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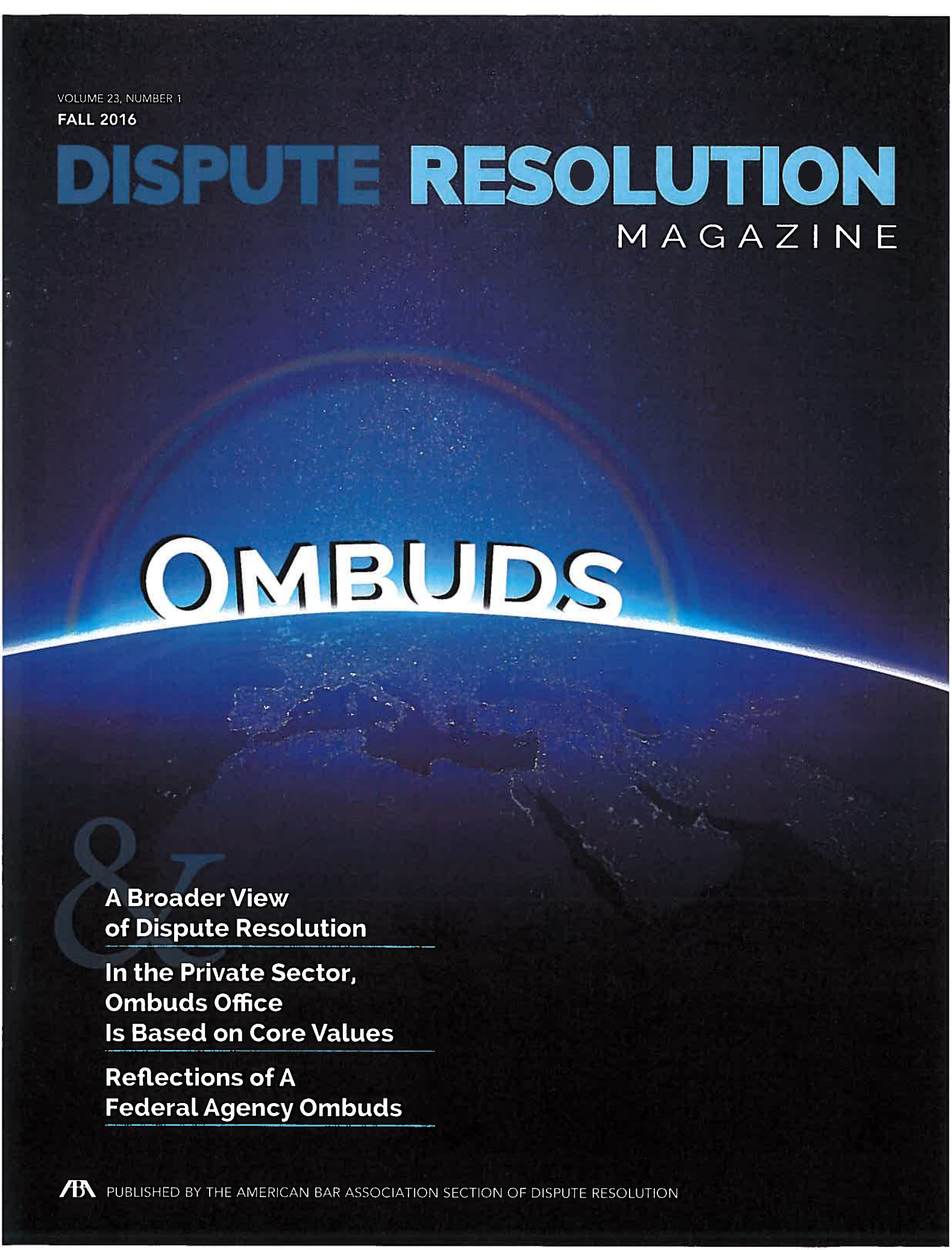
DISPUTE RESOLUTION MAGAZINE



A Broader View of Dispute Resolution

In the Private Sector, Ombuds Office Is Based on Core Values

Reflections of A Federal Agency Ombuds

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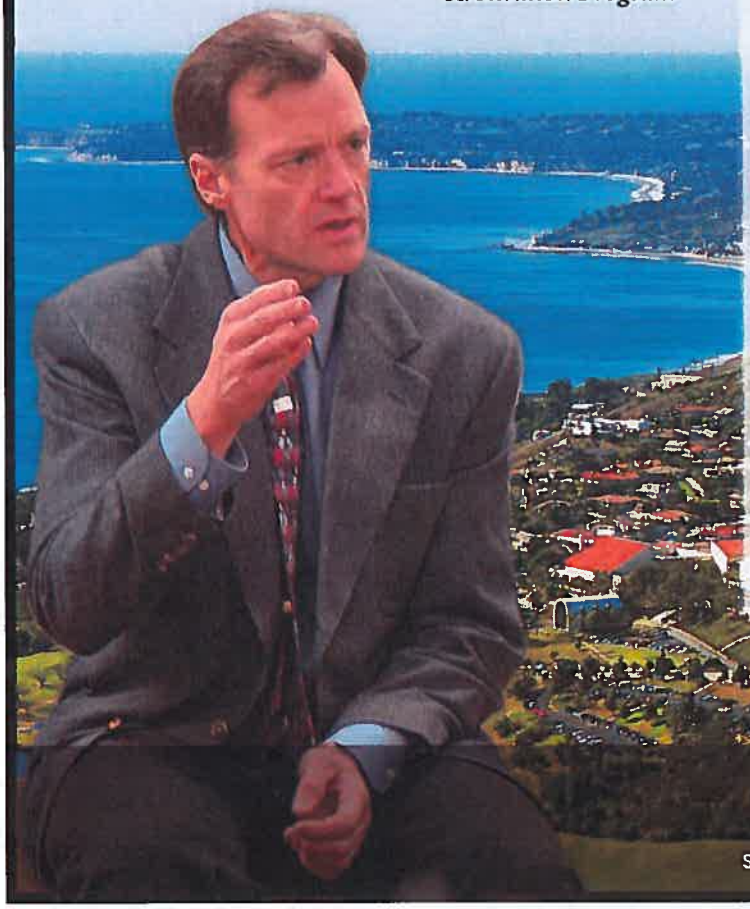

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FALL 2016

Features

Articles

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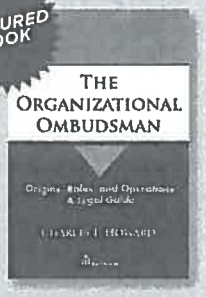

The Organizational Ombudsman: Originals, Roles, and Operations A Legal Guide

By Charles L. Howard

This book is an essential resource for ombudsmen, dispute resolution professionals, in-house counsel, corporate executives, university administrators, compliance officers, and human resources personnel. It provides a history of the evolution of the role of an organizational ombudsman and offers strategies for structuring and operating offices to preserve the confidentiality that is critical to their function.

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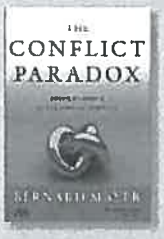

The Conflict Paradox, Seven Dilemmas at the Core of Disputes

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From The Chair *By Nancy Welsh*

This is my first column as Chair of the Section of Dispute Resolution, and I begin by thanking you. You care enough about our field to belong to our Section, participate in its activities, and read the valuable contents of this *Dispute Resolution Magazine*. I am filled with gratitude for you and the many other wonderful people in our Section who devote their time, energy, and other resources to our various committees, boards, task forces, publications, competitions, conferences, institutes, webinars, white papers, and other activities and efforts. If you are not yet involved in a Section activity or group, I invite you to go to the website or review the list of committees and committee chairs in this issue to find your affinity group.

More thanks are in order as we welcome Linda Warren Seely, who became our Section's Director on September 12. Linda comes to us from Memphis Area Legal Services, where she served as Director of the Campaign for Equal Justice and Director of Pro Bono Projects. She also served as President of the Memphis Bar Association in 2013. Linda brings deep experience with the management of volunteers, bar association leadership, and service as a mediator, and she joins our talented staff of Associate Director Gina Viola Brown, Senior Meeting Planner Pamela Meredith, Program Associate Melissa Buckley, and Marketing and Membership Specialist Brandon Moore-Rhodes. Staff Attorney Matthew Conger, meanwhile, has recently become the Director of the Washington, DC, office of the American Arbitration Association. We are grateful that Matthew will remain in our field — and even in the Section's neighborhood in DC — and look forward to working together in the future.

This is the time of the year for transitions in our Section leadership, and I also thank all the committee co-chairs who have served us so well and have mentored our next generation of leaders. For *Dispute Resolution Magazine*, thanks go to Zena Zumeta, who is ending her term on the Editorial Board, and to Fred Hertz and Machteld Pel, who are beginning their terms.

Special thanks also go to Bruce Meyerson. Bruce's recent service as Delegate from the Section to the ABA House of Delegates was the culmination of 20 years as a Section of Dispute Resolution leader. Bruce has served as Budget Officer, Vice-Chair, Chair-Elect, Chair, Immediate Past Chair, Long-Range Planning Officer, and as Delegate to the ABA House of Delegates. He is responsible for creating many of the Section's programs — such as the annual Advanced Mediation and Advocacy Skills Institute (now in its 14th year), the Arbitration Institute (now in its 10th year) and, most recently, Section delegations to other parts of the world. I note that immediately after the return of the Section's delegation to Cuba — organized, of course, by Bruce — President Barack Obama announced his intention to normalize relations between the United States and Cuba. Coincidence? Through all the years, Bruce has displayed an uncanny ability to see opportunities, find ways to respond to them, and then maintain the vision, persistence, and skills to institutionalize his innovations. We look forward to Bruce's continued involvement and contributions to our field.

Finally, all of us owe a debt of gratitude to Howard Herman for his thoughtful stewardship of our Section for the past year. With care and patience, he worked to structure every meeting, committee, and initiative to ensure inclusivity, respectful dialogue, and effective forward movement. Because of his leadership, we have now institutionalized a more sustainable structure for our Spring Conference planning and a similarly sustainable Leadership Retreat that draws on the experience and knowledge of our committee chairs. We also have developed our ability to weigh in on important policy issues through ABA House of Delegates resolutions and submission of comments authorized through the ABA's blanket authority process. Howard also worked tirelessly with ABA staff and Section leadership to structure and complete our search for our new Director. It was not an easy year, but Howard was always ready to talk, consult, and work to find the best way forward. I look forward to his continued involvement and to working with all of our Section's officers, including Chair-Elect Ben Davis, Vice-Chair Harrie Samaras, and Budget Officer Joan Stearns Johnsen.

This last paragraph seems an appropriate place to write a bit about what I foresee for the Section during the coming year. Our Section is a leader in the dispute resolution field, both nationally and

internationally. This role requires us to be ready to speak up for our field. I am proud that we worked with other ABA sections to navigate the ABA's policymaking processes and ultimately won a House of Delegates resolution on health care ADR, submitted comments on arbitration and mediation to the CFPB and FINRA, submitted a letter on arbitration to the Centers for Medicare and Medicaid Services, and worked with the Judicial Division and others to win an Enterprise Grant that will use online dispute resolution to increase access to justice. "Alternative" dispute resolution is now an integral and important part of the regulatory and legal framework within which we operate. There are many policy issues that will offer us the opportunity to play a leadership role. What is needed to ensure that online dispute resolution provides sufficient procedural safeguards? When and to what degree should joint sessions be an essential part of mediation? How should we address concerns about investor-state arbitration processes? What rigorous empirical research must be done regarding mediation and other dispute resolution processes — and how can we support that research? How can we help mediators, arbitrators, and other neutrals sustain their commitment to best practices (and does part of the answer have something to do with reflective practice)? These are all important matters. I look forward to addressing them with each of you and in collaboration with others — including other sections of the ABA, our "sister" dispute resolution organizations, other bar associations, law schools, and graduate schools.

Thanks again. I look forward to being on this journey with you.

Nancy Welsh *is Professor of Law and William Trickett Faculty Scholar at Penn State University, Dickinson Law. She can be reached at nxw10@psu.edu.*

OMBUDS

An Introduction

We are delighted to present this issue of *Dispute Resolution Magazine* on the work of the ombuds. This area of practice, though rich in history, has exploded in recent years and now provides important opportunities for collaboration, education, and employment. Our first theme article, by Chuck Howard, the Co-chair of our Section's Ombuds Committee, serves as a primer on the topic and examines the premise that gave rise to the ombuds, one that is very different from those that led to mediation, arbitration, and other similar forms of alternative dispute resolution. Other articles describe the current landscape of ombuds activity, suggest best practices, and highlight the difference between internal ombuds, who serve an organization's employees, and those who are external-facing and work with the public.

Presenting the three theme articles posed some of its own challenges. First, terminology. Labels vary from office to office and country to country: some people prefer the original term "ombudsman," some use "ombudswoman," "ombudsman," and "ombudsperson," and some have adopted the gender-neutral "ombuds." For the sake of consistency and clarity, in the three main articles we use the term "ombuds" throughout – a decision that not all our authors applaud. To acknowledge this difference of opinion, we have included this endnote in each article:

> *The term "ombudsman" derives from a Scandinavian word that is not gender-specific. In modern usage, different organizations have adopted variations of the word, including "ombuds" and "ombudsperson," to avoid any perceived gender association. In this issue of* Dispute Resolution Magazine, *we use "ombuds" unless the text refers to an office or organization that uses a different version of the word.*

Second, context matters. Each article gives us a glimpse into one organizational culture and reminds us that such cultures — including the law — often use language that can be opaque or sound odd to the ears of those outside them. For example, in their article about ombuds work in the private sector, three authors who make up the ombuds office at McKinsey & Company refer to their fellow employees as "people" or "colleagues," not "employees." In contrast, our author from the federal Consumer Financial Protection Bureau, the CFPB, has "inquirers" and "stakeholders" instead of "complainants" or "constituents."

Finally, confidentiality. As many of us know from trying to communicate about the joys of ADR, our vow of confidentiality almost always prohibits us from providing telling (and often intriguing) details about particular cases or initiatives. In this issue, the authors describe complicated processes and systems, but the details of the actual disputes they have encountered are often confidential. The irony is inescapable: descriptions of the actual work and the particular personalities that we find challenging and fascinating cannot be included.

Despite all these challenges, we think these articles are engaging and valuable, providing rare insiders' views of the work of the ombuds. We thank the authors for sharing their expertise and insights.

One more thing: The careful reader will note a new format for our regular feature "On Professional Practice." We have invited Ty Holt, Judith Meyer, Susan Podziba, and Sharon Press, all distinguished practitioners and thought leaders, to use different presentations – such as interviews and conversations – to analyze practice issues that sustain professional integrity, examine practices that apply across multiple sectors, or crystallize how professional responsibility principles differ from one practice area to another. In this first issue, they discuss, quite appropriately, the ethics of getting started. We hope that this new format will prompt — not end — conversations on these important topics.

– The *Dispute Resolution Magazine* Editorial Board ■

A Broader View of Dispute Resolution

By Charles L. Howard

In English common law, which forms the foundation for much of the US legal system, tradition and precedent are paramount. Because common law was built on the principles of lawyers, lawsuits, and the adversarial process, it's no surprise that many people today assume that resolving a dispute means hiring an attorney and going to court. Even more modern approaches to resolving differences such as mediation, arbitration, and conciliation are seen through this traditional lens. They're all alternatives to having your day in court.

But the concept of the "ombudsman,"[1] a role that first appeared in Scandinavia about 300 years ago and has been implemented in the United States for only about half a century, springs from a very different idea. This broader view of dispute resolution comes from a separate tradition and premise: that organizations, including governments, should function effectively and that an independent, skilled agent within an organization can help make that happen. Resolving conflicts is part of that effective functioning, but it isn't the only part. Understanding this view — and how the ombuds' role has evolved to include ever more governmental functions and many other complex systems — helps us see why and how ombuds can provide crucial help both to individuals and organizations.

A Brief History of Ombuds

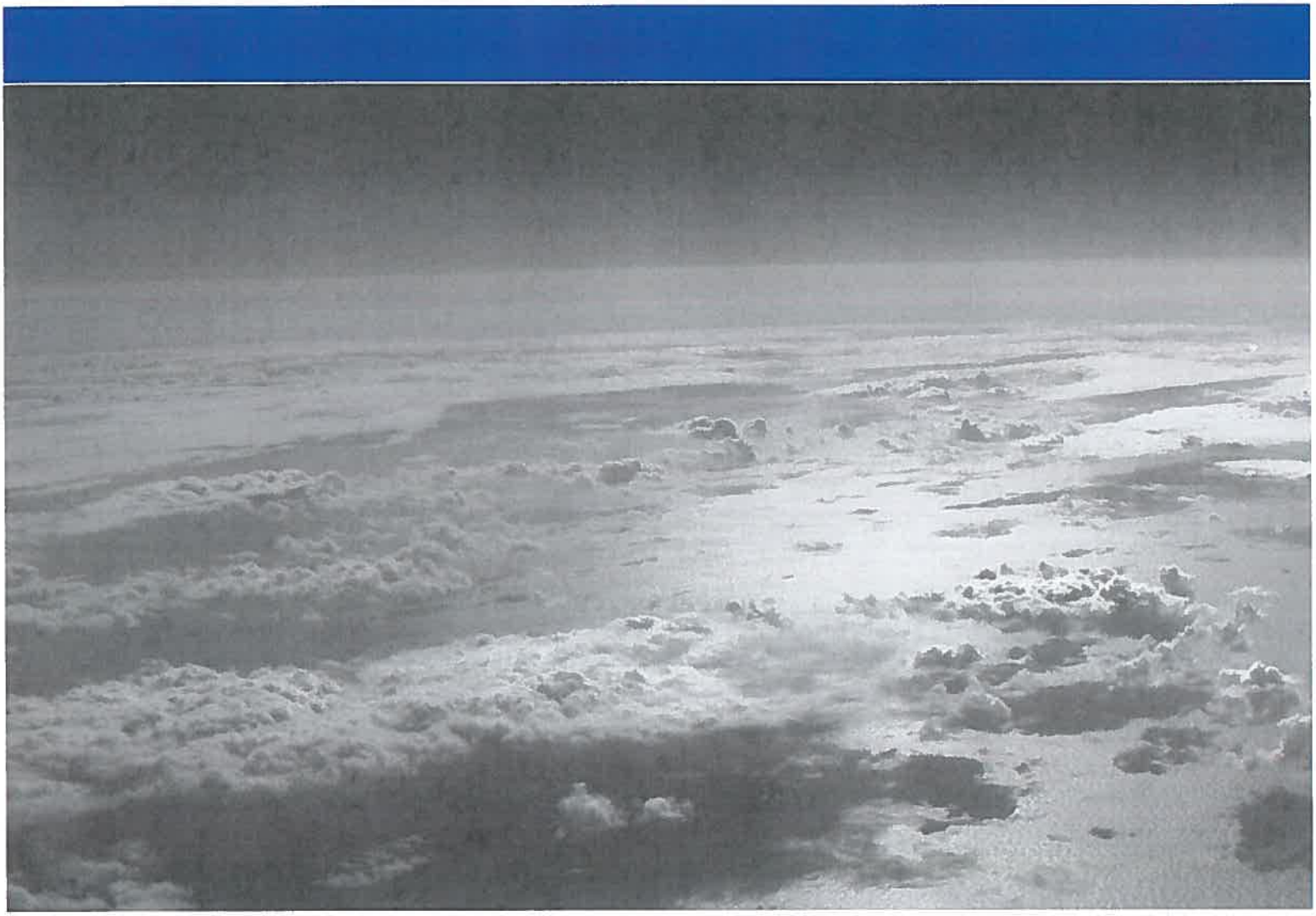
The first ombuds in a role that would be recognized as such today was created in 1713 by a Swedish king. When King Charles XII fled to Turkey after being defeated by Russia, the king appointed an "ombudsman" to ensure that his governmental officials "followed the law and fulfilled their obligations."[2] A century later, in 1809, Sweden adopted a parliamentary form of government with a constitution that provided for an ombuds to guarantee that the government complied with the law.[3] As the concept spread throughout Scandinavia in the twentieth century, an ombuds was a lawyer — an investigator and sometimes a prosecutor — whose mandate was to ensure that the government complied with the law.

Kenneth Culp Davis, a longtime professor at the University of San Diego and an authority on administrative law, helped popularize the ombuds concept in the United States through an article he wrote in 1961 for the *University of Pennsylvania Law Review*[4] in which he described his observations of the workings of the Scandinavian ombuds. He believed the ombuds function filled two important roles: a "check" on the activities of governmental officials and a means of helping ensure fundamental fairness to concerns that could be as petty as

> [w]hen a bureaucrat irritates you, or delays too long, or requires too much red tape, or denies what you want. . . . If the bureaucrat is wrong, the Ombudsman may publically reprimand him. If the government system is out of gear, the Ombudsman may recommend that it be set right, and his view is likely to prevail.[5]

The Work of the Ombuds

These types of disputes — in which disagreements can be against or within an organization — are quite different from those in which the other forms of ADR are often used. Disputes in the ombuds' area often are about process (in addition to or sometimes instead of substance), and they may not even be at a level that would typically prompt someone to take formal action. Perhaps, for example, a medical technician believes that she is being belittled or insulted by her coworkers, supervisors, or hospital physicians — but not necessarily subjected to the kind of sexual harassment that would merit lodging a formal complaint. Whom can she talk to about her concerns and her options? If the clinic or hospital has

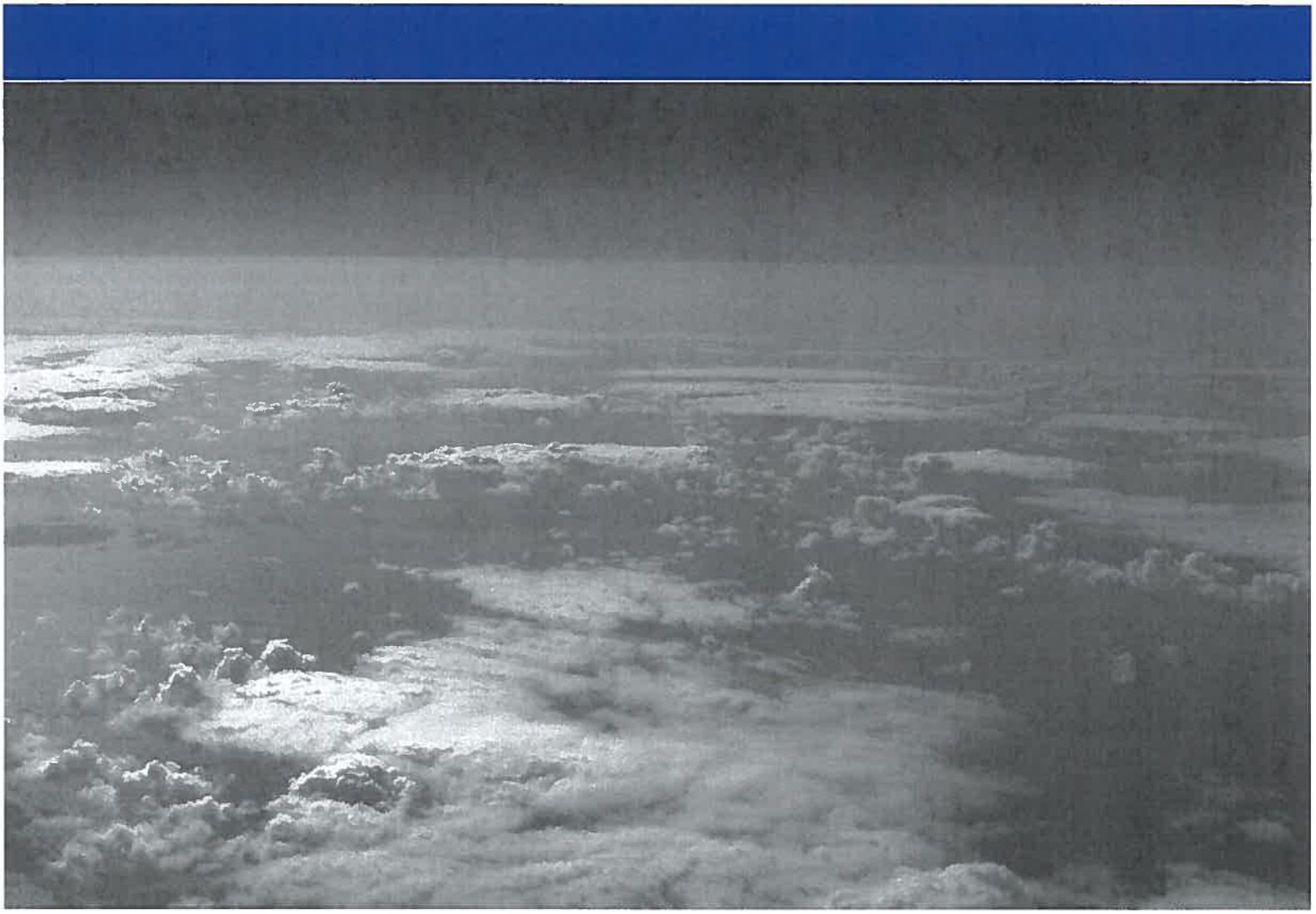


an ombuds, the technician can contact that office in complete confidence and set up a meeting, perhaps in an office located away from the workplace, to talk things over. Maybe that conversation steers her to other resources, helps her articulate her concerns, or assists her in understanding exactly how the organization defines harassment and what she could do to register a complaint. Perhaps the technician takes action; perhaps she doesn't. Regardless of how this particular issue is resolved, the ombuds often uses aggregate data on the types of issues presented to the office (without identifying the inquirers or disclosing confidential information about them) to alert the organization's management about systemic issues that may be of concern.

In all his or her work, the ombuds focuses not only on helping resolve a particular complaint but also on promoting the effective functioning of the organization or system to help set things right, in this case reporting aggregate information about employee complaints. This work pays big dividends, and over the past 50 years, colleges, universities, private organizations, and even prisons and nursing homes have all appointed their own ombuds.

As the ombuds' role has moved beyond its original governmental moorings, which through statute, regulation, or governmental directive provided legal protection for its investigative function and the attendant need for confidentiality, it has been able to adapt to non-governmental contexts by developing and adhering to principles such as independence, impartiality, and confidentiality in the absence of any enabling legislation.

In this evolutionary process, various types of ombuds have emerged. As described in two resolutions adopted by the American Bar Association in 2001 and 2004, ombuds programs have evolved to include "organizational" and "advocate" ombuds in addition to the original "classical" or governmental (whether "executive" or "legislative") programs.[6] Despite such distinctions, the role's dual micro/macro focus endures: ombuds of all types seek to help



resolve particular concerns presented to them — and at the same time identify trends and systemic issues that their organizations should recognize.

In today's world, we all have to deal with government or other organizations every day, whether attending school, going to work, or dealing with a government agency or an insurance company. And whenever people are involved (i.e., always), mistakes, failures, or disregard of the law or proper process are sure to follow. Because most people have never been involved in a lawsuit, arbitration, or other formal conflict or adjudicatory process, they may not even know about traditional forms of ADR. And even if they have heard of mediation, arbitration, or case conciliation, they may not know how or where to find them. Or they may think these processes are intimidating, expensive, or ill-suited to their concern. And for those working inside an organization, even if a wrong seems indisputable, who wants to bring it to light and risk condemnation and perhaps retribution from bosses or coworkers or both?

Because ombuds are usually retained or employed by an organization or governmental agency and operate as an independent and impartial resource available to all the organization's constituents, the ombuds services are typically free for the individuals using them. Ombuds can help resolve conflicts, but because of their deep knowledge about the organizations they serve, they can also provide information and a safe, confidential space where people can discuss options for reporting and addressing their concerns. While the means for dealing with systemic issues may vary depending on the type of ombuds, virtually all ombuds consider identifying and addressing systemic problems within their organization to be among their main responsibilities.

The growth of ombuds programs bears witness to the increasing understanding of just how much this broader type of dispute resolution is needed. Forward-looking colleges and universities, as well as many large corporations and other organizations and institutions, have been surprised by both the variety

and cumulative significance of the issues brought to their ombuds, and each year numerous legislative proposals include calls for the appointment of new ombuds to address specific concerns. Ombuds themselves, their professional associations, and the Dispute Resolution Section's Ombuds Committee all agree: most large organizations and governmental programs would benefit greatly from having or using some kind of ombuds program.

The Broader View in Public School Systems

To this end, the Section's Ombuds Committee aims to sponsor education and outreach about such programs by working with the major ombuds organizations, including the International Ombudsman Association (IOA), the United States Ombudsman Association (USOA), and the Coalition of Federal Ombudsmen (COFO), and encouraging articles and programs to promote better understanding and increased use of appropriately designed, supported, and implemented ombuds programs. One of the Ombuds Committee's big initiatives for the coming year will be spotlighting the potential for ombuds programs in public school systems.

Our public K-12 school systems are a great example of both the need for and the possible opportunities provided by an effective ombuds program. As most of us know all too well, conflicts between parents and school administrators abound, but the traditional means of resolving these disputes, whether through litigation or administrative complaint processes, can be expensive, time-consuming, adversarial, and inflexible for everyone involved. Many disputes take months, or even years, to resolve through formal channels.

But such systems may not always serve the larger good — or even the needs of the families and administrators involved. While almost all school disputes involve distinct facts, many also raise systemic issues that could be addressed through revisions to policy or practices. And some parents and officials really just need to sit down, talk, listen, and start to understand the other person's perspective.

By providing a cost-effective, efficient opportunity for parties to talk and for the larger system to learn and change, an ombuds program can serve as a check on systemic mistakes and promote public perception that educational decision-making is fundamentally fair.

School systems are just one arena where ombuds programs are a valuable resource, and in our increasingly complex and frequently global society, there are many more. Other articles in this issue of *Dispute Resolution Magazine* describe how ombuds help address those issues in certain organizations — an internal ombuds program at a consulting firm and an external-facing ombuds at a federal government agency. In all these contexts, what is needed is an appreciation of a dispute resolution method that goes beyond the common-law alternatives, one in which a trained, skilled ombuds works to help with an individual concern — and improve the system that gave rise to it. ■

Endnotes

1 The term "ombudsman" derives from a Scandinavian word that is not gender-specific. In modern usage, different organizations have adopted variations of the word, including "ombuds" and "ombudsperson," to avoid any perceived gender association. In this issue of *Dispute Resolution Magazine*, we use "ombuds" unless the text refers to an office or organization that uses a different version of the word.

2 Charles L. Howard, The Organizational Ombudsman: Origins, Roles, and Operations — A Legal Guide 2-3 (2010) (quoting Gerald E. Caiden, *The Institution of Ombudsman, in* International Handbook of the Ombudsman: Evolution and Function 9-10 (Gerald E. Caiden ed., 1983)).

3 *Id.* at 45 n.6.

4 Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. Penn. L. Rev. 1057, 1057-58 (1961).

5 *Id.*

6 *See generally* Howard, *supra* note 2, at 468-524. For copies of the 2001 and 2004 Resolutions, see *id.* at 470, 494 (Appendices 6 and 7), http://apps.americanbar.org/dch/committee.cfm?com=DR589600.

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In the Private Sector, Ombuds Office Is Based on Core Values

By Charmhee Kim, Ralph Johnson, and Lynne Chaillat

The focus of McKinsey & Company, a global management consulting firm, is people — its clients, of course, but also its own people. Today McKinsey has more than 10,000 consultants in more than 60 countries who help businesses, governments, non-governmental organizations, and nonprofits shape strategies, deal with change, build capacity, and get results. With a mission statement that describes "building a great firm that attracts, develops, excites and retains exceptional people" and also aims to "uphold the obligation to dissent," perhaps it's no surprise that McKinsey is one of the few professional services firms with its own ombuds office.

Together, we make up McKinsey's ombuds program today, providing services to Asia from Seoul (Charmhee Kim), North America and Latin America from Cleveland, Ohio (Ralph Johnson), and Europe, the Middle East, and Africa from Paris (Lynne Chaillat). We think that a look at McKinsey's ombuds program[1] — its evolution, its structure, and its practice — shows how a program that truly reflects an organization's core values can support and promote good business all around the world.

Getting Started

In 1998, McKinsey hired Elizabeth Pino, who earlier that decade had created the first ombuds program in a law firm, at Boston-based Palmer and Dodge, to start an ombuds office at McKinsey. Using her experience as an ombuds, Pino launched and oversaw the program from her Boston base. The ombuds office started expanding globally in 2007 with a pilot program in Asia.

As every ombuds knows, success depends not only on corporate support but also on the talents,

strengths, and institutional knowledge of the individuals involved. Before becoming ombuds at McKinsey, we all worked for McKinsey in other capacities, including the organization's "people functions," which allows us to blend our experience in the personnel practices with our understanding of how McKinsey works as a whole. This experience working within the organization has been instrumental to the effectiveness of our internal-facing ombuds office. Although this was not accomplished by design, the diversity within our three-person team — of race, gender, and religious beliefs — has made the team even stronger, with complementary skills and perspectives. This diversity, and the fact that our locations are in distinct time zones, allows users of the ombuds program to choose which of one of us they may want to contact to discuss a particular issue, whether it's a concern about fairness, interpersonal dynamics, career development, or even about work-life balance.

Building Institutional Support

Understanding that an effective ombuds office must be protected from all interference and supported by the organization's leaders, Pino deliberately worked to ensure this support and protection. In regular visits to offices throughout the firm, she met with office managers to deepen relationships and trust; facilitated team discussions to address specific issues; and developed and delivered training programs on people-related topics.

This groundwork shows today in senior leadership's strong support for the ombuds office and expectation that the program's presence at the firm will be far-ranging and long-lasting. With budgetary backing and autonomy, members of the office continue to have access to cutting-edge technology, training, and a travel budget to visit McKinsey office locations as needed.

On those visits, each McKinsey ombuds works with the senior leaders in the region to help shape and ensure a supportive work environment, holding discussions on specific topics or emerging issues. Because people need to see their organization's priorities in action, these meetings, along with senior leaders' regular reminders to colleagues that the ombuds are a valuable, confidential resource, telegraph the idea that the ombuds team members all have experience, access, and the ear of senior leaders.

McKinsey's support for professional development extends to its ombuds, and all three of us regularly attend training programs, conferences, and networking opportunities, including the annual conference of the International Ombudsman Association (IOA), where we have been students as well as teachers. Through these networking opportunities, we meet other experienced ombuds practitioners and experts who can support us and our work with advice on mental health matters, legal questions, and other specialized issues.

Staying Connected

Keeping informed and staying connected are crucial for any effective office, even one that is independent by design, and McKinsey's ombuds team hosts regular catch-up discussions with key departments of the organization. These involve more than just regular meetings with the human resources and legal teams; ombuds team members confer with leaders of knowledge management, shared services (centralized functions of finance and accounting, IT, graphics design, etc.), risk, and diversity and inclusion, among others. Such exchanges help maintain working relationships throughout the organization and, equally important, keep the ombuds informed about McKinsey's evolution as it continues its growth and modernization. Hearing about major initiatives and changes in a timely manner enables the ombuds to serve our constituents more effectively, and observing trends — those in one particular pocket of the firm as well as those that stretch across departments — can help ombuds understand and address concerns in a timely and responsible way.



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Solving Problems, Building on Strengths

Management consultants are trained to identify problems and help devise solutions — with clients. At McKinsey, this problem-solving ethos applies to ways that the firm and its members operate, including how situations get discussed and how options are explored in ombuds conversations. When a colleague brings a concern or questions, the ombuds works with the colleague as a problem-solving partner. In addition to being an empathetic, effective listener and offering a safe, confidential, and risk-free sounding board, at McKinsey the ombuds functions as a facilitator, aiming to empower the colleague to make responsible decisions about how to surface issues. In most cases, this enables the individuals to find resolution in a manner that feels comfortable.

Over the past several years, McKinsey has transitioned its evaluation and feedback processes for all colleagues from focusing on developmental failures or performance deficits to looking at strengths and opportunities, a shift that the ombuds have been able to help with and integrate into problem-solving efforts. After asking an individual to list and review the strengths mentioned in a recent performance review, the ombuds can help him or her explore ways to leverage those strengths in challenging situations.

Role-playing sometimes helps people prepare for a difficult conversation, helping them see the situation from alternative perspectives, examine their own assumptions, and frame a set of options that could resolve the issue. All this amounts to coaching, helping colleagues address both their will and skill.

Evolving with the Organization

As the global business environment changes, the management consulting industry innovates, and McKinsey itself evolves, McKinsey's ombuds office is expected to adapt. Since the ombuds office's inception in 1998, McKinsey & Company has almost tripled in size, and the global reach and count of its offices has expanded by more than 50 percent. Moving from the model of one ombuds serving the entire firm to three regionally focused ombuds has been a natural, yet intentional outcome of that growth. With strong institutional support and a valued place in the organization, we expect — and are expected — to stay nimble in serving our colleagues in this steadily changing environment. ■

Endnotes

1 The term "ombudsman" derives from a Scandinavian word that is not gender-specific. In modern usage, different organizations have adopted variations of the word, including "ombuds" and "ombudsperson," to avoid any perceived gender association. In this issue of *Dispute Resolution Magazine*, we use "ombuds" unless the text refers to an office or organization that uses a different version of the term.

Reflections of a Federal

By Wendy Kamenshine

Someone shared that the agency website was not fully accessible to the visually impaired. My office, the Consumer Financial Protection Bureau (CFPB) Ombudsman's Office, contacted a few groups that assist the visually impaired. We asked them to do a demonstration with a screen reader (a text-to-voice computer application) so we could experience the website that way. We invited representatives from various offices across the CFPB to join us at the demonstration and facilitated the conversation between them and the groups that assist the visually impaired.[1]

Some trade groups and companies shared their perception that language in the agency's press releases did not match consent orders, legally enforceable documents agreed to by the CFPB and an outside party. My office reviewed the press releases and consent orders for a defined period of time and met with the relevant agency offices. We concluded that the press releases do generally reflect the language in the consent orders. At the same time, we highlighted three issues for the agency to consider in writing future press releases, including whether the press release contains legal terminology that is not in the consent orders.[2]

Early in the CFPB's existence, some consumers shared with my office that they missed e-mailed correspondence from the agency. They did not know that if they provided an e-mail address as a contact point when submitting a consumer complaint to the CFPB telephone contact center, all agency correspondence on that complaint would be sent via e-mail.[3]

These are just a few examples of the work of an external federal ombuds[4] who assists the public rather than addressing internal human resource matters.

The Federal Externally Facing Ombuds

Like other ombuds, I serve as an advocate for a fair process. However, in this context, I also am a public servant, one with a special opportunity to assist both a federal agency and the people and entities that interact with it.

The CFPB opened in July 2011 and is an independent agency of the US government created in response to the 2007-2008 financial crisis. The agency shares that it "was created to provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace."[5]

The essence of my role is to advocate for fairness in the agency's engagement with the public and the public's engagement with the agency. What does this mean in practice? I think of this in the form of a few questions. Is the agency fairly applying a process it established? If there is no set process for what the agency is doing, should we recommend creating one? Lastly, does the existing process need to be changed

Agency Ombuds

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in some way to provide the public with a fair application of it?

As an externally facing ombuds that engages with the public, my office serves as an office of last resort. You can reach us at any time, but we ask that the public first try the regular avenues the agency provides to resolve what is happening. For example, a consumer can call the CFPB's telephone contact center regarding a consumer complaint already filed with the agency or a company can e-mail the agency's Office of Regulations to follow-up on a regulatory question. That approach usually works. When the regular avenues do not work for some reason or the person wishes to highlight an issue in confidence, that is the time to contact us.

I'm often asked what kinds of skills are helpful for an externally facing ombuds. I have no set response. I generally explain that I have a running list, in no particular order, which includes strong interpersonal skills (such as being able to listen well and communicate effectively with a wide range of people); the ability to spot issues; analytical and critical thinking; public speaking ability; a willingness to review issues from various perspectives; good writing skills; problem-solving; creativity; a willingness to provide feedback; and facility with data. (For many of you, these skills may sound familiar.)

Ombuds Principles that Guide Our Work

In all our public materials, in every presentation, in every opening e-mail message, and in every first meeting, we describe the ombuds principles that guide our work: independence, impartiality, and confidentiality. Together these basic principles enable us as ombuds to be an advocate for a fair process and informally assist in resolving process issues with the agency.

Independence means that we do not report through any agency office or division. We report to the Deputy Director and then directly to the CFPB Director. We serve as an early-warning mechanism, make recommendations for change, and provide feedback. By reporting to the people at the top, we offer information to the individuals who can best effect any needed change organizationally.

Impartiality means we do not take sides, and we advocate for a fair process. In the CFPB context, we do not take the side of anyone who contacts us, and we do not take the side of the CFPB. With independence and impartiality in mind, we do not speak or write on behalf of the agency.

As ombuds, we offer confidentiality so that someone can share an issue without her identity becoming known, which is particularly important for anyone who fears retaliation or retribution in raising it directly with the organization. There are a few exceptions to confidentiality, such as a threat of imminent risk of serious harm, an allegation of government fraud, waste, or abuse, or if required by law. These exceptions are rare, and so in most cases we can protect someone's identity.

This is ADR?

In presentations, I sometimes share that Alternative Dispute Resolution is a heading with many branches underneath, such as mediation, facilitation, arbitration … and ombuds. As ombuds, we serve as third-party neutrals to informally assist in resolving process issues and are advocates for a fair process in everything we do.

I also find it helpful to describe how ombuds work is different from mediation.

Many forms of mediation take place with defined parties over a defined time frame and focus on a

certain set of issues or topics. Instead, as ombuds we consider ourselves to have stakeholders. At the CFPB Ombudsman's Office, anyone outside the CFPB and the CFPB itself are our stakeholders. We understand the issues involved and how to best try to resolve them at the agency.

In addition, as ombuds, we think of ourselves as having a toolbox of resources to try to assist in resolving whatever it is that is happening. That toolbox can include mediation, but is much broader to include facilitation, shuttle diplomacy, providing feedback, making recommendations, and generating options, to name just a few.

Engagement with our Stakeholders

As I mentioned, we engage with our stakeholders, both inside the CFPB and outside the agency, over time. The stakeholders get to know the ombuds office, and we get to know our stakeholders. As a result, we hope to achieve that comfort level so that people outside the agency will seek our assistance, when needed, to raise issues. At the same time, we know the agency well and research the issue and try to address it with the appropriate divisions, offices, and people inside the agency.

Outside the agency, this engagement is through our outreach with consumer, industry, and other groups. We connect with groups that already engage with the CFPB and introduce ourselves and our resource through in-person meetings, teleconferences, and virtual meetings. We also speak at conferences, meet with groups' members in teleconferences, and present to boards of directors. We try a variety of ways to do outreach and love new suggestions. In addition, sometimes we reach back to groups as part of our research on an issue to hear about as many perspectives as possible.

Inside the agency, this engagement is with our "inreach," a word I first heard years ago from an ombuds colleague. Inreach is sharing about our role with new and current CFPB employees in various ways so that if we contact someone to discuss an issue, we hope it is not the first time they learn about our function. It also involves meeting regularly all across the CFPB with various divisions and offices at a regular cadence, whether quarterly, bimonthly, or monthly. In these meetings we serve as an early-warning mechanism, make recommendations, provide feedback, and learn the latest about what's going on inside the CFPB that we might not learn about otherwise.

Individual and Systemic Process Issues

There is no typical day for an external federal ombuds. Day to day, we receive individual inquiries from the public, including individual consumers or their representatives, individual companies, consumer groups, industry groups, other government agencies, and anyone else outside the CFPB. The inquiries are about all kinds of process issues pertaining to that person or entity's particular situation.

Each year we also study a few systemic issues, topics I select in consultation with my team, because we think we may be able to add value from our unique vantage point as an independent, impartial, and confidential resource. They are process issues where we may be able to provide feedback or make recommendations or facilitate a discussion, for example, that would be helpful to everyone, both the public and the CFPB. Past topics have included the presence of enforcement attorneys at supervisory examinations; the public Consumer Complaint Database; and the CFPB's public actions, accompanying redress, and any associated information shared with consumers.

In our FY2015 Annual Report, we included a new flowchart to illustrate what happens when someone contacts us for assistance (See Figure 1). Aside from asking the person if she is reaching us in confidence and seeking more information about her concern, the flowchart is essentially a series of "may" statements: We may ask follow-up questions and may review applicable laws, regulations, policies, and data. We may reach out to other stakeholders to gather additional perspectives and may connect with the CFPB to gather additional perspectives.

Using that flowchart as a guide, we use whatever approach is appropriate under the circumstances to try to assist in resolving what is happening.

Ombudsman Forum

As we explore our ombuds toolbox to try out new ideas on how we may assist, last year we held our first Ombudsman Forum. It was an opportunity for us to hear further from industry groups we had engaged with through our outreach over time to additionally inform our work. The event was closed to the public, the press, and the CFPB. During the course of an

afternoon, my team and I facilitated discussions on process issues, including regulatory compliance; the intersection of supervision and enforcement; field hearings; company responses to consumer complaints; studies and research; and the CFPB's website and social media. We provided the participants' unattributed feedback and their recommendations to the CFPB and summarized that information in our Annual Report.

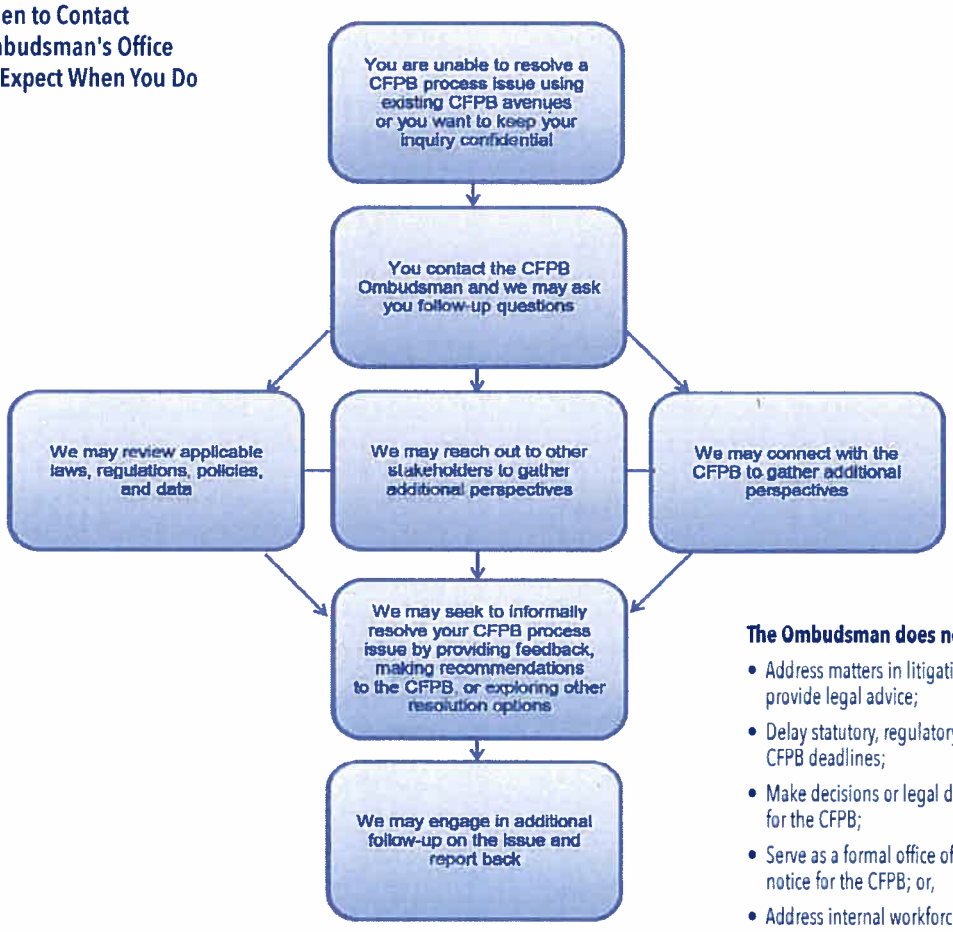
In our second forum, held this past June, we were joined by national and regional consumer-focused organizations we had engaged with through outreach or connected with over time. The format was the same, and we facilitated discussions on process issues, including connecting into the CFPB; the CFPB's consumer outreach; the consumer complaint process; the Consumer Complaint Database; access to the CFPB for the disability community; and creation and consumer usage of CFPB educational products. Again, we provided the participants' unattributed feedback and their recommendations to the CFPB and will be summarizing that information in our forthcoming FY2016 Annual Report.

Going forward, we are considering new possible Ombudsman Forum ideas to further assist the CFPB and those who engage with it.

Getting People to the Right Resource

As a government office that hears directly from the public, we regularly try to assist people in getting to the appropriate resource. In FY2015, we referred the people who reached us to 1,114 resources. We may refer them to another part of the CFPB that can assist.

Figure 1: When to Contact the CFPB Ombudsman's Office and What to Expect When You Do



For example, a consumer may not know that she can file a consumer complaint with the CFPB regarding a financial product or service, or a company may be looking for answers about an agency regulation but not know where to go for those answers.

Sometimes the resource needed is outside of the CFPB. It could be that another ombuds office can assist or perhaps another federal agency. We also might refer someone to a state agency or a legal aid provider.

If someone is caught between federal agencies, we may contact ombuds offices at other agencies to ensure the person is at the place that can best assist. There are ombuds offices all across the federal government, including those that work on internal, workforce type issues as well as offices like mine that are externally facing to assist the public with their agency interactions. As a unique sector within the broader ombuds profession, federal ombuds offices connect regularly through monthly meetings, an annual conference, and otherwise to share best practices and learn from each other. From those connections, we can guide someone to the help she needs.

Conclusion

So what happened with the access for the visually impaired to the CFPB's website? In the facilitated conversation during the screen reader demonstration, the groups that assist the visually impaired showed what worked well, such as labeling fields in the public Consumer Complaint Database, and what needed to be corrected, such as technology barriers that kept the visually impaired from submitting a consumer complaint to the CFPB through the website. The CFPB addressed the issues, and we have not heard about it since.[6]

What about those consent orders and the accompanying press releases? After highlighting the three issues for the agency to consider in writing new press releases, sometime later my office reviewed the topic again for a defined period of time. Again, the language used was generally the same in both documents. At the same time, there was a noticeable improvement on the issues we had highlighted. As I shared in our FY2015 Annual Report, we appreciated the CFPB continuing to consider the issues we highlighted in developing future press releases and then closed the review.[7]

And, finally, what about receiving the updates on the consumer complaints? My office recommended that the CFPB share the fact with consumers that providing an e-mail address on the complaint meant that the CFPB would respond to the consumer only by e-mail. The CFPB implemented that recommendation, so consumers now have that information when they provide an e-mail address to the CFPB telephone contact center.[8]

As my office approaches its fifth anniversary in December, my team and I continue to think of new, creative ways to assist both the public and the CFPB, and, to quote our office motto, "to advocate for a fair process in consumer financial protection."

Wendy Kamenshine *is the Consumer Financial Protection Bureau's first Ombudsman. Before joining the CFPB, she served as the Senior Ombudsman for the US Department of Homeland Security's Citizenship and Immigration Services Ombudsman's Office. Prior to joining the federal government, she practiced international trade law with the law firm Akin Gump Strauss Hauer & Feld LLP. She can be reached at wendy.kamenshine@cfpb.gov.*

Endnotes

1 Ombudsman's Office, Consumer Fin. Prot. Bureau, FY2014 Annual Report To The Director, at 6.

2 Ombudsman's Office, Consumer Fin. Prot. Bureau, FY2015 Annual Report To The Director, at 22-24.

3 Ombudsman's Office, Consumer Fin. Prot. Bureau, FY2013 Annual Report To The Director, at 17.

4 *Editor's note:* The term "ombudsman" derives from a Scandinavian word that is not gender-specific. In modern usage, different organizations have adopted variations of the word, including "ombuds" and "ombudsperson," to avoid any perceived gender association. In this issue of *Dispute Resolution Magazine*, we use "ombuds" unless the text refers to an office or organization that uses a different version of the word.

5 Consumer Fin. Prot. Bureau, http://www.consumerfinance.gov/about-us/the-bureau/ (last visited Sept. 29, 2016).

6 Ombudsman's Office, Consumer Fin. Prot. Bureau, FY2014 Annual Report To The Director, at 6.

7 Ombudsman's Office, Consumer Fin. Prot. Bureau, FY2015 Annual Report To The Director, at 22-24.

8 Ombudsman's Office, Consumer Fin. Prot. Bureau, FY2013 Annual Report To The Director, at 17.

Nancy Hardin Rogers

Editor's Note: "Profiles in ADR" introduces readers to people who have compelling insights into ADR. These interviews are edited for space and clarity.

***Nancy Rogers** is the Emeritus Moritz Chair in Dispute Resolution at the Ohio State University Moritz College of Law, where she teaches and writes, primarily in the area of dispute resolution. She devotes a portion of her time to the Divided Community Project and also serves as Director of the college's Program on Law and Leadership. Her recent article in the* Ohio State Journal on Dispute Resolution *titled "When Conflicts Polarize Communities: Designing Localized Offices that Intervene Collaboratively," received the International Institute for Conflict Prevention & Resolution's 2015 Professional Article Award. In addition to serving on the Moritz College of Law faculty, Professor Rogers has served as Dean of the college, Ohio Attorney General, President of the Association of American Law Schools, a member of the Board of the Legal Services Corporation, and reporter for the Uniform Mediation Act Drafting Committee. Active early in the ABA's dispute resolution activities, she was Chair of the ABA Standing Committee on Dispute Resolution, the forerunner of today's Section, and Co-chair, with Frank Sander, of* Dispute Resolution Magazine's *Editorial Board. She is the co-author of a mediation treatise and textbooks on dispute resolution, dispute system design, and mediation.*

Nancy Rogers

Q: What about your law school experience contributed to your interest in dispute resolution?

When I attended law school in the early 1970's, Yale had several clinical programs, all extracurricular activities. The number of women in the law school had increased, and students expressed an interest in starting a clinical program that had clients who were women. Yale Law Professor Dan Freed hired me as a research assistant to help him propose a clinical program at a state women's prison in Niantic, Connecticut, asking me first to spend part of the summer, 1970, working at the prison. There I interviewed women who had just been arrested and placed in pretrial detention. Their bail was sometimes set as low as $100 — it seemed that no one wanted or expected to keep them in pretrial detention — and some weeks after counsel was appointed for them and sought a change in their bail status, they were usually released. In the several months of incarceration, though, they

and their families sometimes suffered terribly. Single mothers saw their children placed with strangers. Some lost jobs. When, at my professor's suggestion, we contacted the organizations providing defense services for the indigent, prison officials, and some trial judges, we discovered that all of them would support a clinical program in which Yale Law students contacted defense counsel and, with permission, interviewed the women and drafted motions to modify conditions of pre-trial release soon after arrest. Yale started the program the following fall.

That was a very early expereience in what lawyers could do as problem solvers, especially if they understood, as Professor Freed did, the importance of listening. I also learned that even minor improvements in process can lead to major improvements in people's lives.

Q: Who were your role models?

So many people ... I think less of having heroes and more of knowing people whose acts at specific times seemed heroic to me. One who comes to mind is Frank Sander. I got to know Frank in the 1980's because he was teaching mediation at Harvard and I was proposing a mediation class at Ohio State. I called to ask if I could quote him in a course proposal. Frank not only kindly took my call and let me quote him on why Harvard thought it important to offer a mediation class but opened the way for me to meet others in the field. As I met others, I learned that they also considered Frank their mentor. His supportive friendship to so many has been inspirational to me.

After graduating from Yale Law, I clerked for District Court Judge Thomas Lambros of the Northern District of Ohio, who is best known for introducing the concept of the summary jury trial. When he had been a state court judge before becoming a federal judge, Judge Lambros had a docket heavy with domestic-relations actions. During these state court years, Judge Lambros concentrated on facilitating settlements that would serve the long-term interests of the families. He brought his settlement experience to the federal court, where he experimented with various ways of facilitating settlement between the parties if he thought it was beneficial for them to settle. I remember watching how hard he worked when the negotiating lawyers were locked in an adversarial mode, stuck in their positions. Judge Lambros would approach them using humor that would be, much of the time, at his own expense. The lawyers could not help but start laughing, and in the meantime, he would reframe the issues, and that would often lead to immediate settlement. Judge Lambros's settlement techniques were so impressive that I began thinking more about techniques to overcome barriers to settlement.

Q: What attracted you to dispute resolution after that?

After my clerkship, I was an attorney for the Cleveland Legal Aid Society. Negotiation was a big part of the job. When I started teaching, I first taught in an area that I thought I knew something about — litigation. I taught evidence, civil procedure, trial practice, and pretrial litigation at Ohio State. One day the Dean of the law school, Jim Meeks, asked me if I would consider teaching mediation. At the time, I confess, I knew nothing about mediation. Nevertheless, the Dean continued to encourage me because he thought it a promising innovation and wanted to assist a local court that had to terminate such a program because of lack of funding. Despite my lack of experience, or for that matter, expertise in teaching mediation, I was willing to give it a try. With the Dean's blessing, I brought in Dick Salem to help me teach the skills portion of the mediation class. Dick had worked as a mediator for the US Justice Department's Community Relations Service for many years and had just retired. He and I put together some exercises to teach the students how to mediate.

At the end of this first class in mediation, when I could take a breath and read the student evaluations (which I did with a great deal of trepidation), I saw that one response said roughly, "I came to law school to help people solve problems, and this is the first course in which that hope has been realized. This is what I want to do." In reading that student's comment, I realized that I felt the same way. I had never felt so satisfied in teaching a class, and I happily told the Dean that I would teach mediation as often as he thought feasible. Dick Salem and I decided to write a book that could be used by law schools to teach mediation. Although it is no longer in print, it was one of the first law school textbooks on mediation.

Q: Was your goal to be a dean of Ohio State?

No. I was enjoying teaching. Then one day, the Dean asked me to be the Associate Dean, and I found that I enjoyed the problem solving, counseling, and strategic planning — and I could continue teaching. A few years later I agreed to become a Vice Provost for Ohio State University with a similar mix of activities. While Vice Provost, I received a call from some of my law school colleagues inquiring whether I had an interest in becoming the Dean. I applied and was appointed in 2001, and, fortunately, I could still continue teaching. I was the Dean until 2008, when the Ohio Attorney General resigned mid-term and the Governor asked if I would serve as the Attorney General until voters could elect a successor. I was the Attorney General for the nine-month interim period and then returned as a regular faculty member of the law school, where I teach the Dispute Systems Design Workshop and direct the leadership program.

Q: Ohio State's ADR program is considered one of the top three in the country. How did you build it?

Several factors were critical.[1] A primary factor was a group of faculty who worked easily together and were good. At first, I worked mostly with colleagues at other universities. When faculty join to work across institutions, everyone involved gains. You learn from your collaboration, and you are able to take on projects that are larger, more complex, and often more significant.

It was also helpful that the law students at Ohio State became interested in dispute resolution. Shortly after the law school began offering courses in mediation and negotiation, a group of students approached a colleague and me with the idea of starting a journal that would focus on dispute resolution. Because we needed to fill that journal with good articles, we brought in fascinating dispute resolution experts for symposia and for speeches, which then promoted more interest in dispute resolution. This combination of working across institutions with superb people and publishing a dispute resolution journal began our dispute resolution program's success.

The program received a real boost when the central university granted the law school's proposals to invest in dispute resolution on two occasions. That allowed us to bring Josh Stulberg, Sarah Cole, and later Ellen Deason — all of whom have now been honored with named professorships and become leaders in the field — to Ohio State. They brought new energy to the program, and students began to choose the law school for its varied dispute resolution offerings. We hosted more events and included more of our colleagues in other fields on conference panels. One year, to expand faculty interest in dispute resolution, we offered to teach individual classes on dispute resolution within our peers' courses on something else, telling colleagues to think of us as substitute teachers if they needed to be away for one class. They took us up on the offer, though not because they were going to be away but to enrich their classes. For these and other reasons, faculty members who were not hired as dispute resolution specialists started offering courses in the dispute resolution area as well as their own areas of expertise, which further broadened the dispute resolution course offerings. For example, an international law professor introduced a dispute resolution class in international affairs, and a disability law professor began a clinic to teach dispute resolution in the context of that specialty. The dispute resolution program grew in reputation, and as faculty arrived — Amy Cohen, who studies cross-disciplinary subjects such as law and international development and the political economy of food, is a prime example — they sometimes arrived with an interest in the college's dispute resolution program.

Q. Why did you decide to write the law review article on polarized communities?

When I was the Ohio Attorney General, I had a close view of public actions that sometimes left communities within a larger community angry and ultimately embittered. Coming from a dispute resolution background, I began to look for the resources to help the community deal with those issues. I was in contact with the Justice Department's Community Relations Service mediators, but I quickly realized there was no local equivalent to coordinate with the CRS mediators and work before they arrived and after they were called to the next national emergency. The intent of the article[2] was to offer guidance on how, in times of

limited resources and great need, to establish local interveners who might assist divided communities.

Q. What is the Divided Community Project?

Josh Stulberg and I began having some interest in outreach to localities that were facing issues of community division, and we discovered that other colleagues whom we knew and trusted shared this interest. As a result, we put together a national steering committee whose first idea was to synthesize best practices in a format that could be easily transmitted to local leaders, members of the bar, and other interveners for civil rights. Our goal was that this collection of best practices would be available to everyone. Reports embodying them are posted at go.osu.edu/dividedcommunityproject/.

We also looked at how cities could prepare ahead of civil unrest, and generally, how they could best identify and deal with the concerns of their constituents and build bridges across divides within their communities. We published guidance on how this planning might be done and then began a process of working on pilot planning projects in several cities to help leaders institute these best practices for their communities.[3] We are currently looking into the potential for social media to help divided communities as well as the ways that local leaders can overcome the problems created by social media.

The JAMS foundation opened new possibilities when it gave us a grant that permitted us to hire Grande Lum, the immediate past Director of the Justice Department's Community Relations Service, to direct this project over the next two years. Bill Froehlich at Moritz has become associate director, in addition to teaching mediation. This strong leadership has enabled us to move quickly and effectively.

Q: Where do you see the future of dispute resolution?

When I first became involved with dispute resolution, the ABA Committee on Dispute Resolution, which I chaired for a time, focused on how to get lawyers to consider the possibility of mediation or other forms of dispute resolution for appropriate situations. It seems to me that many lawyers now embrace dispute resolution and consider it "part of the job" to think about the many ways disputes are best resolved.

Now the focus within the mediation field has moved from selling mediation's promise to figuring out how to maintain its quality, especially when it is being utilized by our justice system. Public policy issues regarding arbitration have also taken center stage.

There seems to be an additional focus now on thinking more creatively about how to design and modify processes to suit the stakeholders' needs and the context, both in the private and public sector. For example, large companies such as eBay recognize that teaching their customers to use interest-based negotiation and encouraging them to use words that do not escalate conflict will help reduce the number and duration of disputes, and that will be good for business. As I mentioned, city leaders are increasingly interested in processes that might help people build bridges across divisions and talk about their concerns with public officials. This seems to be an era full of opportunity for dispute systems design. Forty-six years after my law school experience, I still believe that even minor process changes can lead to major improvements in people's lives. ■

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Endnotes

1 For a discussion of the growth of the dispute resolution program see Sarah Cole, Nancy Rogers, and Joseph Stulberg, *Sustaining Incremental Expansion: Ohio State's Experience in Developing the Dispute Resolution Curriculum*, 50 FLA. L. REV. 667 (1998).

2 Nancy H. Rogers, *When Conflicts Polarize Communities: Designing Localized Offices That Intervene Collaboratively*, 30 OHIO ST. J. ON DISP. RESOL. 173 (2015).

3 Discussed in Nancy H. Rogers, Grande Lum, and William Froehlich, *Planning in Advance of Civil Unrest: A Role for Mediation-wise Attorneys*, 22 DISP. RESOL. MAG. 4 (Summer 2016).

One Mediation, Accessible to All

Canada is a leader in ensuring meaningful participation by all parties

If mediation is to be a truly voluntary facilitated negotiation process, all parties must be actively involved. But as mediators know very well, many factors can keep people from fully participating in the process. As mediators and advocates of mediation, we must provide environments that recognize all needs and aim to accommodate everyone.

This article focuses on people with disabilities because these individuals face the most barriers in mediation, but the principles can be applied to other people with other needs, including those without disabilities. Although I have written from my own perspective, that of a Canadian academic and mediator, I believe my ideas and suggestions apply far beyond Canada's borders.

The statistics are staggering. Today more than 1 billion people worldwide identify as a person with a disability. This means that in any mediation on any day, one or more parties or the mediator (or both) may have a disability.

Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees the right to the equal protection and equal benefit of the law without discrimination because of mental or physical disability,[1] but historically, people with disabilities have faced many barriers when taking part in legal proceedings in Canada. That includes the right of barrier-free full access to, and full participation in, court proceedings and mediations that form part of the court process. In addition to being bound by *Charter* guarantees, Canadians have a duty to accommodate even in private mediations, as articulated by rulings of the Supreme Court of Canada and by human-rights legislation. While Canadian rulings and legislation are somewhat similar to the *Americans with Disabilities Act* (ADA)[2] in tone and intent, Canadian law defines both disability and accommodation more broadly.

Rather than using a narrow medical focus on disability, which can be intrusive and irrelevant, I suggest adopting a social model that focuses on how the world around us impedes access. If a client says he or she needs an accommodation to participate meaningfully, we should do what we can to oblige. The following are just a few examples of disabilities or limitations that should be accommodated in mediation: mobility (i.e., amputation, paraplegia,

skeletal disorder, or arthritis); sensory capability (i.e., blindness, low vision, or hearing impairment); communication, speech, or learning (i.e., dyslexia, ADHD, or speech and language disorder); mental illness or addiction (i.e., anxiety and panic disorders, depression, or alcoholism). Some of these may not be obvious to an observer, but all of them can prohibit a person's full participation in the mediation process.

Making Mediation Accessible

What does an accessible mediation look like? An accessible mediation will:

1. Enable parties, counsel, and other participants to enter the mediation space and remain there comfortably for the duration of the mediation;
2. Allow all participants to understand fully and take part meaningfully in all phases of the process;
3. Ensure that all participants understand the goals, steps, and ground rules of the process;
4. Make sure that all material and information is conveyed in ways or forms that everyone can understand.

Making mediations accessible in these ways requires joint efforts by mediators and the legal profession, but unfortunately, currently there is little practical assistance for either. The United States does offer some guidance with the *ADA Mediation Guidelines*,[3] which propose mediation standards for conflicts arising under the *ADA* as well as similar laws protecting people with disabilities from discrimination, but the guidelines do not purport to suggest how mediations that do not involve such conflicts should be handled. Although Canada is still in the early stages of addressing these matters, a little more advice is available in Canada. In a document called "Accommodating People with Disability: A Reference Guide for Mediators," the British Columbia (BC) Mediator Roster Society provides specific guidance for mediators with detailed guidelines to be used in a broad range of mediations. My recently published book, *Mediation: A Comprehensive Guide to Effective Client Advocacy*,[4] also covers suggestions for advocates regarding clients with disabilities. With these and other recent works, Canada is at the forefront of the discussion of accessibility in mediation.

Universal Accessibility

Although the phrase "universal accessibility" is used today in many settings such as workplaces, schools, and legislatures, for many people it's still just foreign jargon. To understand universal design, imagine navigating city sidewalks and streets in a wheelchair: curb cuts and lowered paths are crucial. And note that they also make life more manageable for caregivers, anyone using a stroller or pulling a suitcase, and even children riding bicycles. One design decision helps many. The same could and should be true for mediation.

Universal design refers to a broad spectrum of ideas meant to create spaces and processes that are inherently accessible for individuals with and without disabilities. It recognizes both the ubiquity and range of disability in the population and respects the different levels of comfort many feel about disclosing their disabilities. Universal design must be applied in each stage of the mediation process: before people get to the table, during the mediation process, and after agreement is reached.

Why focus on universal accessibility rather than on individuals with specific disabilities? Two people with the same disability may require different accommodations. Not all people with limited or no sight, for example, use Braille. Not everyone who has significant hearing loss understands and uses sign language. To make matters even more complicated, disabilities do not always fit into neat pigeonholes, and many people have more than one limitation or disability that may affect their ability to participate in mediation. For example, physical or sensory disabilities might fluctuate, influenced by environmental factors such as light, ambient noise, or distractors. And someone who has difficulty hearing might also have a learning disability. As a result, a universally accessible mediation can come about only through careful inquiries about each individual's needs — and equally careful accommodation.

Aiming to create universally accessible mediation processes is crucial because the world around us is generally created by and for people without disabilities, which can make someone who cannot easily navigate that world feel "different" or even "inferior." There are certainly some circumstances in which we cannot accommodate everyone. A bright room may be necessary for some to see clearly, while excessive

light may be jarring for others. However, with thought, flexibility, and some minor changes, mediation — and the world around it — can be made accessible.

With this in mind, I offer some suggestions for various points during the mediation process, best practices that I think should be applied even when no one asks for an accommodation. These best practices, which form the basis for a comprehensive guidebook with a disability-by-disability perspective that I am writing for mediators, are all examples of universal design. Characteristics such as personal preference, personality type, and learning style, while not related to disability, can also be accommodated through an open environment that accepts and appreciates all differences.

Before the Mediation

The theory of universal design requires that disability and the possible need for accommodations be considered by mediators and advocates from the very start of the process. Even before someone enters the mediation room, the existence of a disability can raise concerns about the capacity to participate. The *ADA Mediation Guidelines* oblige a mediator to " ... determine whether a disability is interfering with the capacity to mediate and whether an accommodation will enable the party to participate effectively."[5] But what does "capacity" mean in this context? Capacity to mediate is not the same as legal capacity or competence. You should not make assumptions about individuals' capacity to participate in mediation; you should conduct screening to assess that capacity. In short, if a party has sufficient capacity to understand the nature of mediation and appreciate the implications of any agreement he or she may enter into, that person should be encouraged to participate.

Part of ensuring universal accessibility is making sure that all participants are aware of what mediation entails. Only after hearing a clear description of all that mediation involves will clients be able to explain about any accommodation needs they may have. Keep in mind that the process of mediation may be brand new to your client, and so he or she may not even know what kind of accommodation is needed. When in doubt, over-explain, spelling out what's required at each stage of the process, including time and physical demands.

Once you have described the process, ask all clients if they foresee any issues with the length of the mediation session, the physical accessibility of the mediation location or materials, or the time of day the mediation is scheduled to start. Consider how long you will need to circulate material and what document format will be most accessible. For example, a disputant with blindness or visual impairment may need materials in large print, Braille, or electronic form, but advance preparation can allow for such an accommodation without much difficulty or time. Timely distribution is another example of universal design: early circulation of material helps people who are anxious about the mediation (or anyone with a cognitive challenge) absorb the information before the process gets underway.

Consider where the mediation will be held long before parties arrive. If someone uses a wheelchair or other mobility aide, for example, be sure that a ramp or elevator is available as an alternative to steps, that doorways are wide enough for the chair or walker, and that the mediation space itself is large enough to accommodate everyone comfortably. If someone uses a guide dog, make sure the dog has space to sit next to or near him or her. If a party needs to have a caregiver or personal support person present to participate meaningfully, the mediator should let all parties know about this in advance and allot space accordingly. For those with claustrophobia or anxiety disorder, open, light spaces can be helpful. Such accommodations take time to arrange, so don't wait until the last minute.

Keep in mind that *how* you discuss and offer accommodations is important. At each stage, I recommend you provide this information in writing (for the benefit of those who cannot hear the spoken word) and verbally (for the benefit of those who cannot, will not, or have not read the letter). Also, be aware that some people may be reluctant to discuss an accessibility need publicly. The needs of a person in a wheelchair are clear, but those of others may be neither evident nor comfortably disclosed. A person with cognitive impairment or someone who has to use the toilet often may not want to discuss his or her needs in a room full of strangers, so your written and spoken information should offer parties the opportunity to discuss accommodations with you or the attorney in a discreet way.

During the Mediation

Whether you are a mediator or an advocate, offer a careful, welcoming, accessible start to the mediation itself. Be sure to identify and introduce yourself and

all others in the room verbally, which will help people with visual disabilities as well as those with memory or cognitive challenges. Everyone should be made to feel at ease. Especially when several people are present, consider encouraging everyone to identify himself or herself before speaking, at least until everyone present can recognize and recall all the voices, names, and roles in the room.

If you are the mediator, you should also include a comment in your opening statement that invites participants to share their needs for accommodation before the mediation begins. You might find wording like the following helpful:

> I want to be sure you receive reasonable accommodation for any physical, sensory, or mental needs that may affect your ability to participate in this mediation. I want everyone to feel comfortable throughout the mediation. If you require any accommodation, please let me or your counsel know as soon as you realize that such a need exists. We will do whatever is reasonably necessary to make your mediation experience pleasant and fruitful.

If you have prepared properly, this should not be the first time the parties are hearing about your willingness to accommodate. But if you do learn about an accessibility need at a point where you cannot accommodate it, you should reschedule the mediation for a time when you will have been able to make the necessary change.

Sitting for long stretches may be impossible for some, including many without defined or recognized disabilities, so allowing participants to take breaks as they require is always a good idea. Because the need for such breaks may be one people don't want to discuss in a group (perhaps a party needs an injection or medication, or maybe a service dog needs to go outside) establishing a regular pattern of breaks ahead of time is a good idea. If possible, offering separate rooms for parties to use during breaks, places where they can blow off steam, enjoy a few minutes of silence, or otherwise restore their energy, is helpful. If you know that a party requires medication during a break, keep in mind that some medications have immediate side effects that should be allowed to subside before the mediation resumes. In a demanding process such as mediation, rejuvenation is good for everyone.

Toward the End

As the mediation session wraps up, if the parties have reached an agreement, be sure to consider the format, a detail that can easily be forgotten in the rush to wrap things up. Because some people are auditory learners, processing spoken information more easily than written words, reading the agreement out loud and also providing printed copies will assure that everyone present has a chance to understand and digest the terms. If a party brought a caregiver or support person to the table, perhaps that support person should also review the agreement. Keeping such considerations in mind will go a long way toward ensuring that any agreements reached through the mediation process will be enforceable, durable, and meaningful.

Conclusion

The beauty of universal design is that when you look at your mediation — indeed, your world — through the lens of universal accessibility, your mind and your process become open to accommodating everyone. Communication and flexibility are key: the onus of creating and maintaining an accessible process lies both with the advocates and the mediator. Together, we can make mediation available to all. ■

Endnotes

1 Canadian Charter of Rights and Freedoms, § 15, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). This section reads, "Every individual is equal before and under the law and has the right to the protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age, mental or physical disability." *Id.*

2 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

3 *ADA Mediation Guidelines*, Cardozo J. of Conflict Resol. (2000), http://cardozojcr.com/ADA%20Mediation%20Guide.pdf.

4 Martha E. Simmons, Mediation: A Comprehensive Guide to Effective Client Advocacy (2016).

5 *ADA Mediation Guidelines*, *supra* note 3, at 6.

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L. Tyrone "Ty" Holt | Judith Meyer | Susan L. Podziba | Sharon Press

Gaining Entry

We have invited Ty Holt, Judith Meyer, Susan Podziba, and Sharon Press to collaborate on this new version of the regular feature "On Professional Practice." Future columns will vary; we are encouraging the four contributors, who are all experienced practitioners and thought leaders, to use interview-style conversations, debates, op-ed-type essays, and other formats to examine how professional responsibility principles specifically apply to our work. We encourage readers to submit ideas for future columns to the magazine editor, Gina Viola Brown, at gina.brown@americanbar.com.

To give readers some insight into the perspectives and work of the four contributors, this first column is framed as an informal conversation, moderated by Judith Meyer, around one question: how can a neutral get business in an ethical way?

Judith Meyer: Each of us loves doing and supporting the work of neutrals. It is our life. And most of us would rather be busy doing the work than being idle. So the challenge is: how does a professional neutral gain entry?

Professional canons curb but do not prohibit soliciting business. Many people believe that unless someone proactively informs potential participants about ADR processes, neither the process nor the neutral will be used. What are the boundaries between acceptable and unacceptable practices regarding promoting — some might say "soliciting" — our services?

Ty Holt: Let's look at this in the context of the private practice of commercial mediation and arbitration. Do users have different expectations for those who are primarily mediators and arbitrators? People who do this work want to sustain their business success, but is it appropriate for us to think of the work of mediators or arbitrators as "businesses?" There is certainly nothing sinister about advertising and promoting availability, but the codes of conduct for mediators and arbitrators suggest some clear prohibitions: a person must be neutral, fair, and impartial; must make all appropriate disclosures in a timely manner; cannot guarantee a particular outcome; and must be truthful in advertising statements. Those are obvious, although not always properly implemented. But what about more subtle matters? What about making a presentation at a national convention of potential clients (for pay or for free) about mediation or arbitration and the way you conduct it? How about delivering a luncheon presentation on these topics to partners and associates at a law firm that might someday use — or is currently

using — your services? Does making presentations in these settings raise challenges that might exist if you were participating as a panel member at a CLE program organized by a bar association's Business Law Section for an audience of lawyers whose clients might need your services? Or, moving to a related but different challenge, is it acceptable, in response to a mailing from one of your "good clients," to purchase a program "advertisement," perhaps buying a table for 10 for $5,000, to support a fund-raising dinner for that client's favored community charitable organization?

Judith: Ty, I think you are suggesting that some ethical guidelines make it appropriate to engage in CLE teaching opportunities but raise flags about pitching your services to a law firm. Is this not simply a matter of disclosure? For instance, if a law colleague invites me to support a fundraiser for a presidential candidate at the $1,500 sponsorship level, and because I like the candidate I agree to attend the fundraiser (where I can also, by the way and not insignificantly, meet potential clients), is that not something I must just remember to disclose when that law colleague selects me as her arbitrator or mediator? If I do a "lunch and learn" at the three largest law firms in my city, and one selects me as a neutral, is this not just a matter of disclosure? And if I am compensated or not compensated, do I not just disclose that fact? Stated differently, are any of these participations "unacceptable" if disclosed? And why, by the way, is it different for judges who can belong to a country club joined by members of the bar who and from whom that judge might solicit financial support to advance his or her judicial campaign? Frankly, I would like to see neutrals treated with as much respect as judges.

Ty: I speak from the perspective of being both an active neutral and an advocate in commercial dispute and transaction practices. In the arbitration context, neutrals have to be especially careful about how they "pitch" their services to avoid conflicts and the appearance of conflicts. For a mediator, I believe that disclosure of pertinent activities is not only required but cures almost every potential problem. In my opinion, though, disclosure does not cure certain problems in the arbitration context, including unconscious bias and actual bias due to prior contacts and relationships.

Let me answer quickly three other examples that have been raised. First, I would not necessarily agree that attending a presidential candidate's fundraiser requires disclosure unless you actually had a conversation — engaged in a specific contact — that would independently require disclosure (e.g. reference was made to a possible or pending case). Second, I do not believe that the duty to disclose in mediation or arbitration turns on whether you are compensated for the particular activity. The crucial consideration is the nature of the activity. Third, while your comments comparing judges and ADR neutrals may be appropriate at a very high level, as a practical matter, I do not believe the comparison is valid: like it or not, different ethical standards (express and implied) apply, and the user groups' expectation with respect to disclosure are importantly different.

Judith: Ty thanks for those perceptive responses. You raise questions that are certainly worth reflection and maybe the subject of future columns.

Sharon, you have worked with many not-for-profit, community-based dispute resolution center personnel and leaders. Many centers work to build local capacity to address polarizing community disputes. They do so by exploring and offering potential stakeholders various neutral dispute resolution services, ranging from conducting dispute resolution training seminars to providing convener or mediator services. Depending on the center's funding sources, some services might be offered without cost or payment for services may be required. How does such an approach align itself with professional standards governing solicitation? Is this a matter of "solicitation," or are these efforts actually third-party services that, under the Uniform Mediation Act, might constitute the commencement of one's services?

Sharon Press: This has so many interesting aspects. One challenge is to be clear about what dispute resolution processes are being offered. Today ADR includes facilitative, evaluative, and adjudicative processes, and different ethical guidelines should and must attach to these different processes. To respond to your question, I think that a community dispute resolution program must carefully consider

its interventions into polarizing community disputes to ensure that it: 1) does so in a manner that is perceived to be helpful and not self-serving; 2) possesses the expertise and capacity to provide the needed services; and 3) is truthful and not misleading about the neutrals' experience, the nature of the services being offered, and any fees that might be assessed. I believe such a proactive approach is consistent with the Model Standards of Conduct for Mediators, but I suggest center personnel need to think broadly about the meaning of the term "neutral." For example, when conducting a negotiation training seminar in this setting, is the "negotiation trainer," bound by the standard governing confidentiality?

Judith: Can you elaborate on what you mean by "self-serving" versus "helpful interventions" into community disputes? And perhaps provide some examples of truthful and misleading statements about a neutral's experience?

Sharon: In "helpful" as opposed to "self-serving," I was trying to convey the importance of a community dispute resolution center being realistic about its capacity to provide needed services. High-profile controversies warrant thoughtful, skillful intervention and support — I want to encourage community centers to be helpful in those matters. But serving in high-profile controversies, as our colleague Susan Podziba so well knows, carries risks: because the matter has captured public attention, the understandable desire by an intervener to want to become involved might skew priorities in terms of the timing of intervention, the requisite skill set for service, and the like. In short, there is an understandable temptation to convert the focus of attention in such matters to the professional reputation and prominence of the neutral or agency rather than on the people whose dispute it is. The focus on service obviously must be the priority, so it is professionally obligatory that prior to intervening or offering to intervene, community center personnel perform a careful assessment to ensure that the scope of the issue is understood, the proposed intervention is embraced, and that people believe that the intervention offers the possibility of being helpful. This means that sometimes, even though there might be pressure to intervene and the possibility of positive media attention, community centers may determine that it is not "ripe" to do so given the issue, the timing, or the stakeholders.

My experience as director of the Florida Dispute Resolution Center provides many examples of advertising practices that, while "truthful," were misleading. One is a person who, in advertising services as a mediator, highlighted her previous judicial experience. The reference to her judicial experience was truthful, but the Florida Mediator Ethics Advisory Opinion noted that since mediation is a process that relies on party self-determination, highlighting the neutral's decision-making abilities would mislead the participants about appropriate role functions. Another example is for a neutral to claim a designation, such as being "certified," without specifying by whom or for what. In Florida, a mediator can be certified by the Florida Supreme Court for service in county court, family, circuit civil, dependency, or appellate cases. Advertising oneself as being "a certified mediator" without also including who provided the certification and in what area could be misleading to someone searching for a particular set of expertise.

Judith: Susan, you work in the public sector as a mediator and facilitator. In your book *Civic Fusion* you recount situations, such as the dialogue involving pro-choice/pro-life advocates, that might never occur in other communities unless a prospective intervener took the initiative to explore possible service. What factors and considerations weigh into a neutral exploring or suggesting service in settings where the situation has yet to crystalize into what others might recognize as a "case" or a "grievance?"

Susan Podziba: As a public-policy mediator, I do not enter into a case unless I am invited to do so. In other words, I do not identify possible cases from the media and then seek out the parties for participation in a mediated process. Typically, I am hired by government officials who have either determined that a consensus process would be beneficial or Congress has required them to do so. For example, the negotiated rule-makings I've mediated for the US Department of Education under the Higher Education Act and the Every Student Succeeds Act have been required by Congress. On the other hand, the US Environmental Protection Agency decided to use negotiated rule-making

to implement the Small Business Liability Relief and Brownfields Revitalization Act. For the latter, I conducted an assessment to identify the potential negotiators and determine the feasibility of convening the representative stakeholders to negotiate the content of the rule.

For me, it is critical that the institutional capacity for implementation of an agreement exists, although there may be a need to try to create institutions as part of the mediated process. I so greatly value the time, commitment, and expertise essentially donated to the public by representative stakeholders that I feel compelled to ascertain that there is a strong likelihood that agreements reached will be implemented.

Perhaps different from those of other private-sector neutrals, my fee is almost always paid by one party — the government — not the stakeholders. This is fully disclosed. In many instances, the government may also pay the travel expenses of the negotiators.

The abortion talks were a rarity. After fatal shootings at two women's health clinics in Brookline, Massachusetts, where I live, the governor and Archdiocese of Boston called for "common ground talks." When a pro-choice leader was quoted in the *Boston Globe* as saying she would participate in the talks only if they were professionally mediated, I contacted a colleague who had facilitated citizen dialogues on the issue of abortion to discuss the possibility of working together on the case.

At the outset, we conducted an in-depth assessment guided by the principle of "Do no harm." This meant that we would not convene leaders of the pro-life and pro-choice movements if we believed the risks, amid threats of violence, could not be ameliorated and there were no clear benefits. We did eventually bring the leaders together for almost six years of secret talks in a windowless basement. Their story was eventually published in the *Boston Globe*.

Judith: Susan, you said that you do not seek out cases and parties, yet you did extend yourself without being invited by the parties in the abortion talks in Brookline. Why did you deviate from your practice in this case?

Susan: To my mind, the abortion-talks case was created when the governor and cardinal called for the talks. I contacted a colleague, another service provider, who, it turned out, had already been in touch with the governor's office about it. She further contacted his office to suggest our partnership and assessment process, which then gained the support of the governor and cardinal. We contacted potential parties only afterward and we did so to determine

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if it was feasible to bring the parties together based on their stated goals. Important to note: foundations provided the funds to support the talks.

Judith: Since you could not change the values held by the pro-life/pro-choice parties, what did you mediate and — if you can tell us — what was the outcome?

Susan: We first conducted an assessment with the parties. They agreed there would be value in holding talks to develop relations built on mutual respect and understanding that could contain differences about values and policies; create channels of communication; and help de-escalate the polarization among pro-life and pro-choice groups. Six leaders emerged: three each for the "pro-life" and "pro-choice" perspective. They chose to act to reduce the violence of the rhetoric of their respective organizations and to protect against recurring acts of violence.

Throughout six years of discussions, the leaders remained firmly committed to their stance on abortion but gained profound respect for each other and deepened their understanding of the issues that divide them. Each took specific actions to reduce the potential for violence, including contacting the FBI about a specific threat to a participant, refusing to host a supporter of the shooter during his trial, and making careful word choices in public speeches and publications. To this day, more than 20 years after their initial meeting, we continue to meet to celebrate personal accomplishments and mourn losses.

The negotiated outcome was an article jointly drafted by the participants entitled "Talking with the Enemy." Following its publication in the *Globe*, the pro-life and pro-choice leaders went public with their experiences of participating in the talks. They have received communications from throughout the world expressing support for their collaboration and renewed hope because of their example.

Judith: That's inspiring, particularly in these times. And your description of your assessment efforts sounds strikingly similar to what Sharon was suggesting that community dispute resolution centers do when exploring possible service. I would love to examine that further, but we're out of space. Thanks, colleagues. ■

Section News

Section Welcomes New Director

We are pleased to announce that on September 12, Linda Warren Seely joined the ABA staff as the Director of the Section of Dispute Resolution. Seely served as Director of Pro Bono Projects for Memphis Area Legal Services from 2004 to 2015, when she became the Director of the organization's Campaign for Equal Justice. Additionally, she served as President of the Memphis Bar Association in 2013. Most recently, she was elected to the board of trustees of the Tennessee Bar Foundation and the board of directors of the CASA (Court Appointed Special Advocates) program in Madison County, which trains and supports volunteers who advocate for the best interests of abused and neglected children.

She also serves in the House of Delegates for the Tennessee Bar Association and as President of the board of directors of the Association of Women Attorneys Foundation. She has received numerous awards, including the Tennessee Alliance for Legal Services Cooperative Advocacy Award in 1999; the Tennessee Bar Association Public Service Attorney of the Year Award in 2003; the Paralegal Utilization Award from the West Tennessee Chapter of the Tennessee Paralegal Association in 2004; the Tennessee Bar Association President's Award in 2006 for work on the Stand Up and Deliver initiative and in 2009 for work on the For All Initiative; and the Association of Women Attorneys' Marion Griffin-Frances Loring Award in 2014 in recognition of her outstanding achievements in and for the legal profession. She can be reached at linda.seely@americanbar.org or 202-662-1685.

Nominations Sought for ABA Section of Dispute Resolution Awards

Nominations for Section awards are due no later than October 29, 2016. Visit the Section of Dispute Resolution website (www.americanbar.org/dispute) for additional information on the awards nominations processes.

D'Alemberte-Raven Award

The D'Alemberte-Raven Award, the Section's highest honor, recognizes outstanding service in dispute resolution. This award, which is usually presented in conjunction with the ABA Section of Dispute Resolution Spring Conference, honors Robert D. Raven and Talbot D'Alemberte, both of whom were ABA Presidents as well as Chairs of the Dispute Resolution Section. Both guided the Section to become a leader in the dispute resolution arena, D'Alemberte as the first Chair (1976-1979) of what was then known as the ABA Special Committee on Resolution of Minor Disputes and Raven as the first Chair (1993-1994) of the ABA Section of Dispute Resolution.

Lawyer as Problem Solver Award

The John W. Cooley Lawyer as Problem Solver Award recognizes individuals and organizations that use their problem-solving skills to forge creative solutions. The award is given to an individual member of the legal profession and/or institution who has exhibited extraordinary skill in either promoting the concept of the lawyer as problem solver or resolving individual, institutional, community, state, national, or international problems. Award recipients will be acknowledged for their use or promotion of collaboration, negotiation, mediation, counseling, decision-making, and problem-solving skills to help parties resolve a problem in a creative and novel way.

Award for Scholarly Work

The Section's Award for Outstanding Scholarly Work honors individuals whose scholarship has significantly contributed to the dispute resolution field.

Nominations should address one or more of the following:

- The nominee has authored a scholarly publication or a body of work exhibiting excellence in research, writing, and analysis.
- The nominee has introduced new concepts in dispute resolution.
- The nominee has embodied "scholarship in action" for a collective body of work that brings theory to practice in developing (for example) laws, uniform acts, codes of conduct, protocols, competitions, or new programs and services over a sustained period of time.

Section Comments on Consumer Financial Protection Bureau Proposal

On July 29, 2016, the ABA Section of Dispute Resolution submitted comments to the Consumer Financial Protection Bureau on the proposal to require regulated entities to submit arbitration claim filings, awards, and other documents to the CFPB and to publicize such information. The Section's comments support the CFPB's proposed consumer arbitration reporting requirement.

DR Section Council Supports New Anti-discrimination Rule

At the ABA Section of Dispute Resolution Council Meeting on August 6 in San Francisco, the Section Council voted to support the new anti-discrimination rule that was adopted a few days later by the ABA House of Delegates. The new Rule 8.4(g) reads as follows:

> It is professional misconduct for a lawyer to:
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

You can read more about the efforts to draft and adopt Rule 8.4(g) on the ABA Center for Professional Responsibility's website: www.americanbar.org/groups/professional_responsibility.html. ■

ABA Section of Dispute Resolution Leaders, 2016-2017

Section Chair

The 2016-2017 Section Chair is Nancy Welsh, Professor of Law and William Trickett Faculty Scholar at Penn State University, Dickinson Law. Nancy has been a member of the ABA Section of Dispute Resolution since 1996. She has served as Chair of the Publications Board, Co-chair of the *Dispute Resolution Magazine* Editorial Board, on the Section Council, and on the Section's executive committee. She is an active member of numerous Section Committees and Task Forces and presents regularly at Section events. The Section's Legal Education Committee awarded her its "In the Trenches" Award in 2005.

Before joining the legal academy, Nancy was the Executive Director of the non-profit Mediation Center in Minnesota, advised the Minnesota Supreme Court regarding the institutionalization of dispute resolution in the courts, and practiced law in the corporate litigation department of Leonard, Street and Deinard. In 1997, she was named a Leading Minnesota Attorney and in 2011, she received the Most Valuable Peacemaker Award from the Pennsylvania Council of Mediators. She continues to serve as a mediator, dispute resolution advisor, and trainer, and she teaches Civil Procedure, Negotiation/Mediation, Federal Courts and Dispute System Design Seminar. She received her law school's Teaching Excellence Award in 2010. Nancy earned her BA *magna cum laude* from Allegheny College and her JD from Harvard Law School.

Section Officers

Chair ..... Nancy Welsh, Carlisle, PA
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Vice-Chair ..... Harrie Samaras, West Chester, PA
Budget Officer ..... Joan Stearns Johnsen, Gainesville, FL
Long-Range Planning Officer .. Myra C. Selby, Indianapolis, IN
Membership Officer ..... Ava Abramowitz, Leesburg, VA
CLE Officer ..... Brian Pappas, Ann Arbor, MI
Section Delegate ..... James Alfini, Houston, TX
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Immediate Past Chair ..... Howard Herman, San Francisco, CA

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Charles Lynn Howard, Hartford, CT
Kristen Blankley, Lincoln, NE
Richard Lord, Maitland, FL

Liaisons to the Council

Andrea Lynn Ciobanu, Indianapolis, IN ..... ABA Young Lawyers Division Liaison
Holly Megan Smith, Cherry Hill, NJ ..... ABA Law Student Division Liaison
Louis Burke, New York, NY ..... Section Advisory Committee Representative
Susan Grody Ruben, Cleveland, OH ..... Section Advisory Committee Representative
Kimberly Cork, Winnipeg, Canada ..... Liaison from Associate Members Committee
Barry C. Hawkins, Stamford, CT ..... ABA Board of Governors Liaison

ABA Section of Dispute Resolution Leaders, 2016-2017

Open Committees*

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Arbitration
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Co-Chairs: Matthew Schorr, Bryan Branon

*Open Committees: Interested in meeting practitioners with years of experience and thriving practices? Want to get involved with interesting and substantive work? Or just want to learn more about an ADR area of interest? Join a Dispute Resolution Open Committee. Our committees offer the chance to get involved in monitoring and encouraging the development of ADR in specific subject areas; they provide a community for Section members who are interested in the subject area; committees help develop CLE/training programs to assist members; and committees formally liaise with other ABA entities that have a shared subject matter focus. Subject Matter Committees and Process Committees are open to Section members for free! To join a committee, log on to the ABA website, www.americanbar.org, go to MyABA, and look under the Membership and Participation tab for "My Specialty Group Memberships and Committees."

ABA Section of Dispute Resolution Leaders, 2016-2017

Standing Committees, Boards, and Task Forces*

Advisory Committee
Chair: Harrie Samaras

Committee on Committees
Chair: Myra Selby

Committee on Mediator Ethical Guidance
Co-Chairs: Roger Wolf, Sam Jackson

Early Dispute Resolution Task Force
Co-Chairs: Richard Fincher, Anne Jordan

Task Force on Mediation Research
Chair: Gary Weiner

Awards & Competitions

D'Alemberte-Raven Award
Chair: Benjamin Davis

Outstanding Scholarly Work Award
Co-Chairs: Jean Sternlight, Bob Mnookin

Lawyer as Problem Solver Award
Co-Chairs: Geetha Ravindra, Wayne Thorpe

James Boskey Competition
Chair: Peter Reilly

Mediation Representation Competition
Co-Chairs: Lauren Newell, Eric DeGroff

Publications Board
Chair: Daniel Bowling

Dispute Resolution Magazine Editorial Board
Co-Chairs: Joseph B. Stulberg, Andrea Kupfer Schneider
Chair Emeritus: Frank Sander

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Chair: Ava Abramowitz

Standing Committee on the Spring Conference
Co-Chairs: Alyson Carrel, Kelly Browe Olson

Standing Committee on Webinars and Distancing Learning
Chair: Spencer Punnett

*Membership on boards, standing committees, task forces, and awards/competitions is by appointment.

ADR Cases *By Adam R. Martin, Marcia Garcia, and Maureen Rostad*

E-Mail Mediation Settlement Discussions Admissible under Federal Privilege Law

In *Sony Electronics, Inc. v. Hannstar Display Corp.*, No. 14–15916, 2016 WL 4547357 (9th Cir. Sept. 1, 2016), the US Court of Appeals for the Ninth Circuit held that an e-mail settlement agreement is admissible into evidence under federal privilege law even when a plaintiff dismisses all federal claims against the defendant. The underlying dispute involved antitrust claims asserted by Sony against multiple corporations for a price-fixing scheme. Hannstar, one of the defendants, and Sony agreed to mediate their dispute. The mediator e-mailed a "Mediator's Proposal" to Sony and Hannstar, which required both parties to either accept or reject the $4.1 million agreement. After both parties accepted via e-mail, the mediator informed them that the case was settled. Sony sued for breach of contract to enforce the settlement agreement after Hannstar refused to comply. The district court denied Sony's motion for summary judgment, holding that under California evidence law, the Mediator's Proposal and the subsequent e-mails were precluded from admission because there was nothing in the e-mails that affirmatively stated that the settlement would be binding upon both parties. The Ninth Circuit reversed, reasoning that although Sony dismissed its federal claims, the settlement agreement contained both federal and state claims. Therefore the e-mail exchanges are admitted under federal law because Sony and Hannstar negotiated both federal and state law claims during the mediation. The determination of whether evidence relates to a federal claim is governed by the claims the parties negotiated during mediation and not by the eventual dismissal of a federal claim. To read more: http://caselaw.findlaw.com/summary/opinion/us-9th-circuit/2016/09/01/277405.html.

Notice of Arbitration Agreement Found Not "Conspicuous" Enough

In *Nicosia v. Amazon.com, Inc.*, No. 15–423, 2016, WL 4473225 (2d Cir. Aug. 25, 2016), the US Court of Appeals for the Second Circuit held that an Amazon.com customer is not put on constructive notice of binding arbitration by clicking the "place your order" link on the seller's website. The plaintiff, an Amazon.com customer since 2008, purchased weight-loss pills in 2013. The pills contained a substance that the FDA had removed from the market because of health concerns. Amazon.com continued to sell the pills and did not list the substance as one of the product's ingredients. The customer sued Amazon.com for a violation of federal and state laws, but the defendant moved to dismiss, arguing that the plaintiff was on constructive notice of binding arbitration from the website's condition of use. The district court agreed, and the Second Circuit took the case on appeal to determine whether the plaintiff was bound by the mandatory arbitration provision in the defendant's conditions of use. The court found in the negative because, it said, the "place your order" link was insufficient notice that the customer would be bound by additional agreements. The court further reasoned that the order page on which the statement "[b]y placing your order, you agree to Amazon.com's ... conditions of use" had other signs and notices that were much more noticeable. The message was "not bold, capitalized, or conspicuous" enough to put a customer on constructive notice of an agreement to additional terms, including mandatory arbitration. The court expressly stated that its holding was based on the conclusion that reasonable minds could disagree as to the reasonableness of the notice. To read more: http://caselaw.findlaw.com/summary/opinion/us-2nd-circuit/2016/08/25/277302.html.

Arbitration Clause Incorporated by Reference

In *Cortes-Ramos v. Sony Corporation of America*, No. 15-1786, 2016 WL 4709808 (1st Cir. Sept. 9, 2016), the US Court of Appeals for the First Circuit held that a plaintiff agreed to arbitrate by signing and submitting an affidavit that referenced an arbitration clause contained in a separate document. The plaintiff entered a contest held by Sony Music Entertainment in Puerto Rico in which he would have to submit an original song and a music video. Ricky Martin would then perform the winner's song at the FIFA World Cup. To enter the contest, the plaintiff was required to submit two contest documents, a release and an affidavit. The plaintiff sued Sony for

copyright infringement and breach of contract, alleging that Ricky Martin released a song and music video closely resembling the song and video the plaintiff had submitted in the contest, which he did not win. Sony argued that the official contest rules required mandatory arbitration for any claims arising out of or in connection with the rules. The plaintiff argued that the contract was unenforceable under Puerto Rico's contract law because it was fraudulently induced by Sony since he had not read and was not sent a copy of the contest rules. The district court granted Sony's motion to dismiss, concluding that the plaintiff agreed to the contest rules by signing and submitting an affidavit that confirmed his agreement. The First Circuit agreed because although the arbitration provision was referenced in the document and appeared in a separate document, validity is presumed when the person signs. Therefore, whether or not the plaintiff actually received the contest rules in which the arbitration provision appeared, the agreement was valid. The court also noted that the plaintiff did not appeal the order for mandatory arbitration. To read more: http://caselaw.findlaw.com/summary/opinion/us-1st-circuit/2016/09/12/277486.html.

Agreement's Selection of Institution Did Not Provide for Appointment of Substitute Arbitrator

In *Moss v. First Premier Bank*, No. 15-2513, 2016 WL 4501670 (2nd Cir. Aug. 29, 2016), the US Court of Appeals for Second Circuit held that an arbitration clause providing for arbitration before a specific institution contemplated arbitration before only that institution and did not provide for the appointment of a substitute arbitrator. Moss took out payday loans with an online payday lender, SFS, Inc. SFS relied upon banks known as "Originating Depository Financial Institutions," or "ODFIs" to debit the customers' accounts. When Moss applied for the loan, she digitally signed an agreement that included an arbitration clause. The clause provided that any disputes relating to the loan agreement "shall be resolved by binding individual (and not joint) arbitration by ... the National Arbitration Forum (NAF). Moss subsequently filed a putative class action against the two banks for alleged violations of RICO and state laws prohibiting high-interest payday loans. The district court originally ordered the parties to arbitrate. However, the NAF no longer accepts consumer arbitrations because it had entered into a consent decree with the Minnesota Attorney General that prohibited it from accepting consumer arbitrations from consumers such as Moss. Upon Moss's motion, the district court vacated its prior order, and the banks appealed. The Second Circuit affirmed the district court, reasoning that the language in the agreement was exclusive and did not provide for an alternative if NAF was unable to conduct the arbitration. The Second Circuit further held that NAF's inability to accept the case did not constitute a lapse under 9 U.S.C.S. § 5, and where a forum is exclusive, a court may not use 9 U.S.C.S. § 5 to require a party to arbitrate claims before a forum not agreed upon. To read more: http://cases.justia.com/federal/appellate-courts/ca2/15-2513/15-2513-2016-08-29.pdf?ts=1472481005.

Party's Failure to Compel Arbitration Does Not Waive Defense of Arbitration

In *Chassen v. Fid. Nat'l Fin., Inc.*, No. 15-3789, 2016 WL 4698256 (3d Cir. Sept. 8, 2016), the US Court of Appeals for the Third Circuit held that a party that does not seek to compel arbitration at the outset of a dispute does not waive the defense of arbitration if it would have been futile to do so under then-existing law. The plaintiffs, a class of New Jersey real estate purchasers and refinancers, claimed they were intentionally overcharged up to $350 in fees for the recording of their deeds and mortgage instruments. The plaintiffs filed an action in the district court alleging breach of contract and violation of New Jersey law. The defendants raised a number of affirmative defenses but did not seek to compel arbitration. The case was litigated for more than two years. Subsequently, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act preempted state laws that had previously prohibited a party from compelling arbitration in certain situations. The defendants then filed a motion to compel arbitration, and the district court granted the motion. The plaintiff appealed, and the Third Circuit affirmed the order of the district court. The Third Circuit began its analysis

continued on page 40

ARBITRATION WEBINAR SERIES

This six-part arbitration series is a unique opportunity to learn from some of the leading arbitrators and arbitration advocates in the country. Each webinar will focus on different phases and challenges of the arbitration process. Faculty members will provide valuable insights and advice from the perspective of the arbitrator and advocate on every aspect of arbitration, from the importance of the preliminary hearing to the best practices for drafting arbitration awards. The program will also provide in-depth discussion and practical guidance on common ethical issues arbitrators face while building a successful arbitration practice. Please see below for more details on each program.

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Part I

Before the Arbitration: Sources of Authority, Role of the Arbitrator, and Disclosure
October 25, 2016
12:00 PM–1:15 PM Eastern Time
Speakers:
Gina Miller, Moderator, JAMS, Los Angeles, CA
Susan McGreevy, Stinson Leonard Street LLP, Kansas City, MO
Hon. Candace Cooper (Ret.), JAMS, Los Angeles, CA

Part II

Drafting Arbitration Clauses to Ease Preparing for the Hearing
November 15, 2016
12:00 PM–1:15 PM Eastern Time
Speakers:
Debbie Masucci, Moderator, Arbitrator and Mediator, Brooklyn, NY
Theo Cheng, Fox Horan & Camerini LLP, New York, NY
Ariel Belen, JAMS, New York, NY

Part III

Handling the Preliminary Conference and Managing Discovery
December 13, 2016
12:00 PM–1:15 PM Eastern Time
Speakers:
Philip S. Cottone, Moderator, Mediator and Arbitrator, Malvern, PA
Lawrence R. Mills, JAMS, San Francisco, CA
Hon. Bruce Elliot Meyerson (Ret.), Bruce Meyerson PLLC, Phoenix, AZ

Part IV

Managing the Arbitration Hearing and Evidence
January 10, 2017
12:00 PM–1:15 PM Eastern Time
Speakers:
Laura Alyx Kaster, Moderator and Speaker, Laura A Kaster LLC, Princeton, NJ
Susan Nycum, Technology Dispute Resolution Services, Portola Valley, CA

Part V

The Arbitration Award, Remedies, and Post Award Process
February 28, 2017
12:00 PM–1:15 PM Eastern Time
Speakers:
Mark C. Morril, Independent Arbitrator and Mediator, Morril ADR, New York, NY
Julissa Reynoso, Chadbourne & Parke LLP, New York, NY
Stephen E. Smith, Sherman and Howard LLC, Denver, CO
Rachel Thorn, Chadbourne & Parke LLP, New York, NY

Part VI

Ethical Aspects to Consider While Building an Arbitration Practice
March 28, 2017
12:00 PM–1:15 PM Eastern Time
Join two established arbitrators and two of the country's leading ADR service providers as they give practical advice and insights to arbitrators interested in creating or expanding a successful arbitration practice while meeting ethical and disclosure obligations. The panel will offer business development ideas and best practices for arbitrators and discuss ethical obligations that must be considered as you build your reputation and book of business. This is an essential course for all arbitrators who wish to market themselves successfully and ethically.
Speakers:
Serena K. Lee, Moderator, American Arbitration Association, San Francisco, CA
Gina Miller, JAMS, Los Angeles, CA

***ADR Cases** continued from page 38*

by noting that individual and class arbitrations were substantively distinct and that prior to *Concepcion*, the defendants would probably have been forced into class arbitration rather than individual arbitration. The court opined that the right to individual arbitration is a distinct right separate from the right to class arbitration; thus, a court must determine whether a party waived either right. To read more: http://www2.ca3.uscourts.gov/opinarch/153789p.pdf.

Courts May "Look-through" to Underlying Dispute

In *Doscher v. Sea Port Group Sec., LLC*, No. 15-2814, 2016 WL 4245427 (2d Cir. Aug. 11, 2016), the US Court of Appeals for the Second Circuit overruled its previous decision in *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22 (2d Cir. 2000) and held that a district court may now "look-through" a Federal Arbitration Act 9 U.S.C. § 10 petition to determine whether the underlying dispute that is subject to arbitration involved substantial questions of federal law. In 2013, Doscher commenced arbitration against his former employers, both members of the Financial Industry Regulatory Authority (FINRA). The arbitral panel awarded him $2.3 million with the potential for additional damages. A year and a half later, he filed a petition pursuant to 9 U.S.C. § 10 to vacate and modify in part because (1) the panel failed to ensure that the documentary evidence was fully and timely made available to him, and (2) the panel acted in manifest disregard of FINRA Rule 13505 requiring cooperation in discovery. The district court rejected his argument that his petition stated a federal question on its face and that his Section 10(b) claim did not confer federal-question jurisdiction. The district court reasoned that his claims in the underlying arbitration were "squarely foreclosed" by *Greenberg*. The Second Circuit concluded that while the district court correctly concluded its "look-through" analysis based on *Greenberg*, the Supreme Court's subsequent decision in *Vaden v. Discover Bank*, 556 U.S. 49, 129 S. Ct. 1262 (2009) overruled *Greenberg*. To read more: http://blogs.reuters.com/alison-frankel/files/2016/08/doschervseaport-2ndcircuitopinion.pdf. ■

Adam R. Martin *is a judicial law clerk in Pennsylvania.* **Maria Garcia** *and* **Maureen Rostad** *are third-year law students at Penn State University, Dickinson Schools of Law and serve as law student editors for* Dispute Resolution Magazine.

The ABA Section of Dispute Resolution thanks all of the organizations participating in 2016 Mediation Week Events, including:

Colorado Bar Association ADR Section

Upchurch Watson White & Max Mediation Group

Minnesota State Bar Association – Alternative Dispute Resolution Section Council

State of New Mexico - Office of Alternative Dispute Prevention & Resolution

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Section of Alternative Dispute Resolution, Birmingham Bar Association

Arbitration Aand Mediation Services, University of Las Palmas De Gran Canaria

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