Spring 2012

JAMS DISPUTE RESOLUTION ALERT

An Update on Developments in Mediation and Arbitration

THE RESOLUTION EXPERTS JAMS

GROWING TREND OF THIRD-PARTY LITIGATION FUNDING CREATES MIXED OPINIONS

IN DEPTH

Third-party litigation funding, also referred to as third-party financing of lawsuits, alternative claims financing or alternative litigation funding, is a growing business in international arbitration, particularly in Australia and the United Kingdom, and is now being looked at domestically by investors and law firms.

In general, the process involves an outside investor with no connection to the dispute, most likely a corporation that specializes in funding lawsuits or a hedge fund with the same investment strategy. That entity contracts directly with the claimholder (sometimes funders contract with the law firm, but there are fewer conflicts and ethical issues if the contract is between the funder and the claimholder) to provide funding for the claim, and in return, the investor would be entitled to recovery of the principal advanced and a percentage of any recovery. However, in the event a claimant is unsuccessful, the investor would receive nothing.

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WHAT'S INSIDE

ADR CONVERSATIONS

JAMS Panelists Receive Prestigious ADR Award

On April 20, 2012, JAMS panelists Michael K. Lewis, Esq. and Linda R. Singer, Esq. received the D'Alemberte-Raven Award from the American Bar Association. This prestigious award recognizes outstanding service in the dispute resolution field, honoring individuals who have developed innovative programs and have improved dispute resolution services and efficiency, according to Gina Brown, associate director of the ABA's Dispute Resolution Section. Past recipients of the award include former Attorney General Janet Reno and Ambassador Richard Holbrooke.

A graduate of Harvard College and George Washington University School of Law, Singer has more than 30 years of dispute resolution experience as an arbitrator, mediator, civil litigator and neutral evaluator.

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Growing Trend of Third-Party Litigation Creates Mixed Opinions

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Third-party litigation funding is more highly developed and accepted in Australia as a result of legislatures relaxing or eliminating the common law doctrines of champerty and maintenance over the past 20 years. Both common law doctrines have fallen out of favor and have increasingly been eliminated by courts and legislatures. Third-party financing has also grown rapidly in the U.K. over the past 10 years and continues to grow as more investors enter the market.

The report recommends that "lawmakers and regulators should consider prohibiting third-party funding in the United States. At the very least, third-party funding should be banned in the context of aggregate litigation."

U.S. Chamber of Commerce's Institute for Legal Reform

The New York City Bar Association (City Bar) issued an opinion on third-party financing of lawsuits in June 2011. It discussed the various ethical issues that an attorney could face when a third-party financer becomes involved in litigation, including confidentiality, the attorney-client relationship and control over the litigation.

The City Bar advised that with regard to confidentiality and attorney-client privilege, an attorney must consult and obtain consent from a client before disclosing communications or documentation to the third-party financer in order to avoid running afoul of his or her ethical obligation under the rules of professional conduct. It also stated that while a third-party financer may exert influence over the course of litigation, an attorney "may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation, including the decisions of whether to settle or the amount to accept in any settlement."

The opinion concludes by noting that such arrangements can be beneficial to clients: "It is not unethical per se for a lawyer to advise on or be involved with such arrangements. A lawyer representing a client who is a party, or considering becoming a party, to a non-recourse funding arrangement should be aware of the potential ethical issues and should be prepared to address them as they arise."

The American Bar Association's Commission on Ethics 20/20 has released a draft white paper that discusses the ethical issues of third-party financing and the Rules of Professional Conduct that are implicated when the financing mechanism is present in litigation. While not coming to any firm conclusions or suggesting any policy or rule changes, it outlines clearly that attorneys who participate in these types of arrangements must be aware of potential conflicts that can arise.

The U.S. Chamber of Commerce's Institute for Legal Reform also took a look at third-party financing and issued a report warning that the increased use of third-party financing could lead to an increase in litigation abuse, particularly in the area of class action lawsuits.

According to the report, the main problem with third-party financing is the introduction of a party to the litigation that has no relation to the underlying dispute; therefore, their sole concern would be with monetary gain and not the merits of the underlying claim. The report recommends that "lawmakers and regulators should consider prohibiting third-party funding in the United States. At the very least, third-party funding should be banned in the context of aggregate litigation."

Experts Call for Use and Regulation of Third-Party Financing

Maya Steinitz
Professor at University of Iowa College of Law

Maya Steinitz, a professor at the University of Iowa College of Law and author of *Whose Claim Is This Anyway? Third-Party Litigation Funding*, said that "international arbitration is one of the favored areas for third-party financing because there is less regulation" of the process and because of its broader acceptance internationally. In addition, the process is almost completely private and confidential, and allows attorneys who may be prevented in the domestic context from participating due to local rules of professional responsibility or the continued enforcement of the common law doctrines of champerty and maintenance, she noted.

According to Steinitz, investors and funders also like investing in international arbitration "because of the potential of a quick turnaround on their investment and arbitration claims are not subject to appeal and are highly enforceable under the New York Convention." Third-party financing has been used in international arbitrations under bilateral investment treaties for more than 20 years due to the clear causes of action and the fact that one party is a sovereign nation, which, in general, guarantees that a judgment will be satisfied due to their "deep pockets," she explained.

She noted that law firms and arbitrators that have practices in international arbitration "view third-party funding favorably because more cases equals more money." However, there has been some pushback from large multinational corporations because they view it as potentially leading to an increase in frivolous lawsuits and the difficulty that

results from third parties having a say in settlement negotiations, she added.

Michele DeStefano
Professor at University of Miami School of Law

Michele DeStefano, a professor at the University of Miami School of Law and author of an upcoming law review article on third-party litigation funding in the *Fordham Law Journal*, said, "The transparency issue in international arbitration is the one that comes up the most often." In the U.S. litigation context, the concern is over how much influence or control a third-party funder has over the party it is funding and whether its interests could negatively impact the outcome or ability to resolve the claim.

However, these concerns seem to be outweighed by the potential benefits to both parties in litigation and parties in international arbitration, she said, adding, "Commercial claims funders can help clients understand the value of a case, how much time to spend on a case, what level of resources to commit and what is the best time to settle a claim." In addition, funders can serve as a "watchdog for the corporate client, look at attorney's fees and emphasize problem solving and innovation," she suggested.

Selvyn Seidel
Chairman of Fulbrook Management

Selvyn Seidel, chairman of Fulbrook Management, said that "2011 was a watershed year" for third-party funding. It ceased being an up-and-coming industry and established itself as "an industry that is here to stay and will mature over the next five to 10 years," he said.

According to Seidel, there was dramatic change in third-party funding in 2011, as information about it lead to an increase in understanding about the process, greater awareness and an increase in its use and requests for its use by clients.

In addition, a number of new, highly sophisticated funders (both private equity and corporations) entered the market in 2011. These new funders can bring integrated services to third-party funding of litigation and international arbitration, which will enhance the value of claims by providing clients with budgeting help, outsourced legal work and accounting, he said. This should help increase the "recognition that third-party funding is legitimate, good for claims and can increase the ability to deliver both commercial and civil justice," he said.

Seidel noted that third-party funding has reached such a level of acceptance and use that the U.K.'s Civil Justice Council moved forward with a code to address the industry and released a voluntary code in November 2011. The code addresses the key issues that arise around the process, including conflicts of interest, ethics issues, disclosure, confidentiality and issues of control of the litigation or arbitration process.

Seidel said the one area that has gotten the least attention is the use of third-party funding in international arbitration, "where much of the activity is happening," but added that this is starting to change. "International arbitration is very important for the quantity and amounts in disputes in international commerce. International commerce drives more international arbitration, which in turn will drive more funding into international arbitration claims," he said.

According to Seidel, international arbitration is well-suited for third-party funding because the players can structure the process and control more of what happens without running into as many ethical issues as in litigation. However, arbitrators are increasingly looking for greater disclosure of funders to ensure that they do not run afoul of disclosure requirements, he added. "We're beginning to see more knowledgeable, well-informed funders enter the international arbitration market, which could grow even more rapidly as funders come to understand their ability to craft the process," he said.

James E. Tyrell Jr.
Managing Partner at Patton Boggs LLP

James E. Tyrrell, Jr., a managing partner at Patton Boggs LLP in New York, said, "We have seen very substantial growth in the industry over the past several years," and in particular growing interest by private equity and hedge funds. They see providing funds in international arbitrations as an opportunity to invest in an area that is "non-cyclical and separate from the ups and downs of the marketplace," he said.

From a public policy perspective, the involvement of highly sophisticated players such as hedge funds can "bring capital market strength to meritorious claims that might otherwise not be pursued," he suggested. Addressing the notion that making more money available to bring lawsuits could increase frivolous actions, he suggested that it could have the opposite effect because these sophisticated investors could help "cleanse the system because no one wants the black eye of having invested in a fraud or frivolous case." ●

JAMS Panelists Receive Prestigious ADR Award Continued from Page 1

Singer pioneered the development of mediation as a practice, training mediators and lawyers throughout the United States and abroad. Attorneys describe her as tenacious, intelligent and possessing an innate ability to settle cases that others could not. As president of the Center for Dispute Settlement, she has designed ADR processes for companies, court systems and government agencies.

A graduate of Dartmouth College and Georgetown University Law Center and a former Foreign Service Officer, Lewis is known for his ability to resolve the most complex disputes in virtually every area of law, including business, public policy, employment, environment and government. As an ADR consultant, he has advised dozens of organizations, including the Manville Personal Injury Settlement Trust and the National Institute of Corrections, as well as law firms, corporations and federal and local courts.

Lewis and Singer have co-taught mediation and negotiation at Harvard Law School's Program on Negotiation and at the law schools of Georgetown, American and George Washington universities, as well as at the Center for Dispute Settlement.

Based in Washington, DC, Lewis and Singer are not only co-recipients of the 2012 D'Alemberte-Raven Award, they are also married to each other.

Q. What does it mean to you to receive the 2012 D'Alemberte-Raven Award from the American Bar Association?

A. ***Singer:*** This is truly exciting. It's the most prestigious award in our profession because it comes from our peers, because of our predecessors who've received the award and because of the two ABA giants after whom it is named.

A. ***Lewis:*** I'm not sure I've absorbed the fact that the section has decided to honor us. Frankly, it was a real stunner. I hope that those who chose us recognized the importance of our early work in the field—prisons, mental hospitals, schools, community dispute centers—and the desirability of supporting efforts designed to provide dispute resolution services to the less fortunate among us.

Q. What drew you to the ADR field?

A. ***Singer:*** We both got taken with the notion of mediation and of trying to focus parties on what's most important to them, enabling them to look forward and to repair relationships. We grew with the field; we started with interpersonal disputes, and we now handle both huge and smaller disputes.

A. ***Lewis:*** It was the sense that there had to be a better way of resolving disputes other than violence, litigation or taking it to the streets. In the very early 1970s, mediation especially was not used widely other than in labor disputes.

> **"At the end of the day, when you leave with a sense that a mediation has made a difference in someone's life, it's an incredible high."**
>
> Michael Lewis, Esq.

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Q. What kinds of disputes are the most interesting to you?

A. ***Singer:*** I like puzzles with lots of moving pieces. I like the intellectual challenge of multiple parties or of class actions with a lot of different people and issues. Sometimes I'm surprised that the most interesting disputes are less about the subject matter and more about the people and the personalities.

A. ***Lewis:*** I've enjoyed disputes involving layers of government and business and ordinary folks all mixed in one big stew. At the end of the day, when you leave with a sense that a mediation has made a difference in someone's life, it's an incredible high.

Q. What kinds of cases do you find the most challenging?

A. ***Singer:*** It's challenging when a case is heavily emotional for at least one party. Sometimes it's very hard for people who are feeling like victims to focus on their own long-term best interests. Their current anger, often accompanied by a desire for revenge, can overshadow their own sense of what's best for them if only they could look ahead.

A. ***Lewis:*** The cases in which one or more of the parties appear to not be acting in their own best interest. It's challenging and frustrating to watch them cut off their nose to spite their face, to observe them forgetting what's important to them.

Q. Do you expect any sea changes—or subtle changes—in the ADR field in the next 10 years?

A. ***Singer:*** In the mediation world, the sea change may have already occurred. On the West Coast, the East Coast and in a few places in between, most lawyers now expect to go to mediation at some point in almost all disputes. So the question is, what way is mediation going to grow, and into which new substantive areas might it expand? Not all of these may be in the legal arena; our politics certainly could benefit from some mediation! With arbitration, its use could be restricted more and more by court decisions or by legislation. But it's hard to predict.

A. ***Lewis:*** I worry about the adoption and adaption of mediation by institutions—courts, administrative agencies—that often come with bureaucracies and stultifying procedures that overpower the tool's flexible nature. If I had to guess, arbitration, which has been under fire in the last few years, might change more than mediation.

Q. When you teach, what are some of your core themes?

A. ***Singer:*** When teaching mediation, I try to emphasize things that none of us were taught in law school: active listening, empathy, helping to create options and analyzing the settlement options that appear to be possible versus the likely possibilities if settlement is not achieved.

A. ***Lewis:*** For me, the core of what's important to me in teaching is about trying to get people to understand the notions of parties' interests and of encouraging them to let go of a desire for revenge.

Q. What is a commonality among the most successful neutrals that you know?

A. ***Singer:*** Trustworthiness is number one among neutrals. For mediators, we have some evidence that parties rate us most highly when we are good listeners, when we have an ability to connect with parties and when we're both patient and persistent.

A. ***Lewis:*** Two words: adaptability and persistence.

Q. What has been your career highlight so far?

A. ***Singer:*** Maybe getting this award. I'm also proud of being able to mediate complex, high-stakes disputes and still maintain a connection with the nonprofit Center for Dispute Settlement, which I founded in Washington 40 years ago.

A. ***Lewis:*** I, too, am tempted to say receiving this award. But the highlight may have been my involvement in the Pigford case, resulting in more than $1 billion awarded to black farmers and their families for discrimination they suffered by their own government through the Department of Agriculture. It was a pretty powerful case for me.

Q. If you couldn't be a lawyer or an ADR neutral, what would you do?

A. ***Singer:*** I'd probably retire and spend more time with our grandchildren, who are getting too old to need me. I'd also try to convince Michael we should travel more and ride our tandem bike.

A. ***Lewis:*** That's easy for me. I'd try to be a photographer and musician. Taking photographs and playing music have given me great pleasure over the years.

Q. Anything else you'd like to add?

A. ***Singer:*** People sometimes ask us how we, as a married couple, have been able to work together as colleagues for such a long time. We've even mediated a couple of very large cases together, and it really is a pleasure.

Q. What's the secret?

A. ***Lewis:*** Adaptability and persistence! ●

FEDERAL CIRCUIT COURTS

Statutory Language Granting "Right to Sue" Does Not Result in Arbitration Waiver

CompuCredit Corp. v. Greenwood
2012 WL 43514
U.S. Supreme Court,
January 10, 2012

Wanda Greenwood's credit card application from CompuCredit (CC) included an arbitration clause that read, "Any claim, dispute or controversy (whether in contract, tort or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement...upon the election of you or us, will be resolved by binding arbitration..."

In 2008, Greenwood and others in a putative class filed an action alleging violations of the Credit Repair Organizations Act (CROA). CC moved to compel arbitration, but the district court denied the motion, finding that Congress intended claims under the CROA to be non-arbitrable. The Court of Appeal for the Ninth Circuit affirmed the denial, and the case was appealed to the United States Supreme Court.

The Court noted a presumption in favor of arbitration except where Congress has carved out a specific exception. The CROA contains a nonwaiver provision that states, "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person."

The Court then found that the lower courts focused on this language to conclude that signers had a non-waivable right to go to court to prosecute alleged defects. In writing for an 8-1 majority, Justice Scalia stated, "The flaw in this argument is its premise: that the disclosure provision provides consumers with a right to bring an action in a court of law. It does not." The Court found that "right to sue" does not imply that the suit must be brought in a court and concluded that "it takes a considerable stretch to regard the nonwaiver provision as a 'congressional command' that the FAA shall not apply."

The Court found that Congress had used more precise language when it wanted to prohibit arbitration, and found examples in other statutes (e.g., "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"). The Court noted that this language was far more precise than the "right to sue" language in the CROA, which the Court labeled "obtuse." Because the FAA favors arbitration and because the language was not sufficiently clear in the Court's view to amount to a Congressional prohibition, the case was reversed and remanded for an entry of an order to arbitrate.

FAA Pre-Empts California Rule Prohibiting Class Action Waivers in Public Injunction Claims

Kilgore v. KeyBank, Nat. Ass'n
2012 WL 718344
C.A.9 (Cal.), March 07, 2012

A group of students enrolled at a private helicopter school that promised them the opportunity to obtain a pilot's license within 18 months. However, the school did not have the equipment to fulfill this promise.

The school encouraged the students to use KeyBank to take out loans of $50,000 to $60,000, which were paid in full to the helicopter school before the training had even commenced. When the school went bankrupt, the students sued KeyBank in California state court, alleging knowledge on the bank's part of the school's inadequacy. The students sought an injunction against KeyBank that would prevent the bank from collecting on the loans. The case was removed to federal district court.

KeyBank moved to compel arbitration pursuant to an arbitration clause in the loan agreements. That arbitration clause precluded class actions. The district court denied the motion, finding that California case law on public injunctions invalidated any clause that precluded class action arbitration.

On appeal, the U.S. Court of Appeal for the Ninth Circuit reversed, finding the U.S. Supreme Court opinion in *AT&T v. Concepcion* overturned California law precluding class action waivers. The

Court examined the question of whether the Concepcion rule applied to cases involving injunctive relief and concluded, "We hold that the California rule does not survive Concepcion because the rule prohibits outright the arbitration of a particular type of claim—claims for broad public injunctive relief."

Finally, the Court rejected plaintiffs' claims that the arbitration clause was unconscionable. It was very clearly marked and was written in plain language, and no student-pilot was under any compulsion to sign.

Arbitrators' Failure to Disclose Simultaneous Service on Another Claim Does Not Amount to Evident Partiality

Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co.
2012 WL 335772
C.A.2 (N.Y.), February 03, 2012

Scandinavian Reinsurance (SR) and St. Paul Fire and Marine Insurance (St. Paul) entered into a reinsurance contract containing an arbitration clause. When the parties got into a dispute, they engaged a panel of three arbitrators, with St. Paul picking one, SR picking one and the third a neutral umpire chosen by the other two arbitrators and with the assent of the parties.

The panel ruled in favor of St. Paul. SR later discovered that after the arbitration began, the St. Paul arbitrator and the umpire had started and completed a separate and similar reinsurance arbitration, and had failed to disclose this fact to the parties or their lawyers. SR argued that this failure to disclose, coupled with the award to St. Paul, was a violation of the continuing duty to disclose and amounted to evident partiality. The district court agreed and vacated the award.

On appeal to the U.S. Court of Appeal for the Second Circuit, the case was reversed. The Court analyzed the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; the directness of the relationship between the arbitrator and the party he is alleged to favor; the connection of that relationship to the arbitrator; and the proximity in time between the relationship and the arbitration proceeding. In each, the Court found that the level of involvement between the arbitrators was insufficient to conclude that either or both of them were biased. They wrote, "Nondisclosure does not by itself constitute evident partiality." As SR failed to meet the burden of proof, the district court erred in vacating the award.

Where Arbitration Would Conflict With Core Purposes of Bankruptcy Code, Judge May Properly Deny Motion to Arbitrate

In re Thorpe Insulation Co.
2012 WL 255231
C.A.9 (Cal.), January 30, 2012

In a very complex asbestos litigation, the parties reached a settlement and memorialized it an agreement that called for arbitration of any later disputes. When the insurance fund began to run out, the insulator at the bottom of the litigation filed for bankruptcy protection.

Some of the parties moved to compel arbitration pursuant to the settlement agreement, but the bankruptcy judge denied the motion, reasoning that "as a matter of fundamental bankruptcy policy, only a Bankruptcy Court should decide whether the manner in which someone has administered a bankruptcy estate gives rise to a claim for damages. Non-bankruptcy courts cannot be the arbiters of such issues...Moreover, the arguments that the parties wish to advance are inextricably intertwined with the issues that the Court will have to address in connection with confirmation of the proposed plan...The very terms of the plan themselves are among the alleged breaches of the settlement agreement." The aggrieved parties appealed.

The U.S. Court of Appeal for the Ninth Circuit found the question presented to be "core" to the bankruptcy proceedings and that ordering arbitration would conflict with the underlying purposes of the bankruptcy code. Therefore, it was within the discretion of the bankruptcy judge to retain exclusive jurisdiction in that court. ●

Good Faith Requirements Must Be Based on Objective Criteria

By Justin Kelly

A recent court case dealing with the requirement that parties participate in good faith in mediation rejected the notion of a subjective approach, ruling that violations of good faith must be based on objective criteria.

The U.S. District Court for the Southern District of New York in *In re A.T. Reynolds & Sons, Inc.*, reversed a ruling by the Bankruptcy Court that a party had failed to participate in good faith in mediation. The Bankruptcy Court ordered the parties to mediation, directing through court order that "the mediator shall report any willful failure to attend or to participate in good faith in the mediation process of conference. Such failure may result in the imposition of sanctions by the court."

The mediator filed a report to the court and testified about the actions of Wells Fargo. The Bankruptcy Court ruled Wells Fargo violated the court order by failing to send a person with settlement authority, by asserting the supremacy of its case rather than being ready to discuss the case and for trying to limit the range of issues that could be discussed during the mediation process. Wells Fargo was ordered to pay the costs of mediation.

The Southern District acknowledged that courts may sanction parties for a failure to comply with a court order but reversed the ruling after concluding that the test applied by the Bankruptcy Court was subjective in nature and could negatively impact the confidential nature of the mediation process. The court also rejected the notion that parties must engage in risk analysis prior to mediation, because such a condition goes against the established law that courts may not coerce parties into settlement.

The court held that a party satisfies the good faith requirement based on objective criteria by showing up, producing the required pre-mediation memorandum and sending a party with settlement authority.

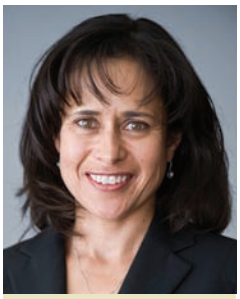
Federal district courts in California do not include a requirement that parties participate in good faith, but rather have adopted local court rules, which mandate that parties submit a written mediation statement, are represented by lead counsel and send a person with full settlement authority.

Furthermore, while there is no good faith requirement written into local court rules, federal district courts in California have cited other court rulings for the proposition that parties are assumed to participate in good faith in mediation. However, no federal district court has imposed sanctions for a failure to participate in good faith, but they have imposed sanctions only where a party has been found to have violated an objective criteria set forth in a court rule or court order.

John Lande
Professor at the University of Missouri School of Law

John Lande, a professor at the University of Missouri School of Law, said a requirement that parties participate in good faith creates a tension with the voluntary nature of mediation, even in a setting where a court orders the parties to mediation, because in the end settling a case using the process remains entirely voluntary. By court rule or court order, if there is a requirement that parties participate in good faith, courts "should use a very narrow interpretation of good faith when deciding whether to impose sanctions," he suggested.

A more effective way to address the issue is to set out clearly defined, objective criteria by which the behavior of parties in mediation may be judged by a court, he said. These could include that parties attend or produce pre-mediation documents, he concluded.



Maureen Weston
Professor at Pepperdine University School of Law

Maureen Weston, a professor at Pepperdine University School of Law, said that a good faith requirement "is a good idea because it forces parties to take mediation seriously" and provides courts with another method to get parties to consider an alternative to full-fledged litigation. However, any test applied by a court to a good faith requirement should be narrow and minimal, she said.

According to Weston, the test of good faith could be based on whether the parties showed up and whether those in attendance had full settlement authority. Ordering parties to mediate, at a minimum, "allows parties to exchange perspectives on the case," she said, adding that "it is rare for parties to push back against a good faith requirement."

She noted, however, that mediators in general "do not want to report to courts about the conduct of the mediation and are not in favor of the requirement that parties participate in good faith." She echoed Lande's comment that if courts require mediators to report about behavior related to good faith, the confidentiality of the process could be called into question and lead to parties being reluctant to discuss the case openly during mediation. ●

JAMS Pays Tribute to Ray Shonholtz, Founder of Partners for Democratic Change

Ray Shonholtz passed away earlier this year, leaving a powerful legacy in the field of alternative dispute resolution. As the founder of Partners for Democratic Change, Shonholtz dedicated his career to the advancement of civil society and the culture of non-violent dispute resolution. Additionally, Partners for Democratic Change received the 2012 Warren Knight Award during the ABA Dispute Resolution Section Conference in Washington, DC.

Ray Shonholtz
Founder, Partners for Democratic Change

Born in 1943, Shonholtz graduated from UCLA and UC Berkeley Law School. In 1976, he founded the Community Boards of San Francisco, one of the country's first neighborhood and school mediation programs. After serving as a Ford Foundation Fellow, Shonholtz in 1989 founded Partners for Democratic Change, with centers in 20 countries throughout Central and Eastern Europe, the Balkans and the former Soviet Union.

Recently retired in Berkeley, Shonholtz and his wife, Anne, had been bi-coastal with homes in Washington, DC, and San Francisco. He wrote and lectured extensively on mediation systems, conflict resolution models and the positive function of conflict in democratic society. He served as a mentor to many in the ADR field, including Julia Roig, the current president of Partners for Democratic Change.

"Ray was one of the pioneers of the community mediation field, but I find it most special that he spent his entire later career building capacity in new democracies so they could be successful," says Roig. "His philosophy of social empowerment and his peace-building agenda were very ahead of their time. Today, there's a recognition of the importance of multiculturalism. But Ray knew that instinctively. His belief was that Americans shouldn't just export the field of dispute resolution. He knew that those in transforming democracies could help themselves, and he wanted to support people in their own countries and help them adapt our methods to their own cultures so they could be leaders there. He also promoted the use of civic collaboration among nations, and we've seen that play out with the Arab Spring. He promoted a very humble model of empowering others to be leaders in their own right."

Jay Folberg, executive director of the JAMS Foundation, law school classmate and longtime friend of Shonholtz, describes a trip they took together in 1999 to Albania as consultants of a World Bank ADR Project. "Watching Ray introduce concepts of mediation and network with dissident groups, as well as with government leaders at the highest levels, was a demonstration in charisma and diplomacy. Ray knew how to help give change a chance by showing disputants a path to overcoming what seemed to be impenetrable barriers."

According to Brad Heckman, CEO of the New York Peace Institute, Shonholtz "practically invented the modern community mediation center, transforming the idea from a quasi-court apparatus to full-service hub for community dialogue, intergroup conciliation and peer mediation, using mediators who reflect the diversity of the community." Heckman worked with Shonholtz for many years, describing him as "a highly influential figure in our field, but one who focused more on building others' capacity and celebrating their triumphs than on getting in his own name and mug in the media and literature."

Shonholtz loved to negotiate, Heckman recalls. "In our limited downtime on international junkets, he often dragged me into hotel after hotel, just to negotiate room rates. He showed me that pretty much everything is negotiable."

Shonholtz also believed that in fundraising and in mediation, "'no' is just the beginning of the relationship," Heckman writes on his blog, The Hecklist. "At the end of a successful negotiation or mediation, Ray would often unnerve me by saying, 'You know, we've made great progress, but something tells me this is not going to work.' I asked why on earth he'd want to plant seeds of doubt after an agreement had been reached. He told me that if folks responded by defending their agreement, we were good to go. But if they showed doubt, we weren't done yet. It was a great deal-sealing maneuver."

> **"His philosophy of social empowerment and his peace-building agenda were very ahead of their time."**
>
> Julia Roig, president of Partners for Democratic Change

Roig adds that Shonholtz's last writing, which was published in the March 2012 issue of the *Cardozo Journal of Conflict Resolution*, was about the Occupy Wall Street movement and how "we should be thinking about the courageous conversations that need to happen here in this country. It's like he came full circle—from community mediation to international dispute resolution to conflict in the U.S. He believed that democratic change isn't a destination but a process."

Germans Propose Law to Increase Use of Mediation

German lawmakers have proposed legislation designed to promote and increase the use of mediation and other forms of alternative dispute resolution in the private sector as part of its obligation under the European Union's mediation directive of 2008.

The EU directive requires member states to adopt legislation that provides courts with authority to refer cases to mediation, authorizes the direct enforcement of mediation settlement agreements, protects mediators from being called as witnesses and protects limitations periods once parties enter mediation.

The draft presented by the German government would have established a court-based mediation system with mediation conducted by judges not associated with the underlying dispute and authorized out-of-court mediation and court-related mediation suggested by the judge. However, the Bundestag (the equivalent of the United States House of Representatives or U.K. House of Commons) adopted legislation late last year that removed many of these provisions, leaving only the provision that authorizes private parties to enter into agreements to mediate outside of court. The German Bundesrat (the equivalent of the United States Senate or U.K. House of Lords) refused to accept these changes and sent the law to the Mediation Committee.

Due to the inconsistencies in the two pieces of the legislation, the proposed law has been referred to the Mediation Committee, a constitutional institution with 16 members from the Bundestag and 16 members from the Bundesrat. The committee is responsible for finding an agreement between the Bundestag and Bundesrat where legislation passed by the bodies is inconsistent.

In a press release, the Bundesrat criticized the Bundestag for eliminating the provision authorizing court-based mediation. "The Bundesrat wants to implement court-based mediation explicitly in the new law as it has proven its advantages especially in complex and large court proceedings" and "has therefore called the mediation committee to establish the court based mediation explicitly in the procedural codes for German courts."

Sabine König
A Judge and Mediator in Hamburg, Germany and a JAMS International Panelist

Sabine König, a judge and mediator in Hamburg, Germany, and a JAMS International panelist, explained that court-based mediation has been part of state courts for more than 10 years and has proven very successful in resolving all manner of disputes, including simple, complex and large-dollar disputes. In these programs, judges who are not involved in the underlying case serve as mediators.

Settlement rates in court-based mediation programs have ranged from 66 to 80 percent, she said, adding, "This is a remarkable proportion in light of the fact that it was often achieved in complex cases, which had already been considered in court." In addition, participants in court-based mediations have been very positive in their assessment of the program, with 91

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"Court-based mediation has been part of state courts for more than 10 years and has proven very successful in resolving all manner of disputes, including simple, complex and large-dollar disputes."

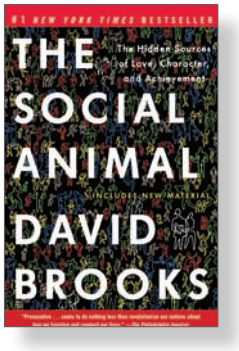
Sabine König,
JAMS International panelist

The German Bundesrat in Berlin

The Social Animal: The Hidden Sources of Love, Character and Achievement

By David Brooks

REVIEWED BY RICHARD BIRKE



Legendary actor and director Orson Welles once said, "We're born alone, we live alone, we die alone." Dog eat dog. Look out for number one."

New York Times columnist, conservative commentator and prolific author David Brooks feels differently. To Brooks, we are all social animals, from the most gregarious politician to the most reclusive hermit. In his book *The Social Animal*, Brooks demonstrates how intimately connected each of us is with others as a result of our biology, our social structures and the neuroscience that explains brain functioning. The insights contained in this book will help people to become better negotiators or mediators by increasing their understanding of how and why people behave the way they do.

The book weaves together more than 370 scientific studies from a wide variety of disciplines into what is, at some level, a romance novel about two characters, Harold and Erica, whom we observe from pre-birth to death. At each stage of the lives of his two main characters, Brooks highlights the aspects of life that both illustrate and prove how the mind and brain are socially constructed.

As an example, Brooks introduces us to Harold's future parents when they are at a resort, scanning for potential mates. The future parents may think they are free to choose mates, but instead they are captives of their evolutionary history. The men scan for women with a .7 waist-to-hip ratio. Women scan for men who are slightly taller than they are, with symmetrical features, and slightly larger than average pupils. We may think we have free choice, but our destinies are largely predetermined by evolutionary knowledge about who will make a good mate.

We may think that all our decisions are made with that most recent of evolutionary creations, our frontal cortex. But in fact, we are making and framing large numbers of decisions with evolved mechanisms deep in our brains of which we are not even remotely aware. So when you decide on a settlement amount or a strategy, you may be guided by primitive instincts that are more related to survival than they are to modern-day business.

When Harold is born, we learn that humans spend a longer time helpless than any other creature, both as a percentage of time and as a raw number of years. Giraffes come out of the womb pretty much ready to stand up and walk, and spiders emerge into the world ready to fend for themselves. Humans, in contrast, live nearly a decade before they can safely microwave a cup of hot water, and some take three decades to fully leave the nest. Were people to be cared for with the same level of attention and for the same amount of time as any other creature on earth, not a single one would survive. Instead, an incredible investment of time and attention causes us to learn about the world in a social network.

In difficult disputes, parties may feel abandoned, isolated or attacked. These feelings are the antithesis of the nurturing environment in which many of us were reared. It's no wonder that parties sometimes express that litigation was one of the most harrowing events of their lives, while mediation—where they had a nurturing mediator who looked out for their interests—was, in contrast, a much warmer place.

Later, we follow Harold and Erica through courtship, marriage, careers and ultimately death. The biographical info is entertaining, but the real brilliance of the book is how each chapter introduces us first to the real-life issues facing our heroes, and then how Brooks uses these issues to illustrate the neuroscience and social psychology that inform our choices. There are far too many tidbits to summarize, but let me offer a couple of my favorites:

- Language is learned through the use of "mirror neurons," and if we have defects in our mirror neurons, we may be autistic, have problems learning language or have difficulty reading social situations. This may explain why some parties in a negotiation or mediation "just don't seem to get it." It may also be the case that expert mediators have an abundance of mirror neurons!

- We are masters at subtle judgment. When someone cries at the loss of a child, we feel compassion. When someone cries because their Maserati was damaged, we feel contempt and disdain. Our reactions are not to the person, but to the person in a social context. Again, master mediators seem to frame situations in ways that create contexts more favorable to settlement.

There are literally hundreds of similar observations, and they all lead to the conclusion that Brooks is right on. We are all social animals, from before we are born to our last day of life.

Brooks might disagree with Orson Welles, but he'd probably be close with John Donne, who famously wrote that "no man is an island," or even—despite crossing party lines—with Hillary Clinton, who said that "it takes a village…." Whether you are on an island or in a village or in a difficult dispute heading to mediation or arbitration, I highly recommend that you read *The Social Animal*. It will help you understand your own life and the lives of the other social animals who share the world with you. ●

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percent saying they were satisfied with the process, and 84 percent with the result of mediation.

König said this issue is the main one being discussed in the Mediation Committee. "Judges are lobbying the committee to allow them to continue to serve as mediators in cases they are not involved in," she said. She also noted that local Chambers of Commerce are actively promoting passage of the mediation legislation.

Under the proposed legislation currently before the Mediation Committee, mediations could be conducted with agreement of parties by one or more private sector mediators. "A mediator is a neutral and independent person without power of decision," it says.

Parties would be free to select their mediator, and mediators would be responsible for ensuring that the parties entered into mediation voluntarily, treating parties equally and promoting communication between the parties, it adds. Parties would be free to end the mediation at any time, and the mediator could end the mediation if he or she determines that the parties are unlikely to reach settlement or benefit from continued mediation.

According to the proposed legislation, a mediator would have to disclose any possible conflicts of interest, and if he or she has previously represented a party, he or she would be prevented from serving as the mediator unless the parties are fully informed of the conflict and consent to his or her service as the neutral in the process. If requested, a mediator would be required to provide the parties with his or her professional background.

The proposed legislation provides that mediators are required to maintain the confidentiality of the process, but they would be authorized to disclose if required to enforce a settlement agreement reached in mediation or disclosure is necessary "for reasons of law and order, particularly in order to avert extensive danger to the well-being of a child or the detriment of the physical or mental integrity of an individual."

Mediators would be required to have suitable training in mediation, including training on the principles of mediation, negotiation and conflict management. It also would authorize the Federal Ministry of Justice to establish additional criteria and requirements that mediators would have to meet before they could hold themselves out as certified mediators.

Finally, the proposed law calls for studies that would look into the efficacy of the mediation.

König said questions have been raised as to whether the proposed law as written conforms to the EU directive because it does not explicitly protect mediators from having to testify and does not provide for direct enforcement of mediation settlement agreements.

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.

JAMS DISPUTE RESOLUTION
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An Update on Developments in Mediation and Arbitration