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ILLINOIS STATE BAR ASSOCIATION

In the Alternative

The newsletter of the Illinois State Bar Association's Section on Alternative Dispute Resolution

From the Editor

By Thomas D. Cavenagh

Once again, we welcome our new student editors for this year's volume. This is a very talented group of student editors with whose work I think you will be very pleased. We are planning an ambitious year of six issues containing new columns and features to enhance the articles, case briefs and current events we have covered in the past. Please feel free to contact me if you have suggestions for or comments on the newsletter.

Madalyn Phillips is a returning editor. Madalyn is a senior majoring in Legal Studies with a minor in Speech Communication. She is a member of the College Scholars program and plans to attend law school after graduation. Casey Harter is also returning. Casey is a junior majoring in International Business and Japanese. She is a member of the College Scholars program. This is the third year Taryn Vaughan has been attending North Central College as an undergraduate major in the Global Studies in our International Business Track. She is a member of various honors societies including Phi Theta Kappa, Alpha Lambda Delta, and Phi Alpha Delta. In the future she plans to attend Law School and is interested in International Law.

On another matter, please be aware that we are very grateful for contributions to this newsletter from members of the section. *In the Alternative* serves as the communication vehicle for and between members of the Alternative Dispute Resolution Section, other practitioners and the legal profession at large. Unsolicited manuscripts of any length are very much welcomed. In addition, we are pleased to include descriptions of upcoming events related to ADR.

Please submit articles and event information to your editor: Thomas Cavenagh, Professor of Law and Conflict Resolution, North Central College, 30 North Brainard Street, Naperville, Illinois 60540, phone: 630\637-5157, facsimile: 630\637-5295, e-mail: tdcavenagh@noctrl.edu. ■

Are your clients' arbitration clauses enforceable?

By David J. Fish, The Fish Law Firm, P.C., Naperville, IL

I recently litigated an employment dispute in the United States District Court for the Northern District of Illinois in which we challenged the enforceability of an arbitration clause. Chief Judge Holderman refused to enforce the arbitration clause on the basis that it lacked sufficient consideration. The case provides a valuable lesson--remember the basic elements of contract law when drafting arbitration agreements.

In *Domin v. River Oaks Imports, Inc*., 2011 WL 5039865 (N. D. Ill. Oct. 24, 2011) the plaintiff/employee sued the defendant/employer alleging a violation of Title VII of the Civil Rights Act of 1964. The Employer filed a Motion to Stay Pending Arbitration which, if granted, would have forced the Employee to resolve his dispute in binding arbitration along with the baggage that this brings to a plaintiff—*i.e,* no jury, considerable arbitrator fees, limited discovery, and comfort to the employer.

The basis for demanding arbitration was that Employee received a handbook and had also

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***(Notice to librarians:** The following issues were published in Volume 18 of this newsletter during the fiscal year ending June 30, 2012: October, No. 1; January, No. 2; February, No. 3; April, No. 4; May, No. 5).*

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Are your clients' arbitration clauses enforceable?

Continued from page 1

signed an "Acknowledgement of Receipt and Understanding" that contained an arbitration clause that stated in part:

> I understand and voluntarily agree that any disputes regarding the terms of this pay plan or my employment or termination from employment (including claims of discrimination and/or harassment) will be resolved exclusively in accordance with binding arbitration governed by the Federal Arbitration Act.... I further understand and voluntarily agree that this alternative dispute resolution program shall also cover claims of discrimination or harassment under Title VII of the Civil Rights Act of 1964, as amended. Although I understand that signing this arbitration agreement is not required as a condition of my employment, I desire to take advantage of the benefits of arbitration and understand that I give up the right to trial by jury and instead will have my claims resolved by a retired court Judge.

The Employer argued that by signing the Understanding (which expressly identified Title VII claims as being subject to arbitration), the Employee was required to arbitrate his disputes.

The Court recognized that an employer and employee may contractually agree to submit Title VII claims to arbitration. *Gibson v. Neighborhood Health Clinics, Inc.,* 121 F.3d 1126, 1130 (7th Cir. 1997). The Court focused on whether the parties had entered into a legally binding and enforceable contract under Illinois law. To determine the arbitration clause's enforceability, the Court looked to Illinois law which requires an enforceable contract to have an exchange, and its elements include offer, acceptance and consideration. *All American Roofing, Inc. v. Zurich American Ins. Co.,* 404 Ill.App.3d 438, 449, 343 Ill.Dec. 355, 934 N.E.2d 679 (1st Dist. 2010).

The Court focused upon whether there was consideration for the arbitration agreement. "Consideration is defined as a bargained-for exchange, whereby one party receives a benefit or the other party suffers a detriment." *Id.* While the Court recognized that "employment itself" can be consideration for an arbitration agreement, the Court focused on one sentence in the arbitration provision that provided: "this arbitration agreement is not required as a condition of my employment...." Based upon this language, the Court found that "it is clear that [the Employer] did not offer employment to [the Employee] in exchange for [his] agreement to arbitrate."

The employer argued that there was, in fact, consideration because there was a mutual agreement to arbitrate. The Court acknowledged that a mutual agreement to arbitrate can constitute sufficient consideration. *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 636 (7th Cir.1999). However, in this case, the arbitration agreement "did not bind the [employer] in the same manner that it seeks to bind [the employee]." *Id* at * 2. Rather, the arbitration was one sided in that it was worded entirely in terms of the employee's agreement to arbitrate (*i.e.,* "I agree", "I am waiving"). *Id.*

As such, the Court held that it "cannot read this language in a way that would bind both [employee] and [employer] to submit any and all of their claims to arbitration [and as such employer] did not provide sufficient consideration for [employee's] agreement to arbitrate, and [the arbitration agreement] is therefore unenforceable." *Id*. at * 2.

Domin v. River Oaks Imports, Inc. illustrates the importance of properly wording and--just as important--implementing an arbitration agreement. To begin with, employment or continued employment should be conditioned upon execution of the arbitration agreement. While the *River Oak* arbitration agreement said "signing this arbitration agreement is not required as a condition of my employment", the message that needs to be sent is: 'you will not work for us unless you sign.' Likewise, depending upon the facts of the employment situation, it may be appropriate to give something (*i.e.,* money) in exchange for having the employee sign the arbitration agreement. Finally, if an employee wants to rely upon mutuality of arbitration to provide consideration, the employer should take care to make sure that the plain language of the arbitration agreement actually binds both parties. ■

Exploring the relatively unknown jury of peers

By Madalyn Phillips, North Central College

Faced with the problems of an overcrowded court system, financial restraints, and community safety, many communities are looking for alternative ways to receive justice for crimes committed in their communities. This is particularly true in cases involving youth offenders, people that our justice system believes are capable of being reformed if the proper information and tools are given to them. Peer Juries are one such alternative for youth. Peer Juries, which are also referred to as Youth Courts, Youth Juries, or Teen Courts, have varying formats and regulations, but traditionally involve a youth offender being sentenced by a group of youths in the community. Typically, these juries do not decide whether the offender is innocent or guilty; they merely decide on a fair punishment for the offending youth. These juries serve as a diversion program from the traditional court system, which leaves offending youth with a permanent record of their crime. Some of these Peer Juries also focus on restorative justice by repairing the wrong done to the community through sentences involving community service hours, apology letters, restitution, etc. In addition, some programs with this focus also provide youths with educational classes or programs that provide the skills and knowledge that can prevent them from committing crimes in the future. These programs are growing in popularity across the country, but with this growing popularity there is also a need for research to determine which models and regulations are most effective in helping our nation's young people.

Peer Jury programs vary widely in models and regulations. According to the Illinois Youth Court Association and the American Bar Association, there are four basic youth court models. In the first model, a traditional trial court format is used. An adult presides over the hearing like that of a traditional judge, while youths serve as the jury and the prosecuting and defense attorneys. This model is called the Adult Judge Model. In the second model, the same traditional trial court format is used but everyone involved is a youth. Youths act as the judge, jurors, and attorneys. This model is called the Youth Judge Model. In my interviews with Peer Jury Coordinators, I have found that both of these traditional court models are very uncommon in Illinois Peer Juries. Many coordinators know about these models but none of them know of any juries that actually used and operated under either of these models. A third model is called the Youth Tribunal Model. In this model, between two and three youth serve as a panel of judges. There may or may not be youth serving as attorneys in this model. In this model, there is no jury to decide the case because the panel of judges makes all of the decisions. This model appears to be the least common, seeing as none of the Peer Jury Coordinators that I spoke with mentioned it. Many knew about the first two models, but the third model never came up in conversation. This leads me to believe that it is not widely used in Illinois Peer Juries.

All three of the models above have two more roles which may or may not be present depending on the individual Peer Jury. The first role is the clerk. The person in this role takes care of all of the paperwork during the proceedings. This can include evaluations, police reports, written agreements, station adjustments, etc. The second role is the bailiff. The bailiff brings order to the court by introducing and closing the cases and by administering oaths in many models. The literature on Peer Juries portrays the role of bailiff and clerk as being played by a youth. However, in one of the juries that I viewed, the bailiff was played by an adult officer. The fourth and final model is the most revolutionary. This model, called the Peer Jury Model, involves a group of youth questioning the offending youth. The peer jury model is less formal and does not involve the roles that are involved in a typical trial court (the judges, attorneys, bailiff, etc.) This is because the questioning group of youth take on all of these roles at the same time by finding out about the incident and the youth and ultimately, deciding the offending youth's sentence. There may be a clerk (which can be a youth or an adult) who handles paperwork and reads certain things aloud for everyone at the hearing to hear.

The Peer Jury Model is the model which is most commonly used in Illinois. All of the juries that I viewed and all of the coordinators that I spoke with used this model in their Peer Juries. In addition, some juries that I viewed which used the Peer Jury Model added an adult moderator who introduced

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the cases to the jury and briefly explained the process to the youth offender and their parents. The moderator also typically was the one to reveal the sentence that the Peer Jury decided to give the youth offender. There were some variances between the individual jury's model of the Peer Jury Model and the basic Peer Jury Model, but when broken down, they all use this similar format.

The National Association of Youth Courts stated that as of 2010, 49 states and the District of Columbia have Youth Courts or Peer Juries. According to the Illinois Youth Court Association, Illinois currently has 129 Peer Juries in operation throughout Illinois. These Peer Juries vary in how active they are mainly due to the fact that they work based on the case load that they are given. If a community does not experience any crimes committed by youth for a specific period of time then there is no reason for a community to have an active jury. In addition to the fact that youth need to commit crimes for Peer Juries to be in session, police officers and Peer Jury Coordinators have an effect on the caseload of a Peer Jury. Officers will typically refer a case to Peer Jury if the crime fits the types of crimes that the Peer Jury will see, if the youth and their parents are willing to cooperate with the Peer Jury program, and if the officer feels the program will be a good fit for the offending youth. Peer Juries will only see certain types of cases, therefore any crime a youth commits cannot be seen by a Peer Jury.

Typically Peer Juries will not take violent offenses with the exception of school fights. Most also exclude felonies from their case load. However, some make exceptions in the cases of theft where the retail amount stolen or the manner in which they stole is what brought the crime to the felony level. Most Peer Juries will also see drug cases involving small amounts of marijuana. All Peer Jury programs require a parent's permission in order for the youth to participate in the Peer Jury Program rather than the juvenile justice system. The parent must also be willing to transport the child to the Peer Jury hearings and to any activities or programs that the youth is sentenced to attend and participate in. A significant factor that may hinder this process with the parents and the child is the child's willingness to admit their guilt. In some cases, the parent and the child would rather attempt to prove their child's innocence in the court system than work with the Peer Jury.

The officers on a case and the Peer Jury Coordinators also play a major role in determining whether a youth's case is seen by the Peer Jury. There are some activities for which the officer has the choice of sending the youth to the Peer Jury or simply writing them a ticket. This option is typically available for status offenses where the minor would not be in trouble for what they did if they were of adult status. These offenses include being out past curfew, using tobacco, and drinking alcohol. In other types of crimes, the officer has the option of sending the youth through the regular juvenile court system or to the Peer Jury. In these cases, the officer can refer the youth to the jury and then it is the decision of coordinator whether or not they are taken into the Peer Jury Program. These evaluations can be made on the age of the offender, the offender's criminal history, the offender's personal background, and the crime they committed. These evaluations are made so that the limited resource of the Peer Jury is not used on youth who are unlikely to respond to the jury's methods.

The majority of the Peer Juries that I spoke with only meet once a month. However, one Peer Jury, which will be called Peer Jury A, reported being particularly active, meeting three times a month, because their jury covered multiple cities. Peer Jury A sees new cases twice a month and "checks in" on the cases that have already been seen by the jury once a month. On the check-in date, Peer Jury A holds two simultaneous court sessions. This allows them to get through their large case load and to see cases in a timely manner. As a result, many compliant youth offenders are released from Peer Jury A's program within a few months and the Peer Jury is allowed to see a remarkable number of cases, over 100 cases in 2011 alone. Another Peer Jury, Peer Jury B, works on a much smaller caseload because its jurisdiction only covers one city. Currently, their docket is pretty light, reporting that they did not have any new cases last month. In the past five years, Peer Jury B has seen between 9 and 15 cases annually. These juries are important to study because the activity of Peer Juries affects the lives of hundreds, and possibly thousands, of youths in Illinois.

Due to the wide variances in Peer Jury programs and how they collect data (if they do) Peer Juries are very difficult to study. From my interviews with coordinators, it seems like there is a dispute as to what constitutes a Peer Jury. Most of the coordinators I spoke with knew about all four models and accepted them all as a form of Peer Juries. However, a few coordinators felt that certain types of models, typically those based off the traditional court models, were not Peer Juries. The confusion in terminology does not help researchers either. The literature, as well as the juries themselves, refer to Peer Juries as Peer Juries, Youth Courts, Youth Juries, and/or Teen Courts. In my research, I have had the opportunity to see juries which utilize the titles of Peer Jury and Youth Jury. By viewing these juries, speaking with coordinators, and reading the literature, I have come to the conclusion that these Peer Juries, even though they have different labels, are marginally the same thing. However, these differences in titles and acceptances of these titles are important to note because it affects the research.

Peer Juries are also hard to research because of the fact that some juries do not keep any formal statistics. In addition, those that do take statistics don't do so in a standard way. Some of the Peer Juries I studied gathered statistics every six months, others every year, while some have kept track from the start of their program's existence. In addition to the varying time collection of the statistics, the statistical content collected by the Peer Juries varied as well. Some collect biographical data, while others may concentrate on data regarding the crime and the sentences imposed. When I started my research, I intended to find which juries appeared to be the most effective by comparing the programs and their respective recidivism rates. I assumed that many of these programs would judge if their program was successful by determining if the youth committed another crime after they went through the Peer Jury process, yet these statistics were not available. This is not because the Peer Juries would not like to or would not be interested to know their recidivism rates; it is merely too time consuming of a task for the juries and their coordinators to collect.

One Peer Jury coordinator explained to me that in order to look up the criminal history on a youth that has appeared before the Peer Jury, she would have to first look them up in two separate databases that their police department uses. She said that she would also check the written records because even though the department has changed over to electronic records, some did not get transferred. In addition to checking the records in the city in which the Peer Jury operates, she may also have to contact another city to check their police department's record if the youth offender is from a different town. In

addition, some juries, like Peer Jury A, are not run completely out of police departments or may be run in coordination with multiple police departments. This leads to questions regarding who would have access to the police records of these youth, which could prompt issues concerning confidentiality.

Confidentiality is another issue which hinders this research. One Peer Jury Coordinator explained to me that confidentiality is one of the main concerns of parents and youth who choose to use Peer Jury programs. Parents worry that youth who serve on the jury or participate in the program may reveal details about their child's crime or other information that is revealed during the Peer Jury hearing. The Peer Juries that I researched deal with confidentiality issues within their own peer jury programs in different ways. Peer Jury A has a bailiff administer an oath of confidentiality before every case that appears before the court. All Peer Jury members must take and abide by this oath every time that they take the stand. Peer Juries B and C merely made it clear to members of the Peer Jury that confidentiality is something that must be obeyed and that there would be serious consequences for breaking confidentiality. Peer Jury C even trains their jury members on how to speak about cases without breaking confidentiality when they are interviewed and begin to become a part of the jury. They are told that they cannot use names and that they cannot reveal any identifying information about the crime. This is important because in most cases, crimes involving those under the age of 18 are not made public through things like the police blotters or local media. In the case that the crime is reported, the name may be withheld to protect the child. This is especially true in Peer Jury cases where one of the goals is to prevent the creation of a permanent criminal record.

Most Peer Juries also attempt to protect confidentiality by not allowing jury members to serve on cases where they attend the same school as the offending youth or if they know the offending youth in any way. This keeps the process fair and helps prevent any temptations to reveal identifying information. Peer Jury sessions, like Juvenile Courts, are not open to the public; therefore, it is even difficult for those researching to view these juries in session. Some Peer Juries have a process for allowing this kind of research by having the viewing party sign a confidentiality waiver. However, even with these options and anonymity being made available, some Peer Juries still do not allow researchers to view their Peer Jury.

Peer Juries have a number of sentencing options available to them depending on the programs and regulations in their community. All of the Peer Juries I researched had community service as a possible part of an offender's sentence. Peer Jury A required that each offender receive at least 10 hours of community service no matter what their offense was. Both Peer Jury A and Peer Jury B were limited to giving no more than 25 community service hours to each offender, whereas Peer Jury C had no limit on the number of community service hours that could be given. Some programs required the offender to serve their community service at an assigned site while others made it the offender's task to find a non-profit organization at which they could perform community service. In addition to, or instead of community service, the Peer Jury can assign the offender other tasks or require them to go through different educational programs.

Of the Peer Juries that I researched, Peer Jury A appeared to have the most options available to them in terms of sentencing. The jury could make the offender take classes in self or anger management. They also had the option to have the offenders assessed for treatment related to substance abuse or counseling needs. This jury also sought to improve the youth offender's ties to the community by having them meet with peers, attend club meetings, apply for jobs, or write an apology to their victim. Offenders could also learn and reflect on their offenses through a reflective or research paper that the jury assigns them. The jury determines the length of the paper and the topics so that it is individually tailored to the individual and the crime that they committed. The options that Peer Jury A has for sentencing are endless and the jury discusses in detail everything that they assign to the offender to make sure it fits them and their needs.

In comparison, Peer Jury B had the option of assigning their youth offenders individualized papers and apology letters to their victims. They additionally had a program that is done on the computer regarding shoplifting and they are in the process of adding in a similar program in regards to alcohol and drugs. Peer Jury B's Coordinator also said that the offenders can be sent for alcohol and drug assessments and that they can be forced to pay restitution to their victims. Peer Jury C had the least amount of sentencing options available to them. Although the Peer Jury can assign any amount of community service hours they please, these sites are preassigned by the coordinator typically by distance from the offender's place of residence in order to make it easier for transportation. Offenders can also be assigned to write an essay, an apology letter, or pay restitution. Peer Jury C does not have any educational programs at their disposal and the Peer Jury can only recommend that the youth seek counseling rather than require it like some of the other peer juries mentioned.

One similarity that held true for all of the juries that I interviewed is that upon completion of the Peer Jury program the offender would not have a criminal record. Some communities do this by holding photographs and fingerprints in-house rather than submitting them to the state to be entered into a database, or by never fingerprinting or photographing the youth offender at all. This is determined by the crime that the youth committed and the rules and laws of the area where the youth was arrested. According to Labeling Theory this is very important. Labeling Theory suggests that once someone is formally labeled as something they will act in a self-fulfilling prophecy in order to live out that label. By only informally labeling these youth by their peers and not giving them a public permanent record, the offending youth will not act as if they are a criminal. Instead, through the Peer Jury process, they are labeled as a good kid that made a mistake. This view allows the offending youth to keep their positive label and still gives them the ability to improve and change. The results show that this lack of labeling, in addition to the sentences and programs that are imposed on the offending youth, are yielding positive results.

In Peer Jury A, the jury is evaluated by the offender and the offender's parents. From reading these comments, it is obvious that parents and the offenders support the program. The vast majority of the evaluations were positive. The official recidivism statistics for this jury were not available to me but one moderator informed me that hardly any youths that went through the program offended again. She estimated the success rate to be between 90% and 95%. Many parents reported positive behavior changes and many youth informed the jury that they now had the skills to make better choices in the future. Some also talked about changing their peer group so they were surrounded by better influences.

Peer Jury B does not formally collect recidivism rates every year but the Peer Jury Coor-

dinator was very confident in the success of their program. The recidivism rates that were recorded documented a 15.79% recidivism rate which puts their success rate at 84.21%. Peer Jury C documented its recidivism rates annually. In 2011, 95% of offenders who successfully completed the Peer Jury Program did not reoffend. Peer Jury C also keeps track of the program's recidivism rate since the program's creation fifteen years ago. They determine this rate by counting any offense a youth committed while under the age of 18 as a mark against the program's historical recidivism rate. This rate currently stands at 86.32% for the program's 15 year history. All three of these peer jury programs have very high success rates, regardless of their varying approaches to the Peer Jury system. Further research will need to be completed in order to determine which model and combinations of regulations are the most successful in preventing youths from committing crimes.

Overall, Peer Juries appear to be an effective alternative to our currently overcrowded and expensive criminal justice system. It gives communities a chance to seek justice with a fair punishment that is handed down by those who understand a youth's situation the most; their own peers. However, it also gives youth the ability to restore their good reputation by removing a permanent criminal record and through educational programs. By bettering their youth, communities are also improving themselves by creating a stronger and more cohesive environment for all of its citizens. ■

Five years later: Child custody and visitation mediation implementation after the 2006 Supreme Court Rules

By Heather Scheiwe Kulp

In July 2006, the Illinois Supreme Court Rules proposed by the Special Supreme Court Committee on Child Custody Issues (the "Committee") took effect. Article IX of the series outlines the procedures for handling child custody cases, with an emphasis on increasing efficiency and coordination. Specifically, Rule 905 requires every Illinois judicial circuit to "establish a program to provide mediation for cases involving the custody of a child or visitation issues." In 2007, the Committee conducted a survey to gauge each circuit's progress in implementing these child custody rules. The Committee found that most circuits without existing mediation programs were either still drafting rules or were waiting for the Supreme Court's approval on recent drafts.

Five years later, the scene has changed significantly. Every Illinois circuit now has a court-referred child custody mediation rule that is in substantial compliance with the Supreme Court's mandate. Mediation is better integrated into the court system. While these are major achievements for the Illinois justice system, there is still room for improvement in certain aspects of some mediation programs.

To explore the implementation of each circuit's rule, Resolution Systems Institute reviewed each rule and conducted a number of interviews with judges, mediators, and court administrators who are involved in child custody and visitation mediation at some stage. RSI's law student intern, Nora Kahn, then developed a report outlining specific access challenges in each circuit and summarizing challenges faced by many circuits. The report suggested strategies that circuits could implement to create greater access to child custody and visitation mediation.

A primary challenge to access is the ability of parties to pay for mediation. In some courts, inability to pay anything for mediation is considered an impediment to mediation. The judge may waive the mediation requirement for low-income parents — and thus, these families will not gain the benefits mediation offers. In other circuits, all parents are referred to mediation with a mediator on the court-approved roster and the mediator is allowed to determine whether he or she will accept payment on a sliding scale. This creates a challenging situation in which mediators must negotiate with parents before providing them neutral services. It also threatens a mediator's livelihood; if the mediator primarily receives such referrals, it threatens to discourage a mediator who serves low-income populations well.

In still other circuits, the court has created a way for everyone, regardless of ability to pay, to access mediation. This comes in a few forms. In Illinois' 2nd Judicial Circuit, now-Chief Judge Stephen G. Sawyer began a pilot judicial mediation program in 2004. Sitting judges who have completed the required 40-hour family training can mediate cases referred from other judges. In the 19th Judicial Circuit (Lake County), low-income parties are referred to pro bono, on-site mediators once a week. To stay on the court mediation roster (and receive mediations for which they are paid), each mediator must sign up for at least one pro bono session per month. This ensures all parties can access mediation and that pro bono mediations are divided equally among mediators. Some circuits have community mediation centers, founded under the Illinois Not-for-Profit Dispute Resolution Center Act (710 ILCS 20/1, et seq.(2003)). The centers, located in Carbondale, Kankakee, and Chicago, offer free mediation services to anyone. They often serve as referral points for judges who identify parents who cannot afford to pay a private mediator.

Pro bono requirements, in which each mediator must take a certain number of pro bono cases per year to remain on the roster, are an easy way for courts to ensure a mediator is available to serve parties that may not be able to pay. All circuit rules do include a pro bono provision. However, in Resolution Systems Institute's research, it appears that not all courts hold mediators to that pro bono requirement. Some mediators report being referred mostly pro bono or low-pay cases, while fellow mediators received only market-rate cases. Few courts require reports from mediators about the number of pro bono cases accepted in a year. Greater compliance with pro bono requirements would provide greater access to mediation for low-income parents and would improve the morale of mediators (especially those now receiving mostly low-paying cases) on the roster.

Another major challenge to access is lack of knowledge about the mediation process or the benefits that mediation can bring to bear on a child custody case. A recent law review article[1] notes that Illinois attorneys often consider child custody mediation an

interference,[2] an infringement, an obstacle that must be overcome to get to trial.[3] Perhaps because of these perceptions, some family attorneys "did not effectively prepare their clients to get the most out of impending mediation encounters," including not educating them at all about the mediation process. Parties experienced feeling "blind" going into such meetings.[4] Other family attorneys feel actual animosity toward the process and advise their clients to "stonewall" the discussions that could be had in mediation.[5]

While such perceptions cannot be completely changed, Illinois courts must find a way to better educate and urge the family bar to see the mediation process as an opportunity rather than an impediment. Mediation can help prepare clients, evidence and attorneys for trial. Mediation can help clients see the strength or weakness of their case and potentially help an attorney move a troublesome case off his or her caseload. Mediation can also improve communication for the parties, such that they may be more able to resolve the case or comply with a court order later. Judges have the ability to emphasize such benefits to the bar and should take the opportunity to do so whenever possible.

Then, family judges and the family bar working together may better prepare litigants for the mediation process. Most people entering the court system have little experience with it prior to the present case. Thus, even the most basic concepts attorneys take for granted ("filing a response," "appearing") may sound like a foreign tongue to clients. This is especially true in the mediation context, in which judges' and attorneys' experience with mediation varies considerably. Litigants who are unrepresented may have no other way but from the bench to learn about what mediation entails and how it could benefit their case. Clients are unfamiliar with the concept of mediation and may be confused about why their case is not simply being heard that day in the courtroom. Attorneys have the responsibility and opportunity to educate clients about this court-referred process, including its benefits for the client's case. This can create more buy-in and will help the attorney guide litigants through subsequent decisions, i.e., whether or not to settle and at what terms. Education empowers litigants to better understand their case and make sound decisions for themselves.

Other findings provide a fuller picture of the state of child custody and visitation mediation in Illinois, and may be found by contacting RSI. RSI hopes this survey will provide greater insight into the challenges and successes of existing Illinois programs and will help courts fully implement child custody mediation for all litigants. RSI intends to present its findings to small groups of mediators and judges around the state, and then ask for feedback about what particular challenges and needs a circuit faces. With sixteen years of ADR program development experience, RSI is eager to offer its services for free to circuits looking to improve access to mediation for low-income parents.

If you would be interested in hosting a presentation and discussion group about the findings, please contact Heather Scheiwe Kulp at hskulp@aboutrsi.org.

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1. Sandra J. Perry, Tanya M. Marcum & Charles R. Stoner, Stumbling Down the Courthouse Steps: Mediators' Perceptions of the Stumbling Blocks to Successful Mandated Mediation in Child Custody and Visitation, 11 Pepp. D.R. J. 441 (2011).
2. Id. at 444.
3. Id. at 452.
4. Id. at 451-52.
5. Id. at 452.

Dartmouth College creates conflict resolution program to address campus conflict

By Madalyn Phillips, North Central College

The prestigious Dartmouth College has made preparations for a new mediation program. This program was designed by a student who had previous experience in conflict resolution. This experience combined with the knowledge she gained from her college coursework compelled her to create this mediation group on campus. Those in the program will mediate conflicts such as hazing, roommate issues, uncomfortable sexual events that do not meet the standards of sexual assault, and other disturbances. However, the program will not be able to undertake any cases where a student actually violated the law. The goal of this program is to avoid using the campus judicial system because in these processes someone in the dispute is clearly labeled as being innocent or guilty of breaking a rule or causing a conflict on campus.

The use of mediation would lead to less punishments being given to students because instead, agreements will be drawn up between the conflicting parties. Those creating the program feel that mediation is more beneficial for all individuals involved because students will be able to better understand disputes, and conflicts could be solved in a more efficient manner. In addition, mediation could help resolve some of the tension that administrators face in giving an innocent or guilty verdict. For example, if the administration finds a student not guilty of committing sexual assault but there are still residual uncomfortable feelings between the two parties; the mediation group can help them come to an agreement that the college will enforce. Overall, this will lead to a more positive and peaceful campus environment.

The students running the program are required to take a two day mediation course consisting of 16 training hours. While these students will be able to mediate on campus, they will not be eligible for state certification because this training does not meet the state's training requirements. The mediation program would like its student mediators to come from diverse backgrounds and as a result they have also added a few staff members to the list of those who will be trained. With the diverse people running the center, they are confident that they will be able to mediate a large range of disputes. The program is supported by the campus administration and has already received funding. In the future, Dartmouth hopes to see the organization expand and reach out to more people on campus, establishing a more efficient form of conflict resolution on the college campus. ■

ISBA—It's just the beginning. Get involved

By Judge Ann Breen-Greco and Sandra Crawford

As part of the ISBA/JTBF Law & Leadership Institute (LLI) at The John Marshall Law School this Summer, Chicago Collaborative Law attorney, Sandra Crawford, led a discussion about ADR with 42 high school students ranging in grade levels from entering freshmen to graduating seniors about careers in the law. The students were invited to participate in this LLI program based on demonstrated leadership skills and came from many different schools around the City. A similar LLI was also held this Summer in Carbondale, Illinois at South Illinois University's Law School. Ms. Crawford discussed the differences between various dispute resolution models (mediation, Collaborative Practice) and traditional litigation. Judge Ann Breen-Greco reviewed with the students the components of Restorative Justice, yet another alternate dispute resolution model to traditional court process.

After their brief lecture on the various alternative dispute resolution choices, Ms. Crawford and Judge Breen-Greco each led Peace Circles for the participating students. The students eagerly participated in this demonstration of how to use a Peace Circle process to resolve conflicts in group settings. Some of the students were already familiar with this First Nations' problem solving model, having participated in Circle Process at their schools. Based on feedback the students reported they could see uses for Peace Circles in their respective schools, families and communities. For more information about Peace Circle Process and Restorative Justice, *The Little Book of Circle Processes: A New/Old Approach to Peacemaking* by K. Pranis is recommended. Additional information about Collaborative Practice can be found at <www.collaborativepractice.com>.

The Law & Leadership Institute (LLI) is a statewide initiative which assists students from backgrounds which are currently underrepresented in the legal profession to achieve academic success and aspire to a career in the law. Various opportunities exists around the state through the Just the Beginning Foundation (see, www.jbtf.org) for lawyers interested in getting involved to help the next generation decide if a career in law is a good fit. Information regarding how to donate time can be found on the JBTF site under "How to Get Involved." For more information about the ISBA/JTBF partnership, its origins and LLI programs see also ISBA's Diversity Matters Newsletter, June 2012, vol. 6, no. 1, "Diversity Leadership Fellows Program Continues to Identify Future ISBA Leaders," By Annemarie E. Kill. ■

Case briefs

By Casey Harter, Em Rademaker, Meghan Steinbeiss, Madeline Moton, Madalyn Phillips, and Shauntal Van Dreel, North Central College

Court affirms district court's ruling on allowance to waive arbitration despite a "No Waiver" clause in contract

***Johnson Assoc. Corp. V. HL Operating Copr.*, ___F. 3d___, 2012 WL 1861675 (6th Cir. May 23, 2012)**

On May 23rd, 2012 the Sixth Circuit Court of Appeals affirmed a district court's ruling that the defendant waived its right to arbitration as a result of participating in litigation for a distance time period of eight months. In December 2009, the plaintiffs filed suit with a discovery deadline set for August 26th, 2010. In that time, the defendant did not pursue in its right to arbitrate in answering and instead engaged in judicial settlement conferences as well as participating in discovery. One day before the discovery deadline, the defendant moved to compel arbitration. From these transactions, the District court found that the defendant's behavior was inconsistent with its previous right to arbitrate. In addition, the court found that the plaintiffs were prejudiced by the defendant's behavior because the defendant "engaged in more discovery than would be permitted in arbitration." The court also addressed the defendant's argument that it was unable to waive arbitration because the contract at hand stated that "no waiver by either party or of any provision of this agreement or of any breach or default shall constitute a continuing waiver of such provision or of any other provision in the agreement." The defendant argued that according to federal case law, it could waive the arbitration rights. To address that argument, the Sixth Circuit Court determined that a "no waiver" clause will not affect courts' analysis of whether a party waived its right to arbitrate in accordance with reasoning from the Second Circuit, which stated that "To allow the 'no waiver' clause to preclude a finding of waiver would permit parties to waste scarce judicial time and effort and hamper judges' authority to control the course of the proceedings" and allows parties to essentially delay affirmation of their right to arbitration until legal action is close to completion.

Fifth Circuit issues decision regarding the level of deference that courts owe arbitrators

***Reed v. Florida Metropolitan Univ., Inc.*, __ F.3d __, 2012 WL 1759298 (5th Cir. May 18, 2012)**

The Firth Circuit issued a decision on May 18th that disagreed with how the Second Circuit's interpretation of the *Stolt-Nielsen* decision resulted and case law regarding the level of reverence that courts must give arbitrators. More specifically, the Fifth Circuit vacated an arbitration award that permitted class arbitration and recognized that SCOTUS's discussions of important hindrances of class arbitration in *Stolt-Nielsen* and *Conception* forced the court to recall the deference the court customarily grants by arbitrators. This case involved a group of students who attained their undergraduate degrees from online programs who then alter discovered

that graduate programs and employers would not recognize their degrees. Each of the students' Enrollment Agreements enclosed the following key provisions: "any dispute arising from my enrollment at Everest University…shall be resolved by binding arbitration under the [FAA] conducted by the" AAA; and "any remedy available from a court under the law shall be available in the arbitration." From these provisions the federal district court compelled arbitration, and the arbitrator concluded based off the provisions that the students could precede as a class rather than individuals. That award also confirmed this decision. SCOTUS has been quoted as saying "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the arbitrator's decision should be confirmed. With that in mind, the Fifth Circuit decided to vacate the arbitrator's decision by holding that neither of the contract clauses cited by the arbitrator could appropriately be interpreted as allowing class arbitration. It also found that the "any dispute" clause in the contract is only a reflection of an agreement to arbitrate and is not an applicable contractual basis to conclude that the parties agreed to class arbitration. The Fifth Circuit noted that, "the arbitrator lacked a contractual basis upon which to conclude that the parties agreed to authorize class arbitration. At most, the agreement in this case could support a finding that the parties did not preclude class arbitration, but under *Stolt-Nielsen* this is not enough."

Tax shelters fall within the scope of arbitration provision

***Musikantow v. Deutsche Bank Ag* (2012) May 11, 2012**

The plaintiff filed a suit against Deutche Bank seeking damages for the latter's involvement in the sale and implementation of a tax shelter that caused the Musikantows to owe back taxes, interest, and penalties to the IRS. The defendant argued the plaintiff's claims fell within the scope of the arbitration provision, while the plaintiffs countered that the arbitration provision was procedurally unconscionable because it was part of criminal fraud. The circuit court sided with the defendant. The Appeals court upholds the circuit court's decision that the tax shelters fell within the scope of the arbitration provision and the provision was not procedurally unconscionable. ■

Happenings

By Casey Harter, Em Rademaker, Meghan Steinbeiss, Madeline Moton, Madalyn Phillips, and Shauntal Van Dreel, North Central College

First Skadden Fellowship Focused on Alternative Dispute Resolution Draws to a Close

Over the past two years, Heather Scheiwe Kulp worked as a Skadden Fellow at Resolution Systems Institute (RSI) and the Center for Conflict Resolution (CCR). The program she established was directed towards creating and improving mediation programs in Illinois, and other states. The program offers a less expensive, faster path to resolution that is particularly beneficial to poor and low-income litigants. Ms. Kulp's work has been widely successful, helping to improve or expand mediation programs in six Illinois circuit courts, nine other U.S. states, and Washington, DC. In addition to working on these alternative dispute resolution programs, Kulp conducted research in an attempt to improve mediation programs in the future. The findings from the study will be published within the year. Even though the fellowship is drawing to a close, RSI plans on continuing to offer its expertise on court ADR to assist with program development, research, and resources. Heather Kulp will be continuing her work as a Clinical Fellow at Harvard Law School's Negotiation and Mediation Clinical Program.

International Academy of Mediators Fall Conference, October 11-13, 2012: Cambridge, MA

IAM will be hosting this year's conference at Harvard Univeristy in Cambridge Massachusetts. The International Academy of Mediators aims to define standards and qualifications for the professional mediator. Interested participants should go to <www.iamed.org> for more information.

Call for Writers for the Connection Point Initiative at Peace X Peace

The Connection Point E-Newsletter invites women and men to express perspectives on cross-cultural understanding between Western and Arab and Muslim societies, with an emphasis on women. The mission is to share with a global audience and dispel misunderstandings prevalent in the mainstream media. Articles are accepted on a rolling basis. Interested contributors should go to <www.peacexpeace.org/connection-point> for more information on submission guidelines.

Mediation for the Professional, Presented by the Center for Dispute Settlement, October 10-13: Washington, DC

Held at the JAMS Resolution Center, this conference will provide an intensive foundation in mediation techniques. Participants will engage in conflict simulations, designed from actual disputes. Guest speaker Linda R. Singer will discuss her award-winning book, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*. For registration information contact Kalee Bacon, the program coordinator at kbacong@cdsusa.org or go to <www.cdsusa.org>.

Health Law Arbitration Training, Offered by the AHLA Alternative Dispute Resolution Service October 19-20, 2012: Minneapolis, MN

Held at Hamline University's Executive Training Center, this interactive conference will enable attendees to arbitrate health law disputes quickly, effectively, and ethically. Key challenges at each stage and how to overcome them will be discussed. More information can be found at <http://publish.healthlawyers.org/Events/Programs/Pages/ArbitrationTraining.aspx>.

Recess Program Reduces Bullying in Schools

Due to growing financial restraints and safety concerns, many school districts are cutting their recess programs. Forty percent

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

November

Thursday, 11/1/12- Teleseminar—Business Succession and Estate Planning for Closely Held Business Owners, Part 1. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/1/12- Springfield, Illinois National Bank Conference Center—Illinois Sentencing- Statutory and Case Law. Presented by the ISBA Criminal Justice Section. 9-4:30.

Thursday, 11/1/12- Bloomington, Holiday Inn and Suites—Real Estate Law Update- 2012. Presented by the Illinois State Bar Association. 9-4:30.

Thursday, 11/1/12- Friday, 11/2/12- Champaign, U of I College of Law—Attorney Education in Child Custody and Visitation Matters in 2012 and Beyond. Presented by the ISBA Bench and Bar Section. 12:30-5; 9-5.

Friday, 11/2/12- Teleseminar—Business Succession and Estate Planning for Closely Held Business Owners, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 11/2/12- Chicago, ISBA Chicago Regional Office—Third Annual Great Lakes Antitrust Institute (viewing of Live Webcast). Presented by the ISBA Antitrust Section; co-sponsored by the Ohio State Bar Association, Indiana Continuing Legal Education Forum, and Pennsylvania Bar Institute. 8:25-5:00.

Monday, 11/5/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 12-1.

Tuesday, 11/6/12- Teleseminar—Attorney Ethics in Digital Communications- Remote Networks, Smart Phones, the Cloud and More. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/7/12- Webinar—Introduction to Legal Research on FastCase. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 12-1.

Wednesday, 11/7/12- Chicago, ISBA Regional Office—Do You Buy or Merge? Presented by the ISBA Business and Securities Law. 9-12:30.

Wednesday, 11/7/12- Chicago, ISBA Regional Office—Fiduciary Risk and Ethical Challenges for Fiduciaries and Their Advisors. Presented by the ISBA Trust and Estates Section.

Wednesday, 11/7/12- LIVE Webcast—Fiduciary Risk and Ethical Challenges for Fiduciaries and Their Advisors. Presented by the ISBA Trust and Estates Section. 2-4.

Thursday, 11/8/12- Teleseminar—Real Estate Partnership/LLC Divorces. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/8/12- Chicago, ISBA Regional Office—National Healthcare Reform and Its Effect on Illinois Employers and Health Insurance. Presented by the ISBA Health Care Section. 1-4:30.

Thursday, 11/8/12- LIVE Webcast—National Healthcare Reform and Its Effect on Illinois Employers and Health Insurance. Presented by the ISBA Health Care Section. 1-4:30.

Friday, 11/9/12- Chicago, ISBA Regional Office—2012 Federal Tax Conference. Presented by the ISBA Federal Taxation Section. All day program.

Tuesday, 11/13/12-Teleseminar—UCC Article 9 Practice Toolkit: From Attachment to Remedies, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/14/12-Teleseminar—UCC Article 9 Practice Toolkit: From Attachment to Remedies, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 11/15/12- Chicago, ISBA Chicago Regional Office—The Student and Parent Side of School Law. Presented by the ISBA Education Law Section. All Day. Mtg Sol Rachel.

Thursday, 11/15/12- Webcast (originally presented May 31, 2012)—Neutralizing Obnoxious Conduct as Professionals and as a Profession. Presented by the ISBA. 12-1.

Friday, 11/16/12- Chicago, ISBA Chicago Regional Office—Illinois Sentencing- Statutory and Case Law. Presented by the ISBA Criminal Justice Section. All day.

Tuesday, 11/20/12- Teleseminar—2012 FMLA Update. Presented by the Illinois State Bar Association. 12-1.

Monday, 11/26/12- Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association- Complimentary Training and CLE Credit for ISBA Members Only. 12-1.

Tuesday, 11/27/12- Teleseminar—Discretionary Distributions. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/28/12- Teleseminar—Offers in Compromise. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/28/12- Chicago, ISBA Chicago Regional Office—American Invents Act- Part 1: Protecting Innovation in a First to File System. Presented by the Illinois State Bar Association. AM Program.

Wednesday, 11/28/12- Live Webcast—American Invents Act- Part 1: Protecting Innovation in a First to File System. Presented by the Illinois State Bar Association. AM Program.

Friday, 11/30/12- Chicago, ISBA Chicago Regional Office—Trial Practice Series: How to Prove (or Defend) Your Case. Presented by the ISBA Labor and Employment Section; Co-sponsored by the ISBA Civil Practice and Procedure Section. 8:55-4:15.

Friday, 11/30/12- Lombard, Lindner Conference Center—Real Estate Law Update- 2012. Presented by the Illinois State Bar Association. All day.

Friday, 11/30/12- Teleseminar—Practical UCC- Understanding and Drafting Letters of Credit in Business Transactions. Presented by the Illinois State Bar Association. 12-1. ■

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