JAMS DISPUTE RESOLUTION
ALERT
An Update on Developments in Mediation and Arbitration

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THE RESOLUTION EXPERTS JAMS

Curbing the Bullying Epidemic with Mediation

IN DEPTH

Bullying in schools today is not confined simply to the extreme cases found in the headlines. Rather, bullying has reached a fever pitch, approaching an epidemic, says San Diego-based lawyer Gretchen Shipley, a partner at Fagen Friedman & Fulfrost, who advises school districts and delivers workshops to students, employees and district leaders on reducing bullying in school communities. With its burgeoning cousin, cyberbullying, through which harassment can be made both anonymously and to a broad audience, the impact of bullying today is greater and more lasting.

By definition, bullying is repeated, unwanted, aggressive behavior among children that involves a real or perceived power imbalance. Bullying can be verbal (such as teasing and taunting), social (spreading rumors) or physical. Similarly, cyberbullying takes place through technology. In either case, both the aggressor

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WHAT'S INSIDE

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ADR CONVERSATIONS

ADR Seen as a Valuable Tool to Address Natural and Weather-Related Disaster Claims

The following interviews were conducted by Contributing Editor Justin Kelly with experts in the insurance and ADR field, including Eric Larson, vice president of Claims Technical Oversight at Fireman's Fund Insurance Company; Peter Hood, an attorney with Nielsen, Zehe & Antas; Larry Pollack, a JAMS neutral in New York; and Kenneth Feinberg, founder and managing partner at Feinberg Rozen. The interviews addressed how insurance companies and policyholders utilize ADR when responding to weather and natural disasters.

Q. What general role does ADR serve in responding to weather- and disaster-related claims?

A. **Larson** said most disaster- or weather-related claims "can be resolved through an appraisal process, but where there is a difference of opinion on damages, the claim goes into a process similar to arbitration. Each side picks one person, and a third is assigned to fill out the panel. The panel has a wide discre-

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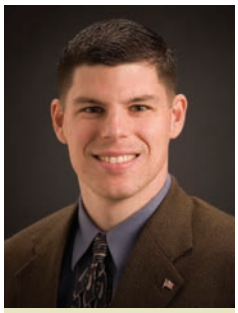
and the victim can experience serious, lasting effects, including depression and anxiety and being prone to physical and substance abuse.

All states except Montana have implemented some form of anti-bullying laws, most of which were passed in the last 10 years. Every state addresses bullying differently. California is one of the first states to specifically address cyberbullying in schools. Yet many of these laws are reactive and punitive, focusing mainly on suspending or expelling the bully, which may not be effective in solving the conflict once and for all. This is especially true when the bullying occurs after school, on weekends or in cyberspace. When the victim and the aggressor live in the same community and share social networks, bullying relationships are particularly hard to mend.

But proactive, alternative solutions not addressed by statute or case law are emerging. Conferences, mentoring, awareness campaigns, training programs, restitution, counseling and safe school ambassadors can transform a school from a place where punishment occurs into a place where conflicts are resolved. Already, in response to the spike in bullying and cyberbullying, conflict resolution programs are sprouting in urban, suburban and rural school districts across the country. Focused on students as young as kindergarteners all the way through high schoolers, these programs teach classic ADR principles, including compromise and active listening skills.

In Detroit, for example, more than 100 public schools took part in the city's Conflict Resolution Initiative, a $2.5-million program to equip students, teachers, administrators and parents with conflict resolution skills. Through the initiative, schools were paired with partner companies that worked with the staff to implement conflict resolution principles. Similarly, Educators for Social Responsibility offers multi-year lesson plans titled "Resolving Conflict Creatively," which involve extensive teacher training and coaching to implement curriculum-based skills, including teaching children self-management, cooperation and problem-solving skills, and promoting interpersonal effectiveness and intercultural understanding. Likewise, the "Safer, Saner Schools" program is offered by the Institute for Restorative Practices, a graduate program that focuses on building social capital and achieving social discipline through participatory learning and decision making. A six-month University of Kent study, published in 2012 by Computers in Human Behaviour, found that middle school students can successfully use emerging gesture and facial recognition software (also known as avatar technology) as a platform for improving empathy and social interaction and resolving bullying conflicts.



Justin Patchin, co-director, Cyberbullying Research Center

"Bullying is not a dispute in the traditional sense," notes University of Wisconsin professor Justin Patchin, co-director of the Cyberbullying Research Center. Rather, it involves an asymmetrical power relationship and repeated behavior. Yet ADR principles can still be applied to de-escalate bullying conflicts provided that service providers apply those principles "reasonably and with fidelity."

In California, behavior that fits the legal definition of bullying carries specific obligations for school districts regarding investigating, responding, resolving and preventing the behavior. According

Gretchen Shipley, partner at Fagen Friedman & Fulfrost

to Shipley, ADR can be used to evaluate whether behavior meets the "reasonable pupil standard." In addition, if a victim in California isn't satisfied with the school's response to bullying, the district must implement an appeals process. ADR, Shipley suggests, could serve as that next level.

Also, "just because behavior doesn't rise to the legal definition of bullying doesn't mean that someone wasn't victimized," Shipley adds, noting that those kinds of cases are particularly ripe for alternative means of resolution. "Schools should always consider peer counseling, mentoring and peer mediations."

School districts are eager to de-escalate harassment before it hits the headlines or results in litigation or criminal charges, Shipley explains. Although they don't want to get sued for not doing enough, school districts usually don't have the staff or the tools to respond to every allegation or in a thorough manner because of budget cuts. "In those cases, we encourage them to consider ADR," she says. "It could spread rapidly as a tool."

The effectiveness of ADR in bullying and cyberbullying cases depends on having the right parties involved, notes Ari Ezra Waldman, a former attorney who is now a Columbia University sociology fellow studying deviance among social groups and social norms in digital communities. "Counselors, faculty, advisors to students and other adult figures with a relationship to students should be trained in mediation," he says.

Done right, ADR can have a deterrent effect on aggressors and an ameliorative effect for victims. "Confronting an aggressor in a safe place can increase a victim's self-esteem, which can limit negative effects of bullying, such as depression, truancy and poor grades," Waldman adds. "And aggressors can come to understand the nature of their behavior as harmful."

For example, Waldman recalls a bullying situation in Missouri that ended positively. After long-term, repeated behavior that progressed from teasing to physical harassment, the victim mistrusted the school, whose attempts to punish had been ineffective. Eventually, the principal instituted a confront-your-accuser negotiation. According to Waldman, the process started off badly. "The victim didn't feel comfortable, and he felt the principal wasn't on his side," he recalls. "But after a few sessions, the aggressor opened up" and eventually gained a more personal understanding of his behavior. "Not only did he stop the bullying, but he encouraged his friends to stop too."

Ari Ezra Waldman, Columbia University sociology fellow

Waldman notes three primary takeaways from that Missouri example. First, resolution through mediation takes time. "It's not going to happen over 20 minutes. Both parties have to grow comfortable" with the process, he says. Second, for ADR to be effective, schools must develop a relationship of trust among all students. In other words, "don't wait for [the situation] to get bad" before instituting mediation. Finally, as evidenced by the Missouri example, mediation in bullying cases "is hard, but it can work."

Because ADR neutrals are not simply focused on punishment, they "could have a significant impact" on the bullying epidemic, according to Waldman, and the ADR community should promote it as an effective tool. For example, ADR professionals could partner with nonprofit organizations that regularly travel from school to school talking with faculty about bullying. The Anti-Defamation League, for example, has an entire school-focused arm (www.adl.org/education-outreach/bullying-cyberbullying/), as does the Human Rights Campaign (http://www.hrc.org/resources/category/parenting schools). But at the moment, "ADR is not getting top billing," Waldman explains. Similarly, neutrals could work alongside bar associations to establish relationships with local schools to "talk to educators about their options" for resolving bullying problems. Waldman also suggests that neutrals write about ADR as a vehicle for reversing the bullying epidemic. Right now, though, "First Amendment scholars and tech people are the only people writing about" bullying and cyberbullying.

For his part, Patchin says, "We already know that with certain types of incidents—property lines, contract disputes—ADR works very well. As a researcher, I'd like to see an evaluation" of ADR's effectiveness in solving bullying issues. "With mediation, do incidents decrease, and do the parties feel they've reached workable resolutions? There's a lot of upside in terms of information gathering." ●

"Counselors, faculty, advisors to students and other adult figures with a relationship to students should be trained in mediation."

—Ari Ezra Waldman

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tion to decide issues before it, and the decision is binding on both sides."

He said that while the speed of the ADR process "varies by policy, it is fairly quick and certainly quicker and less expensive than litigation." Importantly, it is a "cost-saving process for both sides," he noted.

Lawrence W. Pollack, Esq., JAMS neutral

Pollack said, "It plays a substantial role because a large majority of claims are typically settled through an ADR process." There are a few levels of ADR, starting with the typical claims settlement process utilized by insurance companies and followed by an "internal secondary review set up by insurance companies that looks at the initial review of a claim," he explained.

According to Pollack, the final step involves the use of outside ADR providers or neutrals. "Use of outside providers or neutrals is essential because it brings together the claimant's perspective and the insurer's. Mediation is used during this stage and results in a large number of settlements." Arbitration is also utilized, he noted.

Q. Where or in what areas is the use of ADR most effective?

A. **Hood** said ADR is "most effective in resolving claims involving commercial entities or policies rather than in homeowner cases" following a disaster. He suggested this is the case because "homeowners are more skeptical of a process proposed by insurance companies and look at the courts as a more equitable system."

Peter Hood, attorney, Nielsen, Zehe & Antas

"Businesses are more comfortable with ADR processes because they recognize them as the best and most effective way to resolve a claim," he said, adding, "They understand the costs and time associated with taking a case to court." They are "more likely to accept the use of mediation because it is a more efficient use of time and money.

However, "if mediation is explained to homeowners, highlighting the nonbinding nature of the process and the ability to get an independent, third-party neutral to evaluate a claim, they are more likely to agree to use it to resolve their claim," Hood said.

Eric Larson, vice president of Claims Technical Oversight, Fireman's Fund Insurance Company

Larson said, "Mediation is used more often in large claims than in small claims and has become a routine part of the liability process," he said, adding, "It has really become ubiquitous in the last 10 years." It is also often used in "complex and multi-party cases," he noted.

Q. What factors about ADR make it particularly useful in responding to and resolving disaster- and weather-related claims more efficiently and effectively?

A. **Pollack** said the "flexibility of ADR and the use of experts who can value the claim and the breakout of damages" make it a particularly useful and cost-effective method of resolving individual claims and the high number of claims that must be resolved following large-scale disasters. In addition, neutrals can use both "evaluation and facilitation to convince parties of where resolution could lie and should lie," he added.

Kenneth Feinberg, managing partner and founder, Feinberg Rozen

"If the ADR program is effective, it can accelerate and expedite the resolution of individual claims without resorting to the courtroom," **Feinberg** said. "For example, following the BP oil spill, the Gulf Coast Claims Facility processed more than 1 million claims, found more than 500,000 eligible, and paid out about $6.5 billion in just 16 months—before the first trial in the courtroom was even scheduled," he noted, adding, "Talk about efficient and generous."

"Mediation and other forms of accelerated claims processing can prove to be very valuable in resolving disputes in an expedited fashion rather than going to court," Feinberg said. "Personal and property damage claims can be the subject of an ADR initiative aimed at resolving the claims in a nonbinding fashion, i.e., the claimant can decide whether or not the proposed resolution of the damage claim is fair and reasonable," he added.

Q. Can the availability of ADR serve to delay or hinder the claims process?

A. **Pollack** said ADR "does not hinder the process in any way," adding that "just having the parties come together, even if unsuccessful, still promotes settlement by narrowing the focus of the parties to likely settlement options."

Larson echoed those sentiments, further explaining that "mediation allows parties to identify commonalities, evaluate their claims, and [it] can be very effective in guiding the parties to a settlement."

Damage caused by Hurricane Sandy in Connecticut

Q. Are there special ADR programs or processes available to parties involved in disaster- and weather-related claims, such as CATs (critical action teams)?

A. **Hood** said, "the CAT model has been used for the past seven years, in particular following Hurricane Katrina, to bring down the disaster claims volume using independent contractors rather than full-time adjusters of an insurance company." The CATs "rush the scene and deal exclusively with disaster claims and either resolve them directly or prepare the claims for mediation," he added. This also has the benefit of allowing them to "specialize in resolving disaster-related claims through mediation," he noted.

Q. Are insurance companies, attorneys and parties turning to ADR more often or less often during the claims process?

A. **Larson** said parties are turning to ADR "more often and it has become part of the process in complex and multi-party cases because they are harder to resolve in direct negotiations."

Pollack said, "Parties are making greater use of ADR. Insurance companies are in the business of risk assessment, and ADR allows them to resolve claims quickly and more cost-effectively." ADR allows both parties to "define the issues quickly and achieve a resolution more rapidly," he added.

Importantly, using ADR allows insurance companies to "utilize experts at each stage of the claims process." They are even able to use individuals with expertise "in small, medium or large claims that have vast experience in the field and knowledge of differing insurance policies," he added.

Hood said that in his experience, the use of ADR has "plateaued a bit because it has become too much like litigation, which bogs the process down with too many formalities." However, there is "a lot of success using mediation, which signals a need to promote mediation to adjusters as an effective time- and costs-saving process," he suggested.

Q. Is the use of ADR seen as a positive development by those using the process most often and those with only a passing experience?

A. **Larson** said the use of ADR processes, including the appraisal process, mediation and arbitration, "seems to be viewed very positively by both sides."

Hood echoed Larson's sentiment, saying that "across the industry, people are generally happy with ADR. Mediation could be better promoted and streamlined, which would help educate claimants who are not repeat users on the cost and time savings to resolve a claim or dispute over coverage," he suggested.

Pollack said, "ADR is seen as a very positive development in the industry, especially for large claims." People see that "claimants are paid faster and claims are off the books of insurance companies quicker, which reduces their exposure faster," he added.

Feinberg said, "I believe that those who participate voluntarily in these programs also view them as a positive experience. I also believe they work as planned in helping provide prompt, efficient and meaningful compensation to eligible claimants."

According to **Pollack**, the key factor in maintaining the positive view of ADR in the insurance process is "belief in the process and trust in the person leading the process," he concluded. ●

FEDERAL CIRCUIT COURTS

Duty to Disclose Continues Even After Conflicts Checks Complete

Gray v. Chiu

2013 WL 222279 Cal.App. 2 Dist., January 22, 2013

Deborah Gray filed a med-mal claim against Dr. John Chiu and several other medical providers. The matter went to arbitration. The parties selected a retired judge as the neutral. The parties did a conflict check and the arbitration proceeded.

Chiu was frequently assisted in the arbitration by his long-term counsel, William Ginsburg.

The arbitrator ruled in favor of Chiu and Gray later found out that Ginsburg was employed as a neutral by the same organization that provided the neutral. Gray argued on appeal that the relevant California ethics rules and acts required that the neutral disclose that Ginsburg was affiliated with his arbitration firm. The California Court of Appeal agreed and vacated the award. "The neutral failed to comply with his obligation to disclose Ginsburg's membership in the firm administering the arbitration. The California Supreme Court has termed the requirement of a neutral arbitrator essential to ensuring the integrity of the arbitration process." The Court noted that the obligation to avoid conflicts is a continuing one, and even if Ginsburg joined the firm after the arbitration was scheduled and conflicts checks completed, the neutral should still have acted on his duty to disclose.

Court Employs Unique Method of Appointing an Arbitrator

In re American Home Assur. Co.

2013 WL 172210 N.Y.Sup., January 15, 2013

In a dispute between insurance companies, the parties agreed that "If any dispute shall arise between the Companies and the Reinsurers with reference to the interpretation of this Agreement or their rights with respect to any transactions involved, the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen. If either party refuses or neglects to appoint an arbitrator within 30 days after the receipt of written notice from the other party requesting it to do so, the requesting party may nominate two arbitrators, who shall choose the third."

The Court found that there was a dispute and one party urged the Court to choose one of its arbitrators' choices or in the alternative, a ranking method. The other party urged a strike and draw method.

The New York Supreme Court found that the law does not set forth criteria for choosing, so they made up one of their own. The Court noted, "By combining the ranking method and the strike and draw method, a tie in the rankings might arise. A judge in a similar case incorporated the element of chance from the strike and draw method used to break the tie, i.e., a coin toss. However, that judge indicated that the winner of the coin toss would appoint the umpire. There is a subtle difference between breaking a tie among two possible selections with a coin toss versus granting the winner of the coin toss the unilateral right of appointment, although the two methods may be, as a practical matter, functionally equivalent. Under the latter method, the element of chance is removed from the selection of the umpire by one degree. That is, the element of chance does not directly determine the umpire; rather, the winner of the coin toss chooses the umpire. To be faithful to the direct role of the element of chance in the strike and draw method, the umpire (or third arbitrator) must be drawn by random lot in the event of a tie in the rankings of the umpire (or third arbitrator)."

Email Modification of Account Valid Way to Add Arbitration Clause to Contract

Klein v. Verizon Communications, Inc.

2013 WL 399222 E.D.Va., January 31, 2013

Jason Klein was a Verizon customer. When he canceled his internet service prior to the expiration of his one-year term, Verizon charged him an early termination fee of $135. Klein argued that he had encountered billing and internet service problems that voided his obligations.

Klein filed an action in court. Verizon refunded the $135 and also made an offer of judgment of $1,000. Klein rejected the offer and started to pursue a class action. Verizon then filed a motion to compel individual arbitration.

Klein argued that he was not required to arbitrate because the notice of the arbitration provision came in an email after he opened his account. The District Court for the Eastern District of Virginia found that Klein's original contract with Verizon expressly allowed changes in the account to be made by email and that the changes were considered accepted if the customer continued to use the service.

Klein argued that the clause couldn't apply retroactively, but the Court ruled that the broad language of the arbitration provision allowed retroactive application.

Finally, Klein argued that the arbitration contract was unconscionable, but the Court found that Klein failed to show procedural or substantive unconscionability. His argument that Verizon's ability to change the terms via email was deemed insufficient to demonstrate substantive or procedural unconscionability.

The Court directed that the arbitration proceed pursuant to the terms of the email modification to Klein's account.

Non-Signatory Unable to Enforce Arbitration Agreement

In re Wholesale Grocery Products Antitrust Litigation

2013 WL 514758 C.A.8 (Minn.), February 13, 2013

Blue Goose, Millennium Operations and King Cole did business with wholesaler SuperValu . JFM Market and MJF Market did business with wholesaler C&S. Each retailer had supply and arbitration agreements with its wholesaler but not with the other.

In 2003, C&S and SuperValu entered into an asset exchange agreement and some customer contracts were included in the exchange. The retailers brought class action antitrust lawsuits against their respective wholesalers, arguing that they artificially inflated prices. The wholesalers moved to compel arbitration, arguing that equitable estoppel or the doctrine of successor-in-interest allowed the clauses to be enforced against non-signatories.

The district court granted the motion, finding that equitable estoppel allowed enforcement of the agreements. Retailers appealed.

The U.S. Court of Appeal for the Eighth Circuit reversed in part, finding that Minnesota law applied and that under that law, "merely alleging that a non-signatory conspired with a signatory is insufficient to invoke equitable estoppel, absent some 'intimate ... and intertwined' relationship between the claims and the agreement containing the arbitration clause." The Court found that the alleged conspiracy to inflate prices was an action that the retailers could bring against the wholesalers independently of the supply and arbitration agreements. "[The] antitrust conspiracy claims do not involve violation of the terms of the contract, the face of the contract does not provide the basis for the alleged injuries, and there is no evidence that the contract anticipated the precise type of relationship giving rise to the claims. Thus, the requisite relationship is lacking here."

The Court also found that the district court, having decided the case on the theory of estoppel, did not reach the question of whether the doctrine of successor-in-interest would allow for arbitration with non-signatories. The Court remanded so the district court could reach that question.

How ADR Can Stem the "Trademarklawpocalypse"

A luxury-goods company wins summary judgment in its case against a car manufacturer that used the plaintiff's trademark for comedic value during a commercial poking fun at our luxury-obsessed culture. Apple and Samsung are embroiled in a bitter trademark battle related to smartphones and tablets. A designer furniture retailer's lawsuit about trademark rights to a 50-year-old chair design, which the retailer did not invent and over which it holds no copyright or patent, largely survives a motion for summary judgment made by a competitor selling the same chair design at more affordable prices. Christian Louboutin sued Yves St. Laurent over the rights to the color of shoe soles.

Charles Colman, New York intellectual property lawyer

These are just a few examples of the recent explosion of trademark infringement and dilution lawsuits, a phenomenon so pervasive that it was dubbed the "trademarklawpocalypse" by New York-based IP lawyer Charles Colman. Product configuration trade dress, false advertising and unfair competition cases in particular have become fertile ground for federal court litigation, adds Joseph Gioconda, a brand-protection lawyer. Battles over quotes from books and incidental uses of trademarks in films are similarly on the rise, even though many of these suits "would have been unthinkable 30 years ago," Colman notes. Results may include product recalls, corrective advertising, permanent injunctions and, not surprisingly, significant damages awards.

With the ever-growing pressure to achieve quantifiable results for shareholders, companies are seeking to "monetize" intellectual property. But because it's challenging for companies to discover an untapped revenue source in the form of innovation, trademark cases are gaining popularity. Copyright and patent protection are only so flexible: Basic designs and short strings of words typically aren't copyrightable, and patent protection is expensive, time-consuming to obtain and has a limited shelf life. Trademark, on the other hand, has become a primary asset because consumers distinguish products quickly and efficiently through brands. If used as a brand, a trademark can be owned indefinitely.

"Things that are too basic or otherwise ineligible for copyright protection and insufficiently novel to be the subject of design patent protection appear ripe for 'colonization' using the tools of trademark law," even if they were once considered fair game, Colman explains. The perception of trademark has changed "from a system of signals between businesses and consumers to a form of property, with the 'right to exclude' that the notion of property traditionally entails."

In addition, trademark infringement suits can be filed without having first registered a mark with the U.S. Patent and Trademark Office. And because determining a trademark's validity is highly fact-dependent and cannot typically be determined at the beginning stages of litigation, many defendants who have valid First Amendment or other defenses may just cease using an alleged trademark instead of fighting an expensive lawsuit.

Joe Gioconda, New York brand protection lawyer

Meanwhile, the courts are "really at sea" when applying fundamental issues in trademark law, including measuring damages, and juries have "no sense of reality" regarding damages from infringement, adds Goetz Fitzpatrick IP litigator Ronald Coleman. Given the "profound unpredictability" of trademark litigation, ADR—particularly mediation—can play a role in resolving these disputes, he says.

Ronald Coleman, IP litigator, Goetz Fitzpatrick

For example, sometimes plaintiffs launch a purposeful "campaign" to impose costs or obtain a fairly meaningless judgment against an adversary unable to pay, simply to establish a reputation for aggressiveness and to set precedent, Coleman explains. In those cases, "a good neutral may persuade such a party that its claims are not meritorious and that it risks not only a Pyrrhic victory, but even an adverse outcome that could have precisely the opposite effect of the one intended," he says. "Because there's almost never a pot of gold—financially speaking—at the end of the rainbow, some clients need to hear that from a neutral, especially considering the vast expense of really taking a trademark claim to dispositive motions or trial."

Because trademark conflicts involve intensely factual questions of infringement and ownership, the most effective neutrals are those who not only are familiar with substantive trademark laws, but also have "a deep understanding of how advertising, brands and designs work in the actual marketplace," according to Gioconda. "Such expertise allows them to be creative in proposing solutions that the lawyers may miss," including product redesigns and workarounds. ●

JAMS Foundation Extends Its International Mission—In Ecuador

For more than a decade, the JAMS Foundation has funded conflict resolution initiatives that support education about collaborative processes for resolving differences, promote innovation in conflict dispute resolution and advance conflict settlement around the world.

Jay Folberg, JAMS neutral and chair of the JAMS Foundation

"We've wanted to do more internationally, but we also didn't want to get spread too thin," explained JAMS Foundation Chair Jay Folberg. So for many years, the Foundation's international effort remained limited to the Weinstein International Fellowship program, through which qualified individuals from other countries visit the U.S. to learn more about ADR so they can then help expand it back in their home countries. "One hope was that we'd make knowledgeable friends out of the fellows so we might collaborate with them when they returned home. And that's exactly what happened."

A recent case in point is Ximena Bustamante, a member of the first class of Weinstein Fellows, who began working with Mediators Beyond Borders through her job as an ADR coordinator in the Ecuadorian equivalent of the Attorney General's Office. She approached the JAMS Foundation about facilitating web-based and real-time collaboration between various Ecuadorian mediation groups and ADR practitioners, an effort that was necessary because transportation and communication between major Ecuadorian cities can be tricky.

Supporting that effort was "a great opportunity to help without having to set up our own infrastructure," Folberg said. Today, the Ecuador Mediation Exchange and Capacity Building Project serves as a digital hub for Ecuadorian mediators and court-connected ADR projects so they can "share information and be more cohesive."

To further collaboration between Ecuador's conflict resolution leaders and practitioners and enhance multi-cultural mediation practices in Ecuador and the U.S., Mediators Beyond Borders also invited several U.S. neutrals to Ecuador to work with the judiciary and private mediators. The result was the country's first national mediation meetings, which took place in three cities: Guayaquil, Quito and Cuenca. During one week in fall of 2012, lawyers, judges, government officials, academics, for-profit and non-profit business professionals and other conflict resolution experts met to "share what's happening in Ecuador and have experienced U.S. mediators give trainings and presentations," said Folberg, who participated in the meetings. Together, they examined how to practice and promote mediation in Ecuador's public and private sectors. In addition to Folberg, other JAMS neutrals participated, including and Hon. Bernetta D. Bush (Ret.), Alexander S. Polsky, Esq., and Jerry Spolter, Esq., all of whom paid their own way.

Ximena Bustamante, Weinstein Fellow and member of Mediators Beyond Borders

Attendance was excellent, with audiences numbering around 100 at each location. "It was everything we hoped," Folberg said. "Folks were glad to meet one another. We were the catalyst, and their enthusiasm was ignited."

Quito, Ecuador

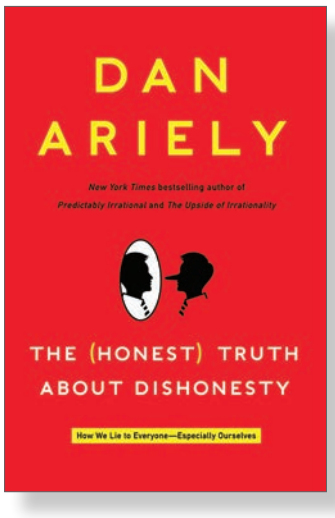
Ecuador is one of the first South American countries to enact legislation encouraging mediation. In fact, an Ecuadorian agreement reached through mediation is enforceable as a judgment, which goes further than U.S. law, which usually enforces a mediation agreement as a contract. Yet ADR still hasn't been embraced as fully as in the U.S., Folberg explained. "It's underutilized, even though many business and civic leaders voiced distrust of the judiciary and indicated that court cases are delayed for years."

Fortunately, former Weinstein Fellow Bustamante, who teaches ADR at the leading Ecuadorian law school, reports that Ecuador's attorney general and its judiciary are eager to promote mediation. "There's a new cohort of judges interested in mediation, so there's reason for optimism," Folberg says.

The (Honest) Truth about Dishonesty

By Dan Ariely

REVIEWED BY RICHARD BIRKE



Every form of dispute resolution—from trial to arbitration to mediation to negotiation—involves an assessment of someone's credibility. At trial, jurors might wonder if a witness is telling the truth or embellishing the story. In arbitration, the neutral has to determine which of the conflicting stories most closely resembles the truth. In negotiation and mediation, parties have to determine whether the most recent offer is truly the best offer or the final offer. Someone in every dispute is always asking themselves, "Are they being honest?"

In his latest book, *The (Honest) Truth about Dishonesty*, psychologist and professor Dan Ariely examines dishonesty from a broad social perspective and comes up with a long list of practical, interesting and useful observations.

The book starts by describing a segment of the popular radio show "This American Life" in which the manager at the gift shop at the John F. Kennedy Center for the Performing Arts tells how a sales force of nearly 300 elderly, retired volunteers took in more than $400,000 annually in sales. All the money was kept in a tin box, like a lemonade stand, with no cash register at all. This was great news—lots of income and little overhead—except that on average about $150,000 of the money went missing each year!

Even after a sting operation using marked bills resulted in the firing of one younger employee, the theft continued. Once the Center instituted a change in the way data was recorded, the manager learned that virtually every one of those kindly volunteers was stealing from the Center. But each one was stealing only a little bit.

Ariely took this anecdotal finding and tested it. In one experiment, students took a timed test for which they received cash for correct answers. The test-takers self-reported their scores, and Ariely compared these scores with those of individuals whose tests were graded by others. The self-reported scores were consistently higher than the objectively graded ones. Pretty much everyone taking the test who had the chance to cheat did so, but they only cheated a little.

Ariely's first amazing finding is that pretty much everyone is dishonest, provided the circumstances are right. What circumstances increase or decrease honesty? It seems that the further you get away from cash transactions, the more thievery increases. When test-takers were allowed to shred their test before reporting and then got a direct cash payment, they exaggerated the number of correct answers by an average of two. But when they were given a token and told to walk literally 12 feet away to cash the tokens in, they exaggerated by four. Ariely notes that "people are more apt to be dishonest in the presence of non-monetary objects—such as pencils and token—than actual money." He goes on to worry openly that "the more cashless our society becomes, the more our moral compass slips." I worry about how we mediate disputes and how the dollars are abstract; a promise to write a check may not exactly be a token, but it's not cash either.

Ariely found that, paradoxically, cheating decreased when the reward for cheating was higher. When the reward for a correct answer was $1, people cheated quite a bit. When the reward was $2, cheating was a little lower, but not much. But when the reward was a whopping $10 per answer, people cheated much less. Why? Because taking one dollar felt okay, but taking 10 felt like stealing. How honest are we? Ariely says, "Essentially, we cheat up to the level that allows us to retain

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ITC Proposes to Reform E-Discovery in IP Cases

Seeking to address growing concerns by stakeholders and legal counsel over the growing costs of e-discovery, the U.S. International Trade Commission has proposed changes to its e-discovery rules for intellectual property (IP) cases. The changes would streamline the process and provide more certainty to parties involved in cases before the Commission.

The ITC's proposed rule amendments would address the e-discovery process in Section 337 disputes, which involve international IP and patent disputes, by limiting the scope of e-discovery to reasonably accessible information, authorizing administrative law judges (ALJs) to limit e-discovery in individual cases and authorizing ALJs to quickly resolve disputes over whether e-discovery requests would be unduly burdensome or whether discovery inadvertently exposes privileged material.

The intended effect is "to reduce expensive, inefficient, unjustified or unnecessary discovery practices in agency proceedings while preserving the opportunity for fair and efficient discovery for all parties," according to the ITC rule proposal.

The proposal was developed at a conference on e-discovery held at George Washington University Law School in July 2011. The ITC subsequently considered e-discovery proposals from various groups, including the International Trade Commission Trial Lawyers Association and the International

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Jamie B. Beaber, attorney, Steptoe & Johnson LLP

Trade Commission Committee of the American Bar Association Intellectual Property section, as well as a model e-discovery order prepared by the Federal Circuit Advisory Council and e-discovery provisions in a pilot program underway in federal district courts.

New sub-section 210.27(c), which would allow a party to refuse to produce requested material based on its inaccessibility, says, "A person need not provide discovery of ESI from sources that the person identifies as not reasonably accessible because of undue burden or cost." However, the party seeking the information could still obtain the material if it shows good cause for the information and that it could be obtained without undue hardship to the responding party.

New sub-section (d) would provide specific guidance for ALJs to determine whether to order disclosure under sub-section (c) by establishing a set of criteria, including whether the request is "unreasonably cumulative or duplicative…the party seeking discovery has had ample opportunity to obtain the information by discovery in the investigation," the respondent has stipulated to the facts, or "the burden or expense of the proposed discovery outweighs its likely benefit."

Sub-section (e), which applies to discovery requests that could touch on privileged material, would require the responding party to expressly make a claim of privilege and produce a privilege log. The ALJ would then resolve any dispute concerning a claim of privilege.

Jamie B. Beaber, an attorney with Steptoe & Johnson LLP in Washington, D.C. specializing in Section 337 cases, said the rule proposal is a "good starting point, and many of the additions are similar to ground rules that are established by ITC ALJs and/or to agreements that are entered into by parties to ITC investigations regarding e-discovery and clawback provisions." The rule proposal demonstrates that the ITC "recognizes the need to address and formalize certain discovery rules and, in particular, e-discovery."

The "problem is that these cases move so quickly that e-discovery can slow the process or confuse it, so over the past six or seven years parties have been entering into e-discovery stipulations or side agreements that limit discovery, in particular e-discovery, such as limiting the number of custodians and the number of search terms as a way to manageably address e-discovery within a short timeline," Beaber explained.

Beaber said that while the proposed sub-section (e) is not a true clawback provision, having privilege and work product issues resolved quickly in a structured fashion by the ALJ and expressly addressing the creation of a privilege log, is surely a benefit to both parties and their counsel in Section 337 proceedings.

Tom Schaumberg, attorney, Adduci, Mastriani & Schaumberg

Tom Schaumberg, an attorney with Adduci, Mastriani & Schaumberg in Washington, D.C., said that "everybody recognizes the strength of Section 337 proceedings is the speed with

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James B. Altman, attorney, Foster, Murphy, Altman & Nickel

which cases are handled, but the increase in the caseload has lengthened the process and put extra burdens on the ALJs."

The ITC clearly "recognizes the need to get the e-discovery process under control," he said, adding, the proposed rules are an important step in that direction. They should allow parties to narrow discovery requests, while still providing parties with all the necessary information needed to resolve a dispute.

James B. Altman, an attorney with Foster, Murphy, Altman & Nickel in Washington, D.C., said "the already heavy workload of ALJs "could be reduced if more uniformity of e-discovery results from the proposed rule changes." ●

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our self-image as reasonably honest individuals."

The book is replete with entertaining stories and examples. It seems that atheists are markedly more honest when they swear on a bible, that a picture of a pair of watchful eyes deters theft far more than any written warnings, and that the brains of pathological liars contain more white matter than those of normal individuals (rendering them less morally culpable but more creative!). In this short review, I can't begin to describe all the findings contained in this entertaining and well-written book. Spoiler alert: The last chapter is titled "A Semi-optimistic Ending," in which Ariely discusses how what he calls a "resetting ceremony" can induce greater honesty in others and in ourselves.

As a mediator and negotiator (and sometimes arbitrator), I found the book full of practical advice on inducing more honesty from parties and their lawyers—how to set up the room, how to phrase and frame questions, how to discuss monetary and non-monetary offers and concessions and how to calibrate myself accurately for how much honesty to expect. *The (Honest) Truth about Dishonesty* is a great and practical read for anyone concerned with any aspect of dispute resolution. Trust me, I wouldn't lie to you. ●

HAVE A BRIGHT IDEA FOR A STORY?

The *Dispute Resolution Alert* is always looking for new and interesting article ideas and suggestions. Please email them to Victoria Walsh at vwalsh@jamsadr.com. We hope to hear from you.

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An Update on Developments in Mediation and Arbitration