



“...to support and promote professional and qualified attorney-mediators who are committed to the proposition that the existing dispute resolution system can fulfill its intended purpose through the use of mediation.”

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Dear Colleagues:

From the heart.

I became a mediator in 1994 quite by accident, which may have been your experience, too. For several years before that I had been going to mediations with my clients as their cases moved toward trial and we went through the process of what my law partners and I called “being mediated upon.” In Austin where I live, the district judges had embraced mediation some years earlier as a way to unclog their dockets, and a local “standing order” required that most cases go through the mediation process. However, I confess that what I knew about the “mediation process” was pretty much limited to the overview that most mediators gave during their opening session.

While I may have given a few academy-award-worthy performances that hid (I hope) the depth of my ignorance on the subject, I was smart enough to know that I needed some education on the “process” that was becoming a routine aspect of my law practice. After all, I wanted to be able to “win” the mediations! I signed up for a basic 40-hour mediator training course offered by the American Academy of Attorney-Mediators. I took the mediator training with the idea of becoming a better advocate, but I stepped into a new career.

I joined AAM when I finished the Academy’s course requirements. I do not have a perfect attendance record at AAM’s twice yearly advanced mediator training programs like AAM’s immediate past president, John Dowdy, but it is close. I have attended a lot of other mediation courses where I always learn a good deal, but AAM’s training seminars are, without question, consistently the best and a great economic bargain! These are only two of the many great benefits to being an AAM member. The really top bonus to AAM membership and attending the training seminars is the opportunity to meet and spend time with the wonderful members. I love being around you guys!

Past and future.

The Annual Meeting and Spring Advanced Mediator Training Seminar held last April 4-5 in New Orleans was sold out and the evaluations were enthusiastic and positive.

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PRESIDENT'S LETTER continued from page 1

The program received CLE accreditation from all of the states represented by our attendees. Skip Hulett, AAM's president-elect, has planned a great program for the Advanced Fall Training Seminar that will be held in San Antonio on November 11. The agenda and registration information are included in this Newsletter.

Let us hear from you.

Your board of directors really wants to hear from you! Do you have a suggestion for how AAM can better serve its members? Where would you like future training seminars to be held? What topics and speakers do you want to hear? Can we help you organize a chapter in your city or state? Please let me hear from you if I can be of assistance to you.

And finally...

I cannot close without acknowledging the incredible treasure AAM has in Brenda Rachuig, AAM's Executive Director. Brenda is incredibly well organized, always prepared, patient and tactful, and an absolute joy to work with.

Your Board looks forward to seeing you at the Fall Advanced Mediator Training Seminar in San Antonio.

Sincerely,

Gayle Cipriano
President

Newsletter Thanks

We owe special thanks to the law firm of Hunton & Williams LLP for compiling and mailing the newsletter, to Allen Butler for supervising his firm's newsletter work, and to John Feather of Houston, Newsletter Committee Chair, for putting it all together. Thank you all for a great job!

AAM Welcomes New Members

We are pleased to announce the following new AAM members:

George Brin, San Antonio, Texas
John "Jack" Davis, Little Rock, Arkansas
Robert Dietz, Orlando, Florida
William Hardie, El Paso, Texas
Reese Harrison, San Antonio, Texas
Maurice Hebert, Metairie, Louisiana
Allen Krouse, New Orleans, Louisiana
Leslie Roberts, Plano, Texas
Searcy "Skip" Simpson, Frisco, Texas
M. Kent Sims, Flower Mound, Texas
L. Zant Woodul, Lubbock, Texas
Jeffrey Wooley, Austin, Texas
Norman Zable, Dallas, Texas

We are also pleased to welcome **Ronald Wiesenthal**, of St. Louis, formerly of Houston, and **James Lober** of Houston, who have renewed their memberships after a period of absence.

We welcome you to the Association of Attorney-Mediators and look forward to your active participation within this organization! Please let an officer of a local chapter or the national board of AAM know what AAM can do for you and how you would like to become involved in AAM's activities.

Advanced Certified Mediators

AAM congratulates the following members who have achieved or renewed their Advanced Certified Mediator status for the 2005 year (subsequent to the prior newsletter printing):

Mike Amis
William Bonham
Jeffrey Abrams (Dallas)
William Short
Larry Hinojosa

In order to retain Advanced Certified Mediator status, holders of the certification must submit renewal applications annually and comply with the Rules Governing Certification.

Patti Wood to Speak at Advanced Attorney-Mediator Training November 11, 2005 in San Antonio, Texas



Patti Wood, MA, CSP, Body Language Expert, is an international speaker who has been researching, writing and speaking on communication for more than 20 years. She will make you learn, laugh and jump out of your chairs with excitement!

In this high energy, interactive presentation, you'll learn to accurately assess others and use the power of your "gut level" responses to improve your business savvy. We form first impressions during the first 90 seconds of an interaction. Since these impressions stay with us for a long time, it's important to be conscious of our abilities and intuitive value filters.

- Do you want to know what creates a *positive* first impression?
- Have you ever wondered what a client was *thinking, but not saying*?
- Do you *know the differences* between the way men and women communicate nonverbally?
- Do you want to *gain the eyes and attention* of others in a meeting?
- Have you wanted to quickly and easily *establish rapport* with customers on the phone and in person?
- Do you want to know two actions to take when *someone isn't listening* to you?

If you answered YES to any of these questions, this program has something for you. Through exercises and discussion, you'll develop awareness that will give you a competitive edge!

In this program, you will learn:

- Ways to empower your physical presence
- How to gain the eyes and attention of others
- Methods to gain and maintain rapport
- How to encourage acceptance and agreement
- Touch taboos and dos
- How to use the best distance and gestures for your situation
- How power, gender, race, and status effect nonverbal communication
- How to handle handshakes — the grippers, the twisters, and the whippers
- What body windows do for your power and self-confidence.

Registration information for AAM's Fall Training Seminar is included in this newsletter or you may visit AAM's website at www.attorney-mediators.org for registration forms. For more information on Patti Wood, please visit her website at www.PattiWood.net.

Brutsché Award Recipient

The Brutsché Award is a very special and prestigious award "Given to the person(s) personifying the principles of service and commitment to the profession that are the foundation of the ADR movement." Congratulations to **Walter Wright** of Austin, Texas, the 2005 Brutsché Award Recipient. Walter is a past president of AAM and is an Associate Professor in the Legal Studies Program at Texas State University. Special thanks for all you do for AAM and the mediation profession, Walter!

2005 President's Awards

For outstanding service "behind the scenes," AAM's 2005 President's Awards were presented to **Allen Butler and Hunton & Williams, LLP** for their continued service in preparing the AAM newsletter, and to **Learn From the Masters (Sid Stahl and John Estes)** for their excellent basic mediation training program and promoting AAM to new mediators. Congratulations and thank you for your continued efforts on AAM's behalf!

AAM SPAM AWARD

At the 2005 Annual Meeting in New Orleans, a new and unique award was presented. The Special Presidential Award of Merit (SPAM) was commissioned by AAM's outgoing President, John Dowdy, Jr., who appointed a blue chip committee charged with the task of formulating the award, designing same, and selecting the recipient.

The SPAM Committee met in secret behind locked doors under armed guard in a clandestine location south of Malakoff, Texas. Each committee member was unaware of the identity of the others. The blindfolded members were driven to the meeting place by the armed guards, blindfolds being removed only after the entire committee were convened and the doors locked. They were instructed to discuss only the formulation and design of the award and to entertain no suggestion or discussion of potential recipients. The first two days were devoted entirely to this task, with meals and water being delivered three times daily.

By the end of the second day, the SPAM Committee had the SPAM Award in its final form. The award was named for Theodora, the wife of Justinian, Emperor of the Byzantine Empire. The only task that remained was to select the recipient.

Each committee member was given a single slip of paper along with a pencil and instructed to write the name

of a suggested recipient, fold the paper, and deposit it through the slot of a metal padlocked box. There was no discussion of potential recipients, only the writing of a name on each slip of paper. AAM's President was notified that each committee member had submitted a name. The door was unlocked, the President entered the room and an armed guard handed him the key to the padlocked box. The box was opened and each slip of paper unfolded. In a remarkable display of consensus, each committee member had submitted the same name. It was no contest.

The wording of the award follows: "As you are no doubt aware, Justinian was the main man in the Byzantine Empire who got far more credit than he deserved. Theodora's daddy was the bear-keeper in the hippodrome. Theodora was beautiful, intelligent, and absolutely iron-willed. More than once the Byzantine Empire profited from her ability to refocus and bolster the will of her wimp husband, who had a tendency to wilt under pressure."

There is only one individual who fits this description, as anybody who has served as AAM's President can testify — **BRENDA RACHUIG**, our Executive Director. Congratulations Brenda!!!! and thanks for making my year as President a very rewarding experience.

John Dowdy, Jr.
Immediate Past President, AAM

Annual Meeting in New Orleans a Huge Success

The Annual Meeting and Advanced Attorney-Mediator Training "Mediation Skills: Kicking Them Up A Notch" held in New Orleans, Louisiana in April, 2005 was a huge success. One hundred ten attendees and forty-one spouses, representing thirteen states, attended the event in the "Big Easy" and enjoyed the great and unforgettable sights, sounds and food of the region. The training was held during the French Quarter Festival, giving everyone a chance to sample New Orleans' cuisine and music in a festival setting along the Mississippi

River. We were enlightened and entertained by very talented AAM members and even tested on our Intercultural Conflict Styles in a fun interactive session. The evaluations showed that everyone enjoyed our time together in New Orleans!

It is with great sadness that we have watched the devastation caused by Hurricane Katrina to New Orleans and the Gulf Coast area. Please keep the people of this region in your thoughts and prayers.

Ripples from Peace Lake by Eric Galton

BOOK REVIEW

Greg Bourgeois, Austin, Texas

I wanted to alert the AAM membership about a new book written for mediators. The book is titled; “*Ripples from Peace Lake: Essays for Mediators and Peacemakers*” and I should disclose that I have a bias toward recommending the book in that my business partner Eric Galton is the author. You can order your copy of *Ripples from Peace Lake* online by going to www.trafford.com.

Even without knowing the author, it would be easy to recommend this book. *Ripples from Peace Lake* is a collection of short stories designed to inspire, teach, and enlighten mediators, peacemakers and anyone involved in conflict resolution. Essays include trust building, apology and forgiveness, the art of mediation, private caucus techniques, patience and a variety of topics intended to improve the skills of mediators and conflict resolution professionals. The book may also be used as a primary or secondary textbook for classes on mediation or conflict resolution. Ripples will evoke the passion of people who work in the field of conflict resolution and is the perfect gift for those who work in any form of peacemaking.

Ripples, is also the type of book that you will want to read more than once. It is designed to be the mediator’s equivalent of the golfer’s little red book. I hope that you all enjoy the book as much as I did.

Here are some additional reviews of the book.

REVIEWS:

“*Ripples from Peace Lake*” is a message of love and hope to all of us, from one of us. This is a book about art, jazz musicians, bartenders and chefs. It is practical and it is thought provoking. Transparent and honest. Magical and sobering. Read beneath the surface and you will re-discover qualities in yourself and in the power of the mediation process that will make your next case your best work to date.

Tracy Allen, Co-chair of the Mediation Section of the ABA Section of Dispute Resolution and the President-Elect of the International Academy of Mediators.

“*Ripples from Peace Lake*”, Eric Galton’s new book, is a must-read for any practicing mediator. Galton explores nuts and bolts issues of mediation practice in an enlightening, entertaining and thoughtful way. Perhaps even more important, he exposes the heart and soul of the mediation process.

Lela Love, Professor of Law and the Director of the Kucin Program for Conflict Resolution and the Cardozo Mediation Clinic, Benjamin Cardozo School of Law.

Eat What You Kill

The Fall of a Wall Street Lawyer by Milton C. Regan, Jr., The University of Michigan Press, Ann Arbor 2004

Imagine that you are an experienced train dispatcher in the U.S., traveling on vacation in Europe, using your EuroRail Pass, waiting at the station. Suddenly, you see events unfolding which to the uninitiated would mean nothing but, because of your expertise, you know spell certain, horrendous disaster. Not immediately, but there will be a horrific wreck in a matter of minutes. And, there is nothing, nothing you can do to stop it. What would you do? Turn away? Watch a little bit? Watch the whole thing?

These are the emotions I have felt reading, and ultimately completing, *Eat What You Kill* by Georgetown law professor, Milton Regan. This true story (you most likely will recognize some of the names) chronicles the fall of a bankruptcy partner at a large, prestigious Wall Street firm, a man who went from an income in excess of \$600,000.00 per year, a man regarded as “one of the best bankruptcy lawyers in the country,” to a two year stay at the Fort Dix Correctional Facility in New Jersey.

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EAT WHAT YOU KILL continued from page 5

“How had he fallen so far so fast?” The first lawyer ever charged under federal criminal law for violating Bankruptcy Rule 2014.

Get this book and read it. I found it at my local, suburban public library. You will want to turn away throughout the book, but like our train dispatcher above you cannot, and you’ve got to tell your buddies about it when you get home. Yes, it’s complicated. Photocopy the diagram on page 81 and keep it handy. Yes, the author can get us bogged down, but he picks us up on the next page and gets us back into the action. The book uses the case presented to illustrate the pressures inevitably present in today’s law practice, particularly within the large firms, how the principal actors respond to those pressures, and the results which flow. From the Prologue, page 7, “The ability to produce revenues in today’s large law firm depends primarily on entrepreneurial effort. The lawyer therefore must seek out his or her own clients. The common way to describe this system in the large firm is that you ‘eat what you kill.’”

Law students can appreciate this book, which is to Grisham as Beverly Sills is to Whitney Houston. But, experienced lawyers in any kind of practice will truly comprehend it, and it should be required reading for all lawyers with over four years experience. From vantage points of personal injury, commercial litigation, bankruptcy, transactional work, probate, from little cases to big cases, don’t we all sit some day, in some way, where this lawyer did? Where the lawyer in the film “The Verdict” sat when he received that piercing question from the Archbishop, “But, is it the right thing to do?” Finish this book and you will want and deserve at least five hours of CLE, rounding down.

Why does AAM have an eight year requirement for the attorney-mediators who seek membership? The answer is found in this book and is as simple and complicated as the third grade wisdom of our founder, Steve Brutsche’: “Takes one to know one.” Read it, hang on, it’s a scary ride, and join me in saying at the end, “There but for the grace of God go I!”

As always, go to www.amazon.com and check it out.

Mike Amis, Dallas, Texas

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CHAPTER NEWS

BEXAR/SAN ANTONIO CHAPTER NEWS

We welcome you to San Antonio for the upcoming Advanced Attorney-Mediator Training in November. You will find the new La Quinta Inn and Suites Convention Center to be a wonderful facility, as many in our group have experienced meetings there since its opening in January of 2005. The Bexar/San Antonio chapter does not currently hold regular monthly meetings. We exist as an informal group for interacting from time to time and to advertise in the San Antonio Bar Association Directory and in the San Antonio Lawyer. For information, please contact William Lemons, Chapter President, at (210) 224-5079.

CENTRAL TEXAS NEWS

The Central Texas Chapter holds a monthly meeting at La Madeleine Café, usually on the second Friday of the month, at which members “catch up” with one another, ponder the complexities of the mediation “process,” and receive CLE credit. Recent topics presented include “Do No Harm — Be Vigilant,” “Mediating the War of the Roses” (divorce mediations), and “Ethical Ways to Get a Mediation ‘Unstuck.’” Our chapter is representative of the AAM membership as a whole in its great depth of mediation talent and knowledge. The Central Texas Chapter’s website address is www.aamctx.org. For information on chapter events, please contact Steve Nelson, Chapter President, at (512) 732-0099.

HOUSTON CHAPTER NEWS

Again this year, the Houston Chapter of AAM is joining with the HBA-ADR Section in providing breakfast meetings and CLE on the second Tuesday of every month. The meetings resume September 13, 2005 at 7:30 a.m. at South Texas College of Law. The presentation is, *Current Trends in the Mediation Market Place a/k/a Where Has All the Business Gone?* Presenters will be Trey Bergman, President/ADR Section of HBA and Alice J. O’Neill, President/Houston

Chapter of AAM. Cost is \$15.00 per person. For information about the Houston Chapter, please contact Alice O’Neill, Chapter President, at (713) 523-5402.

NORTH TEXAS CHAPTER

The North Texas Chapter was again pleased to join together with the Dallas Bar Association’s ADR Section and Collaborative Law Study Group, and the Texas Collaborative Law Council to cosponsor our annual “Summer Social for ADR Colleagues” for the Dallas area ADR community. The well attended Social on July 14, 2005, provided a wonderful opportunity for area ADR professionals and their families to come together in a relax environment to share a meal and catch up on their busy lives. The Chapter’s quarterly breakfast meetings will resume in October — so watch your e-mails for dates and details. For information on the North Texas Chapter, please contact Allen Rudy, Chapter President, at (214) 696-1242.

OKLAHOMA CHAPTER NEWS

For information on the Oklahoma Chapter and upcoming events, please contact Joel Carson, Chapter President, at (405) 946-8022.

ST. LOUIS CHAPTER REPORT

The St. Louis Chapter continues to hold monthly meetings to discuss current mediation developments and issues and to consider specific problems and questions the members have encountered. In addition, at each meeting, one of the members leads a discussion on a specific mediation topic (that qualifies for MCLE credit). Recent topics have included: Ethical Issues in Mediation; Campus Mediation at the University of Missouri-Columbia; Building a Mediation Practice; and Barriers to Settlement. For information regarding the St. Louis Chapter, please contact Richard Sher at (314) 721-1516.

Confidentiality Issues

Charla Beall, JD, MBA
Olathe, Kansas

I. CONFIDENTIALITY THROUGH THE YEARS

Since the Lake Utopia case, courts throughout the years, have examined, pondered, and elaborated on the strengths and power of maintaining confidentiality in the mediation process. This article provides a sampling of quotes from various cases, throughout various jurisdictions, both state and federal level, supporting the mediation confidentiality privilege.

For those who are not familiar with Lake Utopia (*Lake Utopia Paper v. Connelly Containers*, 608 F.2d 928 (1979); cert denied in 444 US 1076 (Feb 19, 1980)), this case affirmed an arbitration award. The importance to mediation comes from the description of the pre-argument conferences being similar to that of mediation, and the requirement for confidentiality in such a process. Because the case was not accepted for US Supreme Court review, many considered this to be supportive of a mediation confidentiality privilege throughout the US.

These later court cases make it very clear that violating confidentiality is unacceptable conduct.

A. From *Clark v. Stapleton Corporation*, No. 91-3263, US Court of Appeals for the Tenth Circuit, 957 F.2d 745 (1992):

“We agree with the Second Circuit that the guarantee of confidentiality is essential to the proper functioning of an appellate settlement conference program (Lake Utopia Paper). We also agree that revealing statements or comments made at a settlement conference is a serious breach of confidentiality. For our conference program to be successful, participants must trust that matters discussed at a conference will not be revealed to the judges.”

B. From *Victoria Paranzino v. Barnett Bank of South Florida*, 690 So 2d 725 (1997):

“If the trial court were to allow this willful and deliberate conduct [of disclosure of confidential communications] to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process.”

C. From *Lourdes Barajas v. Oren Realty and Development Company*, Court of Appeal of California, Second Appellate District, Division 2, 57 Cal. App 4th 209 (1997):

“...if the parties are concerned about what they say at mediation proceedings, and are not kept confidential (sic), we are going to have fewer settlements and the litigation will go on and on.”

D. From the case *Lyons v. Booker*, 982 P.2d 1142 (1999), the Court of Appeals of Utah:

“We agree with the Tenth Circuit [Clark v. Stapleton] that the ‘guarantee of the confidentiality is essential to the proper function of an appellate settlement conference program’ and ‘Revealing statements or comments made at a settlement conference is a serious breach of confidentiality’. ... We also agree that for our appellate mediation program to be successful, ‘participants must trust that matters discussed at a conference will not be revealed to the judges.’”

In deciding to adopt a federal mediation privilege, in *Sheldone v. Pennsylvania Turnpike Commission*, US District Court for Western District of Pennsylvania, 104 F.Supp 2d 511 (2000), the Court noted “forty-nine states and District of Columbia had adopted a mediation privilege of one type or another”. Without confidentiality, “The effectiveness of mediation would be destroyed, thereby threatening the well established public needs of encouraging settlement and reducing court dockets,’ and adopted a mediation privilege.

E. From the case *Brown v. Pica*, Superior Court of NJ, Mercer County, 360 N.J. Super. 565 (2001):

“Parties engaged in settlement negotiations must be free to make and reject offers of compromise without fear that such discussions will be used to their disadvantage if their cases go to trial. Otherwise plaintiffs would be reluctant to make non-exorbitant settlement demands, lest their willingness to take a modest amount in settlement be used against them in the courtroom if settlement is not reached. Likewise, defendants ordinarily would not be inclined to offer any money in settlement, or at least more than a token sum, if they knew that their willingness to make such offers eventually would be treated as evident of the fact that the extent of liability in cases that did not settle.”



F. From *Derolph v. State of Ohio*, 760 N.E.2d 351 (2001):

“The important point is that any party to the mediation has control over the sharing of information that it may consider sensitive and may thereby protect the confidentiality of its position in the mediation. For this reason, no party in this mediation should be concerned that an attorney representing another party who may ultimately share in the responsibility of approving a settlement will gain same undue advantage by participating in the mediation.”

G. From *Wilmington Hospitality, LLC v. New Castle County*, Court of Chancery of Delaware, 788 A.2d 536 (2001):

“Confidentiality of all communications between the parties or among them and the mediator serves the important public policy of promoting a broad discussion of potential resolutions to the matters being mediated. Without the expectation of confidentiality, parties would hesitate to propose compromise solutions out of the concern that they would later be prejudiced by their disclosure.”

H. From the California case of *Foxgate Homeowners' Association Inc v. Bramalea California, Inc.* 26 Cal 4th 1 (2001). Later quoted in *Rojas v. Supreme Court of California*, 33 Cal. 4th 407 (2004).

“Confidentiality is essential to effective mediation [because it] promotes a candid and informal exchange regarding events in the past.... This frank exchange is achieved only if participants know that what is said in this mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.”

I. From the Kansas case *Schauf v. Schauf*, No. 91,783, Court of Appeals of the State of Kansas (Mar 2005).

“In order that mediation be successful, disclosures of strategic strengths and weaknesses need to be shared by the parties with the mediator so that a knowledgeable evaluation can be made in the course of trading offers and counteroffers. When a mediator is asked to step out of this role and assume the impartial role of a master, his or her knowledge of the case would be based in part on these confidential communications, which would have the potential to taint impartiality.”

II. A SECOND LOOK AT INTERESTING COURT CASES

There have been a variety of cases in different jurisdictions dealing with mediation and confidentiality issues. Here are a few interesting ones that are worthy of a further consideration. Note that only the issue of mediation confidentiality is outlined here. Other issues decided in the case or raised on appeal were not included.

A. Appearances Do Count!

Bridges v. Metromedia Steakhouse Company, Court of Appeals of Indiana, 807 N.E.2d 162 (2004).

Facts: Burn injuries sustained in 1998. Mediation in 2002. After mediation, laser treatment to lessen the appearance of scarring.

Issue: Whether the testimony from a mediation participant regarding the plaintiff's appearance observed during the mediation (injuries to hand) were admissible.

Held: Confidentiality may not be waived by the parties. However, the appearance of a participant is not confidential. “The testimony does not constitute either conduct or a statement made in the course of mediation.” And, information about appearance during mediation “could not be characterized as evidence of an offer of valuable consideration in settlement of a disputed claim.”

B. Reports Prepared Solely for Mediation

Rojas v. Supreme Court of California, 33 Cal. 4th 407 (2004).

Facts: First lawsuit involving apartment complex owner versus contractor. Case ended with mediation agreement. During mediation, parties made reports and took pictures of the construction defects. Agreement provided: “defect reports, repair reports, and photographs for information purposes which are protected by COM and Evidence Code shall not be published or disclosed in any way.”

Second lawsuit involving tenants versus apartment complex owner. Tenants subpoenaed files from first lawsuit, including reports and pictures.

Issue: Whether reports and pictures obtained during mediation, not pursuant to discovery, could be subpoenaed. ►

Held: Tenants could not compel discovery. “The mediation privilege is an important one, and if courts start dispensing with it by using the ... test [governing the work-product privilege] ... you may have people less willing to mediate.”

Chester County Hospital v. Independence Blue Cross, et al, Civil Action No. 02-2746, US District Court for Eastern District of Pennsylvania (2003).

Facts: Mediation Agreement provided for confidentiality, and included a “Stipulation of Confidentiality” which: prohibited “future use of settlement offers, all position papers or other statements furnished to selected mediators, and the decision or recommendations in any Mediation proceeding.” Relying on these provisions, parties exchanged position papers and confidential communications, all of which were labeled “Confidential: For Settlement Purposes Only.” Mediation unsuccessful and papers returned accordingly. Pursuant to discovery, some mediation documents inadvertently provided. Immediate request was made for return of these documents.

Issue: Whether confidentiality was waived by providing confidential information during discovery.

Held: Confidentiality privilege was not waived. The documents were not sent to a party outside the mediation privilege. After the documents were sent out, diligent and immediate efforts were made to retrieve the documents.

C. Caucusing and Multiparty

Reason, et al, v. Wilson Concrete Products, Inc, Court of Appeals of Ohio, 2004 Ohio 5744 (2004).

Facts: Multiparty litigation. Different Mediation Processes involving different parties — not all parties included in one mediation process. Disclosure by one party to another party outside of the mediation process.

Issue: Whether information from mediation involving two parties could be shared with another party not involved in the mediation, but in the same court case.

Held: Disclosure violated confidentiality. The disclosures outlined “negotiation, strategies, settlement positions, and other communications” and were disclosed with the intent to pressure other party into giving a better settlement

arrangement. The attorney who had disclosed this information was removed from the case.

D. Dual Role Appointment Is Not The Better Practice

Bowden v. Weickert, Court of Appeals of Ohio, 2003 Ohio 3223 (2003)

Facts: Parties went through med-arb process.

Issue: Whether one individual may serve as mediator and arbitrator, and maintain confidentiality.

Held: Parties must agree to rules for a mediation-followed-by-arbitration (or Med-Arb) process and must agree to give up confidentiality for information shared during mediation to be considered during the arbitration stage. Because these rules were not agreed to prior to the processes, the parties did not waive confidentiality and the arbitrator erred in considering confidential information.

Schauf v. Schauf, No. 91,783, Court of Appeals of the State of Kansas (Mar, 2005)

Facts: Family farming operations. Litigation filed by parents versus son and daughter-in-law. Dispute over whether partnership agreement existed (yes), and division of property and profits. One individual appointed in dual-role as special master for hearing issues not already decided by court, and mediator. Unsuccessful mediation followed by master’s hearing. Master’s Report decided the division of property and profits. Court adopted Master’s Report.

Issue: Whether one individual could serve as both decision maker and mediator.

Held: Because no objections were made by either party, confidentiality was waived. The trial court’s decision was affirmed. However, the better practice is to not have dual appointment because of confidentiality issues and appearance of non-impartiality.

E. Post-Mediation Communications

In the Matter of the Estate of Ernestine Stukey, Deceased, Supreme Court of Montana, 2004 MT 279 (2004).

Facts: Probate case. Mediation agreement reached. During the mediation, parties relied upon a conservator's accounting which contained an incorrect estate value. Court admitted into evidence a letter written by one of parties one week subsequent to mediation. The content of the letter included the understanding of certain statements made at the settlement negotiations. Statute stated: "Except upon written agreement

of the parties and the mediator, mediation proceedings must be confidential...."

Issue: Whether letter referring to mediation discussion was protected by mediation confidentiality privilege.

Held: The letter was not a communication that occurred during the mediation process. Thus, the letter was admissible.

AAM Members Attend "IT'S IN THE STARS" Summer Mini-CLE in Fort Davis, Texas

*John Dowdy, Jr.
Immediate Past-President*

In a "first of it's kind" experiment, a small group of intrepid AAM members convened at the old, historic and pregnant with quaint Hotel Limpia in Fort Davis, Texas for a two day CLE program. The CLE scholarship was accompanied by side trips to the McDonald Observatory to observe the stars, to Marfa to observe the lights, to the Big Bend to observe the mountains, and to Alpine's finest eatery to observe each others' appetites.

The historic background for the CLE program itself was the Estate of William Johnson McDonald, Civil War veteran, attorney, banker, amateur astronomer, and one of Texas' all-time characters. Mr. McDonald died in 1926. His estate was worth approximately \$1.3 million, a substantial amount now and a princely sum in 1926. His will purported to fund a Department of Astronomy at the University of Texas and construction of an observatory. Some of Mr. McDonald's distant relatives got heartburn over his assets going toward star-gazing instead of to them, resulting in litigation over the validity of his will. After two contested trials (first trial result reversed on appeal and hung jury in second trial), the estate was finally settled and an agreement was reached with the orangebloods for the University of Texas to get \$800,000.00, thus funding the design and construction of the McDonald Observatory, which was dedicated in 1939.

On Friday, June 10, Mike Amis led off with a discussion on how this probate contest might have been resolved today by mediation, integrating into the discussion an

insightful analysis of the Avary and Alford cases and how they impact our practices as attorney-mediators. Mike's part of the program was followed by Larry Maxwell and Sherrie Abney, who dealt with the same scenario from the collaborative dispute resolution approach. The role play was illustrative, even though none of the actors attracted any attention from the Academy. Sherrie and Larry were followed by John Dowdy, Jr., who led a discussion on mediating a multi-party probate contest, using a fact scenario too bizarre to have been made up. John simply changed names and a few circumstances. The final session, on Saturday morning, was the popular format developed by and led by Ross Stoddard, building on the substantive material discussed the day before. All speakers and attendees participated in this session, as well as in the Friday sessions. The program content was enhanced by the small group format. Nobody needed a microphone.

There seems to be a consensus among all participants (totaling fourteen) that the absence of exotica in the venue was more than offset by the historical and laid-back setting of Ft. Davis, the Davis Mountains, and surrounding area. Hey!!!! No phones in the hotel rooms!!!! Beat that with a stick. It's great!!!! Do we do it again, making the mini-CLE an annual event? Based on an informal and semi-scientific poll administered by the Amis, Hulett, Dowdy Group, the answer appears to be in the affirmative. The scouting excursion to Big Bend, including a tour of greater metropolitan Terlingua and the partaking of local cuisine, led to substantial sentiment to hold next year's mini-CLE at that locale. Stay tuned.

To Do List:

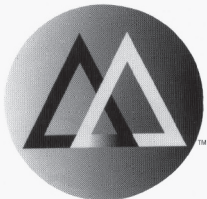
- ✓ Register early for the AAM Advanced Mediator Training Seminar in San Antonio and make hotel reservations. Reservation deadline for the hotel's reduced rate is October 11, 2005.
- ✓ Update the national office with any changes to your address, phone, fax or email.
- ✓ Add AAM's website link to your law firm/mediation firm/personal website. It increases AAM's priority and exposure. www.attorney-mediators.org.
- ✓ TELL ONE COLLEAGUE OR FRIEND ABOUT AAM Brochures are available for your circulation upon request to the National Office. 1 (800) 280-1368 or aam@airmail.net.

AAM Website Members' Area To Be In Operation September 30

The "Members' Area" of the AAM Website will be up and running by September 30. The "Members' Area" will make mediation forms available to members through the website. To access the members' area, the user name will be the member's last name in lower case without non-alphabetic characters and the member's password will be the last four digits of the member's bar number plus aam. Example: 0045aam. The website has also been moved to a new host, which should alleviate some of the technical errors experienced in the past.

Now is a good time to look at your biographical sketch on the AAM website. Has your information changed? Need an update? Do you want to add a photo or update your photo? Your photo can be sent in electronically, in hard copy or, if you have a photo on a different website, we can retrieve it from that site. Click on to www.attorney-mediators.org. To make changes to your website information, please email Brenda at aam@airmail.net or call 1 (800) 280-1368.

Add AAM's website link to your personal website! It increases priority and exposure for AAM and referrals for you!



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