



THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

Published by the Alternative Dispute Resolution Section of the Federal Bar Association

Message from the Section Chair

by Lisa Brown



Congratulations to the ADR Section's newly elected Board Members who will start their term on October 1, 2019. Alex Zimmer is the incoming Chair. Alex has been actively involved in the ADR Section, serving the last three years as a Board Member. Alex is an attorney and mediator in New York. Bryan Branon is Chair Elect. Bryan is an international dispute resolution practitioner in Seattle. Bryan's career has focused on the intersection of alternative dispute resolution and public policy. Angela Eastman is the incoming Secretary. Angela is a health care law regulatory compliance professional in Boulder, Colorado where she established the consulting firm AME High Solutions. James Downey, the incoming Treasurer. James is a mediator and arbitrator in Massachusetts and is Senior Defense Counsel for the

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Message from the Editor

by Alexander J. Zimmer

We are very pleased to present the Fall 2019 edition of The Resolver, the newsletter of the Alternative Dispute Resolution (ADR) section of the Federal Bar Association. Our contributors represent ADR practitioners from across the country, and their articles remind us that ADR touches a wide range of substantive legal areas and demands special interpersonal skills and situational awareness. We hope that this issue will stimulate thought and discussion of current issues that ADR practitioners, neutrals, and educators face on a regular basis. Many of these issues are relevant far beyond the field of alternative dispute resolution.

Many people would agree that stock-taking and reflection is a useful practice to promote positive development, insight, and growth. Simeon Baum walks us through a practitioner's self-study of mediation reviewing its origins, uses, and promises. We would be well-advised to reflect on the potentialities of mediation as a dispute resolution tool along with the surprising unintended consequences of the use and practice of this important branch of the ADR field. Alex Zimmer's article recommends the use of mediation early the emergence of a conflict as a way

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Come on In, The Water's Fine: An invitation to Swim in the Deep End of Mediation (But if you prefer wading, that's fine too.)

by Simeon H. Baum

Growing Use of ADR Processes & Sophistication of Counsel

Looking back on the development of ADR since the enactment of the Civil Justice Reform Act of 1990 and the ensuing creation of the initial ADR pilot programs in the federal district courts, it is gratifying to see how our field has grown. We see growth in the use of alternative processes—mediation, neutral evaluation, and arbitration. We witness greater sophistication even in the use of that granddaddy of dispute resolution processes—negotiation.

In arenas ranging from corporate to family matters, both parties and counsel demonstrate knowledgeable application of principles of cooperative, mutual gains, joint problem-solving approaches to negotiation promoted nationwide in law schools and CLEs, and through such bestsellers as Fisher & Ury's "Getting to Yes" and "Getting Past No."

Mediation: A Deep Lake

While many make good use of mediation, there remains a range of opportunities in mediation that counsel are invited to explore. Mediation is a deep lake layered with varied zones for meaningful engagement and reflection.

As representatives, we members of the Bar guide parties through the waters of mediation. As transactional counsel, we make process choices in the dispute resolution clauses we draft. It is helpful, then, occasionally to reexamine the waters we navigate to be sure we are availing our clients of the fullest and richest opportunities the process offers.

Facilitated Negotiation

Mediation is most commonly seen as a confidential, facilitated negotiation. Unlike its dispute resolution cousins, arbitration and litigation, mediation does not involve a neutral third party's making a determination, award, verdict or judgment that is binding on the parties. Rather than evaluate or tell the parties what to do, the mediator facilitates the parties' own communication and decision making.

The mediator is a special type of neutral party. He or she is a deep, compassionate listener; less on no one's side, and more on everyone's side. The mediator models active listening (validating, empathizing, clarifying, and summarizing), and helps reframe communications in a constructive direction.

Mediators, under this model, serve parties by greasing the wheels of negotiation. From this vantage point, the mediator conversant with contemporary negotiation theory can support parties and lead them through a problem-solving approach to resolving their dispute.

Counsel representing parties in this process also benefit from a sophisticated understanding of negotiation theory and skills.

Win/Win Negotiations & Dealmaking

Fisher, Ury and other contemporary proponents of negotiation theory and skills offer excellent advice to negotiators and users of the mediation process. They posit that parties are driven by interests. Like the Italian economist Pareto, who defined the optimal deal as that which most satisfies the interests of all parties, contemporary theorists urge negotiators to seek to design deals along these lines.

As Fisher and Ury taught, we discover interests through productive discussions. Being "soft on the people" by constructive communication; avoiding ad homina, threats, gamesmanship and dirty tricks; and building trust are more likely to induce one's counterpart to reveal interests that can be the building blocks of a deal. Being analytically "hard" on the issues – learning what stands in the way of satisfying parties' interests – reveals clues that enable parties to fashion options meeting the parties' interests.

Negotiations are kept on track if parties consciously identify standards that everyone can accept. Parties are further aided in deal-making by considering where they would be left by not taking the deal on the table. Fisher and Ury termed this concept the "BATNA," i.e., the best alternative to a negotiated agreement.

The BATNA and Evaluation

As parties in mediation assess whether a proposed deal makes sense, they might consider whether other deals are possible or whether the gains offered in a proposal on the table equal or exceed their condition should they reject a deal altogether. When parties are in litigation, a primary alternative they might consider is litigation itself.

Mediators can be very effective in helping parties and counsel engage in dialogue and contemplative reflection concerning the risks and transaction costs associated with litigation. This can be cultivated in joint sessions, with all parties around the table, or in private sessions – known

as caucuses – where the mediator can help parties reflect on case risks and costs without the need to save face or display strength and commitment level to maintain strategic leverage.

Depending on their orientation, different mediators might be more inclined to have parties arrive at case and transaction cost assessment by facilitating their own communications and reflection or by sharing the mediator's own prediction or evaluation.

Transformation through Empowerment and Recognition

While problem-solving and deal-making, aided by the parties' analysis of risks and transaction costs, are valuable indeed, mediation may have more to offer. Surprising though it might seem, Baruch Bush, Joseph Folger and other proponents of "Transformative Mediation" see the mediator's purpose not as settling cases or solving problems, but as fostering party empowerment and recognition.

Publicized by Bush and Folger in their 1996 book, *The Promise of Mediation: The Transformative Approach to Conflict*, Transformative theory sees conflict as a crisis in relationship that impairs parties' ability to communicate with each other. Enabling parties to identify opportunities to make choices (about the process and communication, as well as deal terms) helps parties rise from hunkered down defensiveness and feel greater control.

With this increased sense of personal power comes a greater ability eventually to have and express a better understanding of the other party's perspective, emotions, and values. This growth in empathy and recognition is the change from which Transformative Mediation derives its name.

Transformative mediators are pure facilitators. They follow the parties, reflecting back their communications with a "micro-focus" that takes its cues, meanings and directions from where each party is.

Understanding in Mediation

Jack Himmelstein, Gary Friedman and their colleagues have spent over two decades developing an approach that sees deepening understanding as the heart of mediation. As parties move beneath the "v" in *Jones v. Smith*, they come better to understand themselves, each other, and their contexts – legal, economic, relational, hierarchical, and more. This growth of understanding is seen as the most fundamental opportunity offered by mediation, and as the source of real resolution.

To avoid reinforcing the divide embodied in the parties' dispute, Himmelstein and Friedman urge a transparent approach in mediation that maintains joint session throughout, dispensing with separate, private caucuses. Parties to mediation in this model "contract" to stay

together and seek to understand, despite the emotions this might stir and the frustration this might engender.

Mediators in this model listen and communicate with a loop of understanding, embracing and reflecting back the speaker's meaning until the speaker acknowledges that he or she has been fully understood.

A Dizzying Array of Possibilities and Perspectives

We have here, in summary fashion, charted a few of the major zones in the aquatic topography of mediation. There are many other nuanced areas of mediation theory and practice. Indeed, at times, cross currents of theories and approaches converge and diverge in the conduct of each mediation.

Navigating Mediation's Waters

Mediation can be seen and used in many ways. Practitioners and counsel might, e.g., think of using a Transformative Mediation approach for a family matter or an embedded employment dispute. Perhaps counsel or parties might seek an Understanding-based practitioner for a partnership matter, where a continuing relationship is desired. In a complex commercial dispute, counsel might seek out a mediator who is skilled at enabling parties to encounter and assess the risk and transaction cost associated with litigation. Or, in a distributorship dispute, perhaps a mediator skilled in problem solving approaches would be ideal. These examples are not prescriptions. Different counsel might seek different mediator styles and orientations for the same matter.

Mediated matters need not fit neatly into one theoretical box. Mediator Lori Matles coined the term "360-degree mediator" for one who draws on a range of theories, and applies a variety of skills and techniques, as is needed and appropriate in a given set of circumstances.

Take the Plunge

There are many ways of understanding the rich potential of mediation. As parties search for fairness and grapple with the actualities of imperfect human behavior and the limitations of circumstances, we may recognize mediation as a forum for the working out of the norms of justice and harmony.

As people struggle to make choices and be heard – and as we build understanding and acceptance of ourselves, each other, and circumstances -- we may see mediation as a gateway of freedom and compassion.

Mediation exemplifies humanism. We seek the answers not from an external, authoritative source. Rather, persons are seen as a locus of truth. We swim in the waters of humanity. In this process, everything – emotions, principles, visions, stories, values, interests... as well as legal, economic, business, hierarchical, relational and other realities and

concerns – everything is legitimate for consideration. Ours is an open process; not black and white, but living color.

The rich depth of mediation may offer a cure to what ails many members of the Bar. Over the years, Bar leaders around the country have considered how a substantial number of new, as well as experienced, lawyers express dissatisfaction in their legal practice. They may feel isolated before their computers, like cogs in a wheel in large firms, or alienated as they bridle at a lack of civility or bicker with adversaries over discovery. The collaborative and personally engaged message of mediation can be liberating. It is an opportunity to work with, not against, one's counterpart. It activates the whole person, drawing upon a range of personal resources that reward, and call forth, creativity.

There are times when mediating parties achieve moments of deep insight, appreciation, truth and acceptance. And there are times when people leave the table irked, but with a deal.

However it is used, mediation has much to offer. The waters of mediation beckon us to bring parties for a swim, and see where the current leads.



This article appeared in The Resolver, Winter 2017, issue.

Simeon H. Baum, President of Resolve Mediation Services, Inc., (www.mediators.com) has successfully mediated over 1,000 disputes. He has been active since

1992 as a neutral in dispute resolution, assuming the roles of mediator, neutral evaluator and arbitrator in a variety of cases, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, Trump's \$ 1 billion suit over the West Side Hudson River development, and Archie Comics' shareholder/CEO dispute. He was selected for New York Magazine's 2005 - 2017 "Best Lawyers" and "New York Super Lawyers" listings for ADR, and Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011 and 2017, and for the International Who's Who of Commercial Mediation Lawyers 2012-17.

For over two decades, he has played a leadership role in the bar relating to ADR, including service as founding chair of the Dispute Resolution Section of the New York State Bar Association, chairing the ADR Committee of the New York County Lawyers Association, and serving on ADR Advisory Groups to the New York Court system. Mr. Baum is a past member of the FBA board of directors, former chair of the FBA's ADR Section, and former president of the SDNY Chapter. Mr. Baum teaches on the ADR faculty at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.

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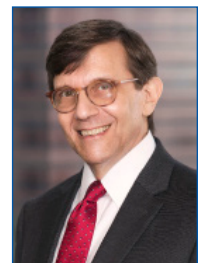
to preserve relationships and avoid the costs, time, and disruption of more formal adversarial dispute resolution.

The Joan Hogarth offers an insightful look at the role of social media in ADR practice as she reminds us that our individual backgrounds, experiences, and expectations effect our use, or misuse, of this means of contemporary communication. She reminds us that wherever we, as ADR practitioners, sit on the comfortability scale with social media, must be mindful of how ADR ethical standards may govern the use of social media. Bryan Branon highlights the challenges of achieving diversity and inclusion in Federal practice. Our ADR Section is co-sponsoring with the FBA Diversity and Inclusion Special Task Force a panel on this important topic at the 2019 Annual Meeting.

Finally, James Downey reports on an interesting Massachusetts case that involves FINRA arbitrations and

whether FINRA should be viewed as a governmental body for purposes of state anti-SLAPP statutes. He reminds us that FINRA practitioners should keep an eye on state law developments.

We hope that our readers will find this issue of The Resolver useful and though provoking. We welcome your comments and reactions, and we invite you to contribute your own thoughts, analyses and opinions to our next issue which will be published in Spring, 2020.



Thank you for your support.
Alexander Zimmer, Editor

Mediating Troubled Financing Relationships

by Alexander J. Zimmer, Esq.

Most financing relationships sometimes go smoothly and other times – not so much. When a client's financial needs or capabilities change, the consequences are bound to affect the client's relationship with its financing provider. In many cases, evolving needs and capabilities create stress on the existing relationship leading to uncertainty and conflict. How the client and the financier manage the rough spots, however long or short, affect the parties' long term relationship, each party's business operations, and ultimately its bottom line. An early intervention mediation is a conflict management tool that can save both the client and the financier time, stress and money before a difficult situation becomes intractable and hopelessly adversarial.

Mediation is a process that addresses trust and predictability in a business relationship, which are often the first casualties of continuing conflict between parties. Ordinarily, financiers and clients respond to each other's requests for funds or information and adjust to each other's requirements. But, requests for more financial support or new and additional information can quickly disrupt a working relationship resulting in frustration and uncertainty. Advances to the client slow, or stop altogether, and the financier finds its window into the client growing increasingly opaque.

When conflict reaches this level, the client-financier relationship is at a tipping point. The account representative prepares to defend his now troubled situation, measuring reasonableness against the necessity of protecting the financier from loss. At the same time, the client begins to make plans to protect his business and provide for continuing operations. Both sides devote more and more attention to protecting and defending their positions at the expense of tending to the regular day-to-day business. Inevitably, anxiety and the tendency to assess blame grow.

While the goal is to find a workable solution which can be sustained over time, these circumstances make that goal very difficult to achieve. In haste to dispel concern about the future, either party may agree to proposals that are unrealistic or have little chance to succeed in redressing the mutual problems. Or, the parties may take the other extreme and propose solutions that will work for one but not the other. The costs of failure are high. The financier stands to lose:

- Time and productivity in its accounts management department;
- Time and productivity in its work-out group;
- Legal fees and expenses of both its internal legal department and outside counsel;
- Principal and profits on the financing;
- Reputation costs; and
- The relationship with the client.

The client stands to lose:

- Time and productivity in responding to the financier's demands for information;
- Efficiency in operations due to diminished cash flow

and attention diverted from operations;

- Profits from disrupted operations;
- Relationships with suppliers and customers from disrupted cash flow;
- Financial reputation; and
- Relationship with the financier.

A mediation conducted by a knowledgeable mediator can salvage the situation and help the parties reach an agreement that helps each of them. Here's how.

Simply put, mediation provides a neutral forum in which the client and the financier, each have an opportunity to describe their own view of the circumstances and to find a workable solution. The mediator facilitates the discussion and helps the parties explore options for resolving their common problem – the troubled financial relationship. While each party is able to present its own needs and concerns, an experienced mediator can help the parties evaluate solutions realistically without making judgments or assessing fault. The nature of the mediation process accommodates the difficult issues that characterize troubled financial relationships.

Before a financing relationship becomes non-performing or moves to "work out", mediation gives the parties a chance to pause, reassess and reach a workable agreement for resolving the situation. Although every troubled relationship is in some ways unique, four issues are always present: (1) Diminishing trust; (2) Growing uncertainty, loss of predictability; (3) Narrowing perception of common interests; and (4) Increasing conflict between freedom of action and cooperation. The mediation process ameliorates each of these issues by: (1) Fostering better communication between the parties; (2) Encouraging reciprocal understanding of each other's interests; and (3) Offering a neutral view of the situation and options.

Simply beginning mediation demonstrates a willingness to address a problem and helps repair the loss of trust. Typically, each party will describe what the other did that "caused" trust to erode. An experienced mediator can help the parties to communicate better the reasons they took actions and to see how they were perceived by each other. As communication becomes more precise, the parties have a greater chance of making themselves better understood and of understanding each other. Improved communication is the first step in articulating and identifying interests and reaching common ground.

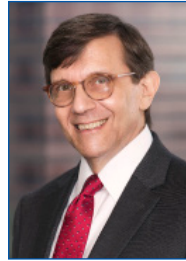
Predictability is fundamental to a working financial relationship. The client needs to know that its needs will be met and the financier needs to know that the client will do what is expected. Neither party likes to be surprised. The unexpected is often the precipitating cause of conflict. One has only to look at the disruption caused by the recent Great Recession to see how businesses seemed compelled by events to act. The narrative of the mediation exposes the reasons for the actions behind the loss of predictability which characterizes a troubled financial relationship. By

nurturing improved communication and articulation of each other's situation, the mediator can help the parties see how they share great concern over the issue of predictability.

The mediation dialogue will address the narrowing perception of common interests caused by the conflict. Loss of trust and predictability drive the parties into a defensive posture creating more and more distance from each other. From this perspective, vision of common interests diminishes. The mediator helps the parties see how poor communication, or outside events, may have contributed to the current conflict. Better understanding of each party's interests helps define the problem as mutual and creates motivation to find a shared solution.

Ultimately, the parties must confront the tension between the desire for freedom of action and the necessity of cooperation. A sustainable solution requires agreement on the balance of these competing drives. The mediation process will have provided the base from which agreement is possible. Improved communication and mutual understanding permit full exposition of the elements of the shared problem. Working with these tools the parties can explore options for resolving their conflict. As a neutral the mediator can help the parties test alternatives against considerations presented by the reality of the situation.

The benefits of adopting an early intervention mediation as suggested here are many. Experience shows that parties who reach agreement through mediation are likely to adhere to its terms. Both the client and the financier save time and avoid escalating risks inherent in fruitless "negotiations" between parties that are frozen in defensive positions. Both sides can save legal costs which invariably accompany a deteriorating financing relationship. The relationship is far more likely to be saved than if the conflict devolves into "work-out" or litigation. The benefits of implementing an early intervention mediation program far outweigh the risks of allowing troubled financing relationships to continue their costly, all too familiar course.



This article appeared in The Resolver, Spring 2016.

Alexander Zimmer is an attorney and mediator in New York City. His experience as an attorney and as a principal encompasses both sides of the financing relationship in a legal and business career of more than 30 years. Mr. Zimmer can be reached at alex@ajzimmerlaw.com.

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Massachusetts Army National Guard.

We gratefully acknowledge the significant investment of time by our current Board members in their efforts to develop so many interesting programs for our members and for the ADR Section to sponsor throughout the year. A few of the highlights included:

- An excellent webinar presented in June by Board Treasurer, Mary Austin, and her colleague, Marcia Adelson, on the "Value of Mediation and Arbitration in Healthcare".
- Collaboratively sponsoring the March Symposium held by Cardozo and Touro Schools of Law on the new United Nations Singapore Convention on the Enforcement of Mediated Settlement Agreements; thanks to the significant time invested by Board Secretary, Bryan Branon, and Chair Elect, Alex Zimmer in the co-sponsorship of this event.
- Sponsorship of 25th Annual Northwest Dispute Resolution Conference at the University of Washington School of Law in Seattle, thanks to the efforts of Board Secretary, Bryan Branon. The Conference attracted over 300 attendees in more than 50 sessions and set in motion the establishment of the FBA's 50th State Chapter in Washington.
- Sponsorship of the forum presented by the Southern District of New York's FBA chapter on Grasping Victory With An Open Hand - Effective Representation in Mediation presented by Chair Elect Alex Zimmer and former ADR Section Chairs Simeon Baum and Joan Hogarth.

We encourage everyone to attend the ADR Section's presentation at the FBA Annual Meeting and Convention in Tampa on "The Demand for Diversity in Federal Practice - What We Know, Where to Go, How to Grow". Thanks to the tremendous time and effort invested by Board Secretary and

future Chair Elect Bryan Branon. The presentation will feature FBA National Diversity & Inclusion Task Force Co-Chair, Tara Norgard, Partner, Carlson Caspers Vandenburg & Lindquist (MN), Barbara Stevens, VP and Corporate Counsel, Prudential Financial, Charbel Barakat, VP and Chief Counsel, Florida and Mid-Atlantic Regions, D.R. Horton, Inc., Steve Baker, Partner, Quintairos, Prietor, Wood & Boyer, P.A. (Tampa) and Bruce Jackson, Associate General Counsel, Microsoft. The Panel will discuss the history of diversity at the Federal Bar, case studies as provided by in-house executive counsel, what can be done to inspire diversity and inclusion within attendees' organizational structures and an interactive panel/audience dialogue in regard to what the future may hold.

Best wishes to the newly elected Board members and much appreciation to the current Board for their commitment to expanding the scope and reach of the ADR Section's activities.

Lisa Brown
lisa@lisabrownattorney.com

The Pervasiveness of Social Media: An ADR Practitioner's Guide to Maintaining Ethical Norms and Civility in the Alternative Dispute Resolution (ADR) Arena

by Joan Hogarth

***“Should an arbitrator walk into a bar?”
Walking into the bar is innocuous -- legally
and ethically neutral -- but what you say
or do there might matter and should be
treated in the same way that you'd treat
similar activity done anywhere else. The
same analysis applies to things done on
social media.”***¹

***“I avoid participating in social media
..., because I find it to be a serious waste
of time. Then there is the possibility of
creating a problem for yourself in creating
unwanted conflicts of interest. Leave it to
the kids and millennials”***²

A huge gap is evident between the practitioner who is pro social media and the practitioner who is anti-social media. Admittedly, for the uninitiated, it is a daunting task to engage in a process that is so amorphous, without clearly defined rules.³ Yet we must. After all, social media has taken over the way we think, operate and simply exist. Social media is one of the places where business is being conducted by current and potential users of ADR, policies are being made and jobs found. It is where the exchange of information takes place in the form of blogs, video clips, podcasts, pictures and other content.

I must confess that I am not of the younger generation working in a paperless environment and thriving on virtual relationships. Indeed, I am from the old school of drafting articles with pen and pad, banking by walking into the bank building (now a café), submitting typed resumes, writing letters by hand, and even “dialing” a phone number. The primary sources of my social networking are professional events, training and “meet-ups”. These are all so “yesterday” modes of communicating that if I remain unchanged for too long, I too will be left behind. So too, will the disinclined ADR practitioner, bent on maintaining world order in a world that no longer recognizes, or even uses the old tools of communications. Social media has grown exponentially and developed unfamiliar characteristics so that the ADR practitioner has become agitated in her attempts to grasp the full meaning of its role in society and its effects on the practitioner's ethical duties. Consequently, to manage social media, many of us have relied on the sage⁴ advice that has ranged from “carefully tread into the social media environment”, to “stay away at all costs.”

Many of us hope that we can manage our foray into social media by analogizing those interactions to in-person situations. Ethical norms and civility off-line should be ethical norms and civility evident on-line. (i) Enter the bar. (ii) Drink responsibly. (iii) Conduct yourself in a manner that does not make tomorrow's

headlines. On the other hand, the ADR practitioner who is legitimately concerned about the dark web, cyberspace, this amorphous thing we call the Internet, knows that it is a risky proposition to engage in that it may negatively affect future business, or the practitioner's reputation. That practitioner chooses not to engage; chooses to forgo potential clients; chooses to not share or consume social media content. The consequence of disengagement is abandonment.

In this article, I encourage ADR practitioners to engage in social media; to be transparent; and to maintain the professionalism, fairness, independence and impartiality that is required of the ADR practitioner in all communications environments. The framework for social media interactions already exist in the mediator and arbitrator codes of conduct, compounded only by the fact that once you hit the “Send” key, you are committed to that thought, idea or expression, forever. That is the only point of caution that must be moderated by good sense.

Social Media Defined

Social media is a form of communicating and has been variably defined as: (i) facilitating communications and communities; (ii) the range of Internet-based services that allow users to participate in online discussions, share user-created content and join online communities; and (iii) web-based portals created to allow dialogue and the sharing of content. There are many social media platforms, the most popular ones being Twitter, LinkedIn, Facebook, Instagram, Google+, Tumblr, Pinterest, Sina Welbo and Snapchat.⁵ Social media has gained popularity in all industry segments including that of the legal field. It is used for marketing, advertising, recruitment and communication with clients. “It's where people are” claims the Environmental and Protection Agency (EPA) in a 2014 presentation.⁶ It is where people network and communicate with each other.

Effectively, what has occurred over a few short years, is that communications have morphed from, controlled, confidential one-on-one or targeted communications and discourse to a more open, literally world-wide, dispersed and amorphous communication. In this environment, the communicator is not necessarily aware of who is listening to or reading the content of his/her remarks or creation, until there has been some feedback or consequence of the communication. It is this uncertainty that has created anxiety for the ADR practitioners who wish to maintain a neutral profile or who are concerned about inadvertently creating conflicts (as in disputes or as in conflicts of interest).

The ADR Practitioner's Codes of Ethics⁷

Consider, then, the underlying code of ethics for the ADR Practitioner. Arbitration is a private way of

resolving disputes in an environment where the parties are treated fairly and impartially. The Arbitrator's Code of Ethics provides guidance in resolving the dispute so there is confidence that the process is fair and that there are high standards of conduct. That is the statement of Canon I of the Arbitrator's Code of Ethics.

Similarly, it is expected that Mediation would be fair and impartial; where an impartial third party – the Mediator - facilitates the negotiation process promoting voluntary decision making by the parties to the dispute. The Mediator allows the parties to define and clarify the issues, understand the other's perspective, identify interests, explore and assess possible solutions, and eventually arrive at a mutually satisfactory agreement.

With these two codes in mind and a lot of commonsense, the ADR practitioner should be sufficiently armed with ethical norms and civility that will guide them while on social media. The guidelines (canons & standards) that possibly could be implicated by the ADR practitioner's use of social media are: (i) impartiality, (ii) disclosure of conflicts of interest, (iii) confidentiality, and (iv) truth and accuracy in advertising. A fifth canon is limited to the arbitrator, i.e. *ex parte* communications.

Reconciling the Relevant Codes with Social Media Use

Impartiality

Like the arbitrator, the mediator's obligation of impartiality is satisfied when he exhibits neutrality and fairness in the process. Impartiality indicates that the practitioner does not favor one party over the other. That lack of impartiality is often exhibited by providing advice and counsel to one or the other. Impartiality could be implicated by a user of social media if, as a member of a virtual community, one of the parties, or counsel inadvertently contacts the arbitrator through the platform. Social media notwithstanding, an arbitrator who is a member of a bar association in which one of the parties is a member, is no more in breach of this code when he connects in person than online. There is no unethical behavior in this contact although, it is likely to be perceived as partiality. In none of these scenarios – online or at the bar event, should the arbitrator fall victim to inappropriate inquiries. Without disclosure of such a "contact", in person or online, the likelihood exists that this simple appearance of partiality could lead to an award being vacated.

Duty to Disclose

Both CANON II of the Arbitrators Code of Ethics and Standard III of the Mediator's Code of Conduct, state that the practitioner should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality. They must disclose any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. With or without social media, such an obligation can be satisfied with reasonable inquiry. The obligation to disclose continues from pre-arbitration, to the start of the arbitration process, throughout the process and continues after arbitration. Any issue

that arises at any time during and after the arbitration process, that could give the appearance of partiality or conflict of interest, should be disclosed.

So, it is the practitioner's continuing obligation to disclose all interests that may give the appearance of partiality. For the arbitrator, where there is no reasonable inquiry that could definitively identify all relevant social media contacts, the arbitrator needs to prepare a blanket disclosure that could address current and potential online contacts. Parties in arbitration are mostly now aware of social media, how it works and the resulting formation of "world-wide relationships". Some experts recommend that the arbitrator who uses social media may wish to use a disclosure such as is shown below.

Sample Disclosure Statement

I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn website but I do not maintain a database of all these professional contacts and their connections which now number over 500. LinkedIn also features endorsements, which I do not seek and have no control over who may endorse me for different skills. The existence of such links or endorsements does not indicate any depth of relationship other than an online professional connection, similar to connections in other professional organizations.⁸

Confidentiality

Arbitration is private and both arbitration and mediation are generally touted for the confidential nature of the process. CANON VI of the arbitrator's code, and Standard V of the mediator's code provides substantively the same guidance - be faithful to the relationship of trust and confidentiality inherent in that office. In other words, he must keep proceedings, and information gained during proceedings, confidential. The ADR practitioner has a duty to refrain from sharing this confidential information in whatever forum he may be in. Practitioners should not discuss the substance of their cases with the parties, friends or even a colleague, without the permission of the parties. Guidelines issued by various Bar Associations encourage a commonsense approach. Neutrals should not allow the anonymity of the social media platforms to embolden them to share where that would not otherwise have occurred.

The practitioner should take the time to understand social media – the breadth and scope of the various platforms – in order to make an informed decision to join. For example, a whisper to a colleague about a case does not have the same impact as a posting online. Even with identifiers removed, it is likely that someone in the community could recognize the case. Sharing confidential information would be a breach of the code of ethics. On the other hand, as the mediator's code of conduct states, there may be occasions where the mediator is in an academic setting and may wish to

share lessons learned from a case. The mediator would need permission from the parties and should promise to protect their anonymity.

Advertising

CANON VIII is perhaps the more accommodating of the arbitrator's ethics rules in that an arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate. The use of social media is for precisely this purpose. Private industry and government have come to recognize the benefits of social media for marketing purposes. An arbitrator, even if listed on a provider list, is generally allowed to promote the work they do. The arbitrator, in keeping with the professionalism of ADR and of the arbitration process would need to choose wisely where to have his or her presence known. For example, in evaluating the various platforms, an arbitrator's potential client would not be a Snapchat user but is more likely to be a LinkedIn user. LinkedIn is one social media platform for professionals that the arbitrator could use. Due diligence and ongoing monitoring of the chosen platforms will ensure that the arbitrator complies with the rules.

Standard VII of the Mediator's Code of Conduct cautions the mediator to be truthful and to maintain confidentiality of cases in which the mediator has been involved. Knowing that social media is world-wide and captures any and every thing, the mediator should wisely choose how to promote his or her business without violating these rules.

Neutrality – *ex parte* communications

Canon III of the Arbitrator's Code of Ethics states that an arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

This obligation is easily affected by social media because many of the platforms allow for "friending"⁹ or endorsing persons or subscribing to a channel. An arbitrator, as a member of a social media group, may endorse or "like" discussions of persons on social media before being engaged in an arbitration. To the extent that a reasonable review cannot reveal that relationship, a disclaimer would be in order. Where it is known that a social media relationship will affect an ongoing matter, the arbitrator may wish to refrain from participating in the discussion to avoid breaching the *ex parte* communication rule.

Conclusion

If social media has become so integrated into our society that most marketing, advertising, hiring, sharing and communicating is done on it, the ADR practitioner should not hesitate about its use in his or her practice. It is appropriate and wise to question and analyze social media but not to the point of paralysis. The arbitrator must be engaged in the social media environment. The Codes of Conduct/Ethics are not being compromised. The cautious arbitrator should take each canon; sit with a "kid" or "millennial"; together, assess how social media activities of an arbitration will affect each canon; and create a subset of rules to ensure that the arbitrator does not breach the code. To remain on the outside looking

in would provide the arbitrator no comfort as the world whooshes by and it would do the ADR process no good. People are on social media. The enlightened practitioner must be on it too. That is the innocuous part. As long as the rules are followed, there should be no ethical breach.



Joan Hogarth is a mediator, arbitrator and attorney whose practice focuses on healthcare and healthcare-related issues. She regularly serves as guardian ad litem in Surrogate's Courts and in guardianship cases related to elderly, mentally challenged or disabled persons where her mediation skills have served her well. She has been a neutral in over 400 disputes related to healthcare (contracts, claims), sexual harassment, employment discrimination of various types, securities, insurance claims, and consumer disputes.

Endnotes:

¹A blogger's response to the line of discussion as to the extent arbitrators should be active on social media.

²Yet another blogger's response to the same line of discussion.

³It's expected that as the technology develops, standards would evolve. In the interim, the approach the practitioner wishes to use is certainly like that of guy who walks into the bar.

⁴Defined in Merriam's Dictionary as "archaic, prudent, wise, and characterized by good judgment".

⁵In 2018 the top social media platforms were LinkedIn, Facebook, Flickr, Twitter, Instagram, YouTube and Snapchat. Less than a year later the list has changed. The most popular platforms are Facebook, YouTube, Reddit, WhatsApp, Messenger, WeChat, Instagram, QQ, and Tumblr; and I suspect that it is subject to change any day now.

⁶An Introduction to Social Media, an EPA presentation found at <https://www.epa.gov/sites/production/files/2014-03/documents/social-media.pdf>. Last accessed July 31, 2019.

⁷Joint AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes; and Model Standards of Conduct for Mediators (jointly developed by ABA, AAA and ACR.

⁸Example of disclosure language offered by Ruth Glick, mediator and arbitrator; accessed online at: https://twitter.com/ABA_DR/status/588814439119335425.

⁹Wikipedia defines "friending" as the action used on social networks to add someone to your list of "friends". It further explains that "friending" does not necessarily involve the concept of friendship.

The FBA ADR Section and Special Task Force on Diversity & Inclusion Highlight the Demand for Diversity at the 2019 FBA Annual Meeting & Convention

by Bryan J. Branon, Esq.

The ADR Section has partnered with the FBA's Special Task Force on Diversity and Inclusion (D&I) ("the Task Force") to present, "The Demand for Diversity in Federal Practice: What We Know, Where To Go, How To Grow." The presentation will take place on September 5, 2019, during the FBA's annual meeting in Tampa, Florida. FBA Task Force Chair, Tara C. Norgard, will moderate a panel of leading executive counsel from D.R. Horton Homebuilders, Prudential Financial, the National Association of Minority and Women Owned Law Firms and Microsoft.¹ The presentation will focus on what the FBA is doing to ensure the federal legal community reflects and embraces the communities we serve, provide insight from executive counsel on their corporate diversity initiatives, and offer tangible resources for others to develop and implement their own D&I strategies.

"The FBA recognizes that we must tirelessly and relentlessly work to ensure that our organization—and indeed our entire federal legal community—fully reflects and includes the rich diversity of our nation," commented Task Force Chair, Tara C. Norgard. "It is a privilege and responsibility for the FBA to partner with national leaders in this area to chart a continued course forward for meaningful and sustained diversity and inclusion in every part of federal practice."

The Task Force is composed of diverse FBA leaders from around the country. This is its second year of developing and implementing an action plan to ensure a deep and sustained commitment to a diverse and inclusive federal practice is incorporated into all facets of the FBA—and the broader legal community. The group has focused its work in five areas, each of which has a dedicated subcommittee:

1. Communications,
2. Membership,
3. Leadership,
4. Infrastructure, and
5. External Partnerships.

Those who are interested in furthering this work are welcome to become involved.²

"The members of this Task Force, and our Judicial and Corporate Counsel Advisory Panels, have come together to bring innovative, practical and actionable D&I initiatives throughout the federal legal community," said Norgard, "it is humbling and inspiring to work with these leaders and to learn from their experience and tireless commitment to true diversity in the legal profession."

The "Demand for Diversity" presentation will feature pertinent data and research, what the FBA is doing to meet the diversity imperative, ways to incorporate D&I into

practice, and insight into what the future of D&I may hold. On behalf of the FBA ADR Section and Special Task Force on Diversity and Inclusion, we hope to see you in Tampa!³



Bryan J. Branon, Esq. is an international dispute resolution practitioner whose career has focused on the intersection of alternative dispute resolution and public policy. He organized this Panel in his capacity as Secretary of the FBA ADR Section and Member of the FBA National Diversity and Inclusion Task Force He is Principal of Branon's ADR

LLC based in Seattle, WA and can be reached at Bryan.Branon@gmail.com.

Endnotes:

¹Confirmed panelists include: Barbara Stevens, VP and Corporate Counsel, Prudential Financial, Charbel Barakat, VP and Chief Counsel, Florida and Mid-Atlantic Regions, D.R. Horton, Inc., Steve Baker, Partner, Quintairos, Prietor, Wood & Boyer, P.A. (Tampa) and Bruce Jackson, Associate General Counsel, Microsoft.

²Contact Tara C. Norgard at tnorgard@carlsoncaspers.com or any member of the Special Task Force on Diversity and Inclusion to find out ways to get involved.

³A special thanks to Joel Stern, CEO of NAMWOLF, for NAMWOLF's contributions to this Panel including Panel participants and CLE materials, among others.

ADR - D&I Task Force Program at a Glance:

Title: "The Demand for Diversity in Federal Practice: What We Know, Where To Go, How To Grow"

Where: The FBA Annual Meeting and Convention, Tampa, FL

When: September 5, 2019, Session 3C, 2:15 p.m. ET

Presenters:

Steve Baker, *Partner*, Quintairos, Prietor, Wood & Boyer, P.A. (Tampa)

Charbel Barakat, *VP and Chief Counsel*, Florida and Mid-Atlantic Regions, D.R. Horton, Inc.

Bruce Jackson, *Associate General Counsel*, Microsoft

Barbara Stevens, *VP and Corporate Counsel*, Prudential Financial

Tara C. Norgard, *Partner*, Carlson Caspers Vandenburg & Lindquist, P.A., (Minn.), Moderator.

FINRA ARBITRATIONS AS A GOVERNMENT PROCEEDING

by James Downey, Esq.

Criminal complaints in State District Courts, Harassment Prevention Orders and allegations of threats and extortion. Not the typical series of events one thinks of in Financial Industry Regulatory Authority (FINRA) arbitrations. *Dever v. Ward*, a 2018 Superior Court opinion of seemingly first impression in Massachusetts had all this, and more, and found FINRA arbitrations to be “government proceedings” at least as applied to the State’s Strategic Litigation Against Public Participation statute (anti-SLAPP statute).¹

The Massachusetts anti-SLAPP statute allows a defendant in a civil action, who believes they have been targeted because of the exercise of their right to petition, to file a special motion to dismiss early in the process.² The law limits this right of petition to: “[a] legislative, executive, or judicial body, or any other governmental proceeding.” The Massachusetts statute does not differentiate between federal and state governmental proceedings. It should be noted that other states have specific language in their anti-SLAPP statutes, when addressing quasi-government proceedings which limit the anti-SLAPP protections to state proceedings.³

FINRA is a not-for-profit corporation incorporated in the state of Delaware, but is also a self-regulatory organization (SRO) registered with the U.S. Securities and Exchange Commission (SEC) under the Securities and Exchange Act of 1934 (Exchange Act).⁴ FINRA provides the largest securities dispute forum in the U.S. for members and customers of registered broker dealers.⁵ Under FINRA rules, arbitration is required for disputes that arise from the business activities of members.⁶ FINRA Arbitrations vary in composition according to the amount of the claim.⁷ FINRA’s Arbitration Rules dictate, and as those who participate in Arbitrations are aware, only if an award is issued by a FINRA arbitrator will it be made publicly available.⁸

Dever offers a very interesting fact pattern and is an opinion that could have implications for parties and counsel involved in FINRA arbitrations. Stemming from a FINRA arbitration which lasted three (yes three) years, Plaintiff, James Dever, was ordered to pay a \$75,000 judgement. and The Judge in *Dever* found: “FINRA in effect acts as a quasi-governmental entity when conducting arbitrations pursuant to its delegated authority.”⁹ In determining a FINRA arbitration constitutes a petitioning as defined in the state statute, the Judge leaned heavily on Federal and state court holdings that have similarly found FINRA performs a quasi-government function.¹⁰

In addition, the Judge reached his conclusion based in part on the fact that FINRA, although a private non-

profit company is closely supervised by the Federal government via the SEC.¹¹ Although acknowledging the fact that FINRA gets no state money, was not created by the U.S. Congress, and none of its member are appointed by the government, the Judge felt the function assigned to FINRA, via the SEC, is vital to government operations; thus the nexus to a governmental function is present. The Judge cites as a comparable example an entity created by the state legislature to serve a public purpose and states even if such an entity has no real legislative powers it can constitute a governmental body.¹²

The Judge gave short shrift to Plaintiff’s arguments, supported by case law which supports the notion that such state laws do not apply when non-government proceedings are the basis.¹³ Plaintiff emphasized, among other things, the fact that FINRA’s website ends in .org rather than .gov and bolstered his argument by citing language from FINRA’s website which states it is not part of the government.¹⁴ Although acknowledging previous Federal Court decisions that have concluded FINRA’s predecessor, the NASD, was not a state actor for purposes of constitutional claims, and while conceding that FINRA is a private entity, the Judge felt its arbitrations qualify as governmental proceedings at least for the limited purposes of the Massachusetts anti-SLAPP statute.¹⁵

The *Dever* Judge felt the powers given to FINRA through the Exchange Act and the SEC’s power of approving FINRA rules provided enough of a link to find FINRA arbitration a quasi-government proceeding, thus an exercise of a right of petition under the state law.¹⁶ Accordingly, the Defendant’s (counsel for the Broker Dealer Firm at arbitration) motion for dismissal was granted. Plaintiff Dever has filed an Appeal with the Massachusetts Appeals Court.¹⁷

The Way Ahead-Questions Linger

Although a first of its kind decision in Massachusetts, *Dever* seems to be following a nationwide trend in viewing FINRA as a government body. FINRA enjoys many of the protections of being a government entity.¹⁸ Currently, FINRA publicly releases limited information on its arbitrations.¹⁹ However, it is not subject to any of the public records laws or other open government requirements. Will FINRA continue to enjoy a leg in both worlds?²⁰ Additionally, will state laws which require exhaustion of administrative remedies now be applicable when a FINRA or a similar forum’s arbitration is involved?²¹ Will other SROs/arbitral forums such as the National Futures Association be deemed subject to state laws?²² Will parties at FINRA arbitrations stand

clear of state courts to confirm arbitration awards?²³

At this point the answers to these questions are unclear; but practitioners and parties should be aware of *Dever* and similar cases. It would be surprising if the staid world of FINRA arbitration would be dramatically altered in the wake of *Dever*. Nevertheless, FINRA arbitration practitioners should have one eye on the application of state laws and keep in mind that many jurisdictions see FINRA arbitrations as government proceedings.

Endnotes:

¹*Dever v Ward*, Superior Court of Massachusetts, At Plymouth, 2018 Mass. Super. LEXIS 120. See also: “Securities broker arbitration gets SLAPP protections”, by Pat Murphy, Massachusetts Lawyers Weekly, August 6, 2018.

²MGL Ch. 232 Sec.59H states:

“As used in this section, the words “a party’s exercise of its right of petition” shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.”

See also: <https://www.mass.gov/info-details/massachusetts-law-about-anti-slapp-law>.

³Missouri for example has such limiting language as: “in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state.” Missouri - Mo. Rev. Stat. § 537.528.

For a state by state review of such statutes, see: <https://www.medialaw.org/topics-page/anti-slapp?tmpl=component&print=1>.

⁴15 U.S.C. 78a et seq. See FINRA Certificate of Incorporation at: http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4589. See also: 15 U.S.C. §78 c (a) (26) and 17 CFR § 1.3 for definition of an SRO.

⁵See: <https://www.finra.org/arbitration-and-mediation>.

⁶FINRA Manual, PART II, GENERAL ARBITRATION RULES, Rule 13200, available at: http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4193&record_id=5272&filtered_tag=

⁷See: <http://www.finra.org/arbitration-and-mediation/overview>.

⁸See: <http://www.finra.org/arbitration-and-mediation/>

learn-about-arbitration.

“Arbitration is generally confidential, and documents submitted in arbitration are not publicly-available, unlike court-related filings. However, if an award is issued at the conclusion of the case, FINRA posts it in its Arbitration Awards Online Database, which is publicly available.”

⁹*Dever* at 10.

¹⁰*Sparta Surgical Corp v. NASD*, 159 F. 3d 1209 and *Bluestem Advisors LLC v. Eventure Interactive, Inc.* 2017 WL 3047895 (C.D Cal).

¹¹*Dever* at 9.

¹²See *North Amer. Expositions Co.Ltd. P’ship v. Corcoran*, 452 Mass 852.

¹³*Century 21 Chamberlain & Associates v. Haberman*, 173 Cal. App. 4th 1 (Cal. Ct. App. 2009), (dispute between real estate broker and client at private arbitration forum does not involve protected activity under California’s anti-SLAPP statute.)

¹⁴See: <http://www.finra.org/about>. “FINRA is not part of the government. We’re a not-for-profit organization authorized by Congress to protect America’s investors by making sure the broker-dealer industry operates fairly and honestly.”

¹⁵*Desiderio v. National Ass’n of Securities Dealers Inc.* 191 F. 3d 198 (2nd Cir. 1999).

¹⁶*Dever* at 9, citing the Exchange Act and the fact that the SEC closely supervises FINRA and it is an “integral part of a comprehensive system of federal regulation of the securities market.”

¹⁷As of July 24, 2019 oral argument have not been scheduled.

See: http://www.ma-appellatecourts.org/display_docket.php?src=party&dno=2018-P-1220&pf=y

¹⁸Many courts have ruled on the immunity of FINRA and other Self-Regulatory Organization, see for example: *Sparta* and *Weissman v. Nat’l Ass’n of Sec. Dealer*, 468 F. 3d at 1311.

¹⁹See Endnote 7 above.

²⁰“Finra reform getting traction in Washington,” Mark Schoeff Jr. No 6 2017, The Washington Insider, available at: <https://www.investmentnews.com/article/20171106/BLOG07/171109956/finra-reform-getting-traction-in-washington>. The article discusses a Heritage Foundation panel at which panelists proposed, among other reforms for FINRA, making FINRA subject to the FOIA, and making arbitration proceedings and awards more transparent.

²¹The Mississippi consumer protections statute for example requires consumers to make “a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General”. MISS. CODE ANN. § 75-24-15(2).

²² In *Mayo v. Dean Witter*, 258 F. Supp. 2d 1097, amended by 260 F. Supp. 2d 979 (N.D. Cal. 2003), a federal district court held California’s state requirements for Arbitrators were preempted by Federal laws. The court found conflicts between the SROs (in this case the New York Stock Exchange) and California Standards

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and if SROs were forced to comply with the California standards they would become subject to a patchwork of state regulation at odds with their national function.

The National Futures Association a registered futures association and an SRO provides an arbitration forum for its members and customers similar to FINRA. See: <https://www.nfa.futures.org/arbitration/index.html>.

²³See: <https://www.finra.org/arbitration-and-mediation/faq-awards-faq>. A FINRA arbitration award may be vacated or confirmed by a court of competent jurisdiction under applicable Federal or state laws. See also: FINRA, Customer Code Rule 12904 and Industry Code Rules

13904, available at: <https://www.finra.org/arbitration-and-mediation/decision-award>.



James Downey is an attorney, mediator and arbitrator in Massachusetts. He is a Lieutenant Colonel in the Judge Advocate Generals Corps in the Massachusetts Army National Guard, and serves on the Panel of Neutrals for the Better Business Bureau, FINRA, MWI Inc. and the U.S. Department of Defense.

ADR Section Leadership

CHAIR

LISA BROWN
BULLARD LAW
200 SW MARKET STE 1900
PORTLAND, OR 97201
LBROWN@BULLARDLAW.COM
(503) 248-1134

CHAIR ELECT

ALEXANDER ZIMMER
ATTORNEY AT LAW
200 PARK AVENUE, SUITE 1700
NEW YORK, NY 10166
(646) 580-2013
ALEX@AZIMMERLAW.COM
WWW.AZIMMERLAW.COM

SECRETARY

BRYAN BRANON
802-752-7314
BRYAN.BRANNON@GMAIL.COM

TREASURER

MARY K. AUSTIN
MEDIATOR, ARBITRATOR, ATTORNEY
412-759-1985
MKAUSTIN@GMAIL.COM

ADDITIONAL BOARD MEMBERS ARE:

IMMEDIATE PAST-CHAIR

JOAN D. HOGARTH
LAW OFFICE OF JOAN D. HOGARTH
43 W 43RD ST
NEW YORK, NY 10036
(973)722-1329
JAYHOGARTH12@GMAIL.COM

PAST CHAIR/MEMBER-AT-LARGE

SIMEON H. BAUM
RESOLVE MEDIATION SERVICES, INC.
1211 AVENUE OF THE AMERICAS
40TH FLOOR
NEW YORK, NY 10036
(212) 355-6527
SIMEONHB@DISPUTERESOLVE.COM
WWW.MEDIATORS.COM

EDITOR – THE RESOLVER

ALEXANDER ZIMMER
200 PARK AVENUE, SUITE 1700
NEW YORK, NY 10166
(646) 580-2013
ALEX@AZIMMERLAW.COM
WWW.AZIMMERLAW.COM

If you are interested in becoming the ADR liason for your chapter, please send an email to Alea Al-Aghbari, sections and divisions coordinator, at aalaghbari@fedbar.org.

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Section of the Federal Bar Association
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Arlington, VA 22201