Such disclosure would have allowed the parties to choose another mediator who could avoid the potential future conflict of interest. In a circumstance in which there either was no such case in the office or the attorney-mediator did not know about it, there would be no duty to disclose.

*The ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance provides advisory responses to requests for ethical guidance. The committee includes ADR practitioners, academics and leading ADR ethical experts from the public and private sector. The committee accepts inquiries from ABA members and non-members and may also consider an issue on its own initiative. While it may draw on other sources of authority, such as opinions or other guidance issued by state ethics authorities, its focus is on interpreting the Model Standards of Conduct for Mediators (2005) ("Model Standards") and applying them to the issue presented.*

*For full versions of the opinion referenced in this column, SODR 2007-1, SODR 2008-1, and SODR 2008-2, visit the Section of Dispute Resolution's Ethics Resources, available at [www.ambar.org/disputeresources](http://www.ambar.org/disputeresources).*

Finally, the Committee considered whether the question presented also poses the issue of the application of concurrent standards of professional conduct. The facts of a situation may make an attorney-mediator subject to both a mediator ethics code and to a lawyers' professional code.

In the case presented, the Committee suggested that the attorney-mediator keep in mind relevant legal ethics provisions that may come into play if the attorney-mediator is ultimately confronted with the ethical dilemma posed by the hypothetical. Relevant ethics provisions include analogs of the following ABA Model Rules of Professional Conduct: (1) Rule 1.7 Conflict of Interest: Current Clients; (2) Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third Party Neutral; (3) Rule 1.16 Declining or Terminating Representation; and (4) Rule 2.4 Lawyer Serving as a Third-Party Neutral. ♦



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In *Mastick v. TD Ameritrade, Inc.*, B237475 (Cal. Ct. App. 2nd Dist., Oct. 9, 2012), the California Court of Appeal affirmed the denial of a motion to compel arbitration that was based on California law because the parties specifically chose California law in their agreement. The court held that when a choice-of-law provision chooses California law without also selecting the Federal Arbitration Act, the FAA does not preempt the state law. To read more go to: <http://www.courts.ca.gov/opinions/documents/B237475.PDF>.

In *Phillips v. Sprint PCS*, 209 Cal. App. 4th 758 (Cal. Ct. App. 1st Dist., Sept. 26, 2012), the California Court of Appeal affirmed the trial court's decision to reconsider a past order refusing to enforce an arbitration clause containing a class action waiver based on unconscionability. After a stay in the case and the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, the trial court reconsidered the past order and issued a new order compelling arbitration, recognizing that "*Concepcion* has resulted in a significant clarification of the Federal Arbitration Act—and a major change in California law" and that the FAA preempted the state law. To read more go to: [www.courts.ca.gov/opinions/documents/A134371.DOC](http://www.courts.ca.gov/opinions/documents/A134371.DOC).

In *Goodridge v. KDF Automotive Grp., Inc.*, \_\_ Cal. App. 4th \_\_, 2012 (Cal. Ct. App. 4th Dist., Aug. 24, 2012), the California Court of Appeal affirmed the trial court's decision that an arbitration clause was unconscionable. The Court agreed with the trial court's rejection of the argument that *AT&T Mobility LLC*

*v. Concepcion* eliminates unconscionability as a valid objection to an arbitration agreement. The Court held that *Concepcion* did not eliminate the common law defense of unconscionability with respect to any arbitration clause, but "*Concepcion* reaffirmed that the savings clause preserves generally applicable contract defenses such as unconscionability, so long as those doctrines are not 'applied in a fashion that disfavors arbitration.'" To read more go to: [www.courts.ca.gov/opinions/nonpub/D060269.DOC](http://www.courts.ca.gov/opinions/nonpub/D060269.DOC).

In *Caron v. Mercedes-Benz Financial Services USA, LLC*, \_\_ Cal.App.4th\_\_ (Cal. Ct. App. 1st Dist., July 30, 2012), the California Court of Appeal held that the FAA preempts the Consumer Legal Remedies Act (CLRA) prohibition on class action waivers. The Court reasoned that "[n]o meaningful difference exists between the CLRA's class action prohibition and the *Discover Bank* rule [which was preempted by the FAA under *AT&T Mobility LLC v. Concepcion*]. Both are state law rules that prevent enforcement of an arbitration agreement according to its terms." Citing *Concepcion*, the Court held the FAA preempts any state law that "stands as an obstacle" to the FAA's purpose of enforcing arbitration agreements according to their terms. To read more go to: [www.courts.ca.gov/opinions/documents/G044550.DOC](http://www.courts.ca.gov/opinions/documents/G044550.DOC).

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## The Section of Dispute Resolution Welcomes the Chairs of Standing Committees and Task Forces

### Standing Committee on Publications

G. Daniel Bowling, San Francisco, CA

### Dispute Resolution Magazine Editorial Board

Joseph B. Stulberg, Columbus, OH

Nancy A. Welsh, Carlisle, PA

### Diversity Committee

Deborah Masucci, New York, NY

### Standing Committee on Membership

Margaret "Marnie" Huff, Nashville, TN

Serena Lee, Seattle, WA (Vice-Chair)

### Standing Committee on Mediator Ethical Guidance

Kim Taylor, New York, NY

Roger C. Wolf, Baltimore, MD

### Long Range Planning Committee

Bruce E. Meyerson, Phoenix, AZ

Lawrence R. Mills, Seattle, WA (Vice-Chair)

### Task Force on Women in Dispute Resolution

Ruth V. Glick, Burlingame, CA

### Omnibuds Task Force

Bennett Feigenbaum, Morristown, NJ

Peter Scarpato, Yardley, PA

### Task Force on Civility and Civil Discourse

Bruce Meyerson, Phoenix, AZ

# Section News

## Final Report Published by the Section Task Force on Mediator Credentialing

In October 2011, the Section Council appointed a Task Force to recommend whether the Section should adopt a policy on mediator credentialing. The Task Force concluded that the Section should not support creating a single nationwide credentialing system because there is a lack of consensus at this time about the attributes of the mediation process or a process for determining competency. However, the Task Force recommended that the Section should support local initiatives and innovations in mediator credentialing provided they meet six guidelines for what an effective credentialing program should include:

1. Clearly define the skills, knowledge and values that credentialed persons must possess.
2. Ensure candidates have training adequate to install those skills, knowledge and values.
3. Be administered by an organization distinct from the organization that trains the candidate.
4. Have an assessment process capable of consistently determining whether candidates possess the defined skills, knowledge and values.
5. Explain clearly to persons likely to rely on its credential what is being certified.
6. Provide an accessible, transparent system to handle complaints against credentialed mediators, including de-credentialing mediators who fail to comply with the standards.

The Task Force expressed that the Section should not support credentialing systems that operate as mandatory licensing programs, programs that bar non-lawyers from becoming credentialed, or programs that bar disputants from selecting a non-credentialed mediator.

For a copy of the full Final Report, please go to [www.americanbar.org/dispute](http://www.americanbar.org/dispute).

## Upcoming Section Events

### Teleconference: *Fallout from Concepcion*

December 11, 2012

### 2013 ABA Midyear Meeting

Dallas, Texas

February 6–12, 2013

### Teleconference: *Point Counterpoint on Mediation Representation*

February 12, 2013

### Teleconference: *Negotiation Ethics Rules 4.1 and 3.3*

March 12, 2013

### 2013 Dispute Resolution Section Spring Conference

April 3–6, 2013

Chicago, IL

### 2013 ABA Annual Meeting

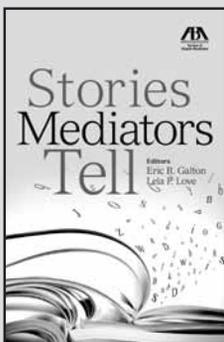
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## Stories Mediators Tell

**Stories Mediators Tell** is a collection of inspirational stories shared by experts in the field who want others to experience the art of mediation. Their stories share advice on how to handle certain situations. The stories were not collected to glorify or to vilify mediation, but to make it accessible to readers generally to share what mediation is about and

how certain situations were handled. The authors are motivated by the particularly given confidentiality strictures, belief that mediation is not well understood—even its practitioners are often limited to their own experience,

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# The Section of Dispute Resolution is pleased to welcome our 2012-2013 Officers and Council Members.

## Section Chair, John R. Phillips

The Section is pleased to welcome John R. Phillips as the 2012-2013 Section Chair. John has been an ABA member since 1980. Over his many years of service with the Section, John has served as a Council Member, Secretary, Vice-Chair, Chair-Elect and co-chair of the Advance Arbitration Training Institute. John is a partner at Husch Blackwell LLP in Kansas City, Missouri. John began his career concentrating his work on labor and employment areas, and began mediating and arbitrating in 1992. Since then, he has increasingly served as a neutral mediator, arbitrator or Special Master for courts in complex commercial, securities, product liability and healthcare matters, as well as employment cases and class actions.

## 2012-2013 Section Officers

Chair	John R. Phillips, Kansas City, MO
Chair-Elect	Ruth V. Glick, Burlingame, CA
Vice-Chair	Geetha Ravindra, Glen Allen, VA
Budget Officer	Howard Herman, San Francisco, CA
Assistant Budget Officer	Philip Cottone, Malvern, PA
Long Range Planning Officer	Bruce Meyerson, Phoenix, AZ
Assistant Long Range Officer	Lawrence Robert Mills, Seattle, WA
State/Local Bar Officer	Howard H. Vogel, Knoxville, TN
CLE Officer	Joan Stearns Johnsen, West Newton, MA
Section Delegate	Pamela Enslin, Kalamazoo, MI
Section Delegate	James Alfini, Houston, TX
Immediate Past Chair	Deborah Masucci, Brooklyn, NY

## 2012-2013 COUNCIL MEMBERS

2013	Benjamin G. Davis, Toledo, OH	2014	Jeffrey L. Krivis, Encino, CA
2013	Richard L. Miles, Catonsville, MD	2014	Kimberly Taylor, New York, NY
2013	James M. Schurz, San Francisco, CA	2014	Nancy A. Welsh, Carlisle, PA
2013	John A. Sherrill, Atlanta, GA	2015	Roger M. Deitz, New York, NY
2014	Alyson Carrel, Chicago, IL	2015	David L. Sandborg, Hong Kong, China
2014	Dwight Golann, Boston, MA	2015	Inga A. Watkins, Alexandria, VA

## Liaisons to the Council

Cassandra Georges, Philadelphia, PA	ABA Young Lawyers Division Liaison
Cara H. Johnson, Houston, TX	ABA Law Student Division Liaison
Stephen D. Gordon, Saint Paul, MN	Section Advisory Committee Representative
David A. Horowitz, Studio City, CA	Section Advisory Committee Representative
Timothy Hedeem, Kennesaw, GA	Liaison from Associate Members Committee
Margaret Huff, Nashville, TN	Membership Committee Chair
Serena Lee, Seattle, WA	Membership Committee Chair
Thomas A. Hamill, Overland Park, KS	ABA Board of Governors Liaison

Please visit [www.americanbar.org/dispute](http://www.americanbar.org/dispute) to see the full leadership Directory.



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