



THE TCAM NEWSLETTER



Volume 18, No. 1

TARRANT COUNTY ASSOCIATION OF MEDIATORS

January 2010

TCAM January Meeting

Inside This Issue

When: Monday, **January 25**, at 6:00 PM

Where: New Location!
Texas Wesleyan University School of Law
 1515 Commerce Street, Fort Worth

Agenda: 6:00 PM Gather and Greet Members and Guests
 6:15 PM Program

January Program	1
TCAM Calendar/ 2010 TCAM Board	2
TCAM Board Minutes/ TCAM Meeting Minutes	3
2009: A Year of ADR Ideas	4-7
Save the Dates	8
Purpose of TCAM	9

“What Me Worry? I’m a Mediator!”

Speakers: Kay Elliott and Frank Elliott

Kay Elliott and Frank Elliott will reprise their earlier presentation on Preparation and Enforcement of Mediated Settlement Agreements. The troubling issues of unauthorized practice of law, ethics in preparing legal documents as a mediator, and suggestions for appropriate and ethical ways to finalize the case will be discussed and debated! You don’t want to miss this important and controversial program!

TCAM has received permission to bring food to our meetings provided that we clean up afterward. For this meeting, you are welcome to bring your own food.

Time to Pay Your Dues!

Please use the attached Membership Application. Our application is also on our website: www.TCAMediators.org.



2010 TCAM Calendar

Regular Meetings of Members - Texas Wesleyan University School of Law 1515 Commerce Street, Fort Worth

Monday - 6:00 pm - January 25, 2010

Monday - 6:00 pm - March 29, 2010

Monday - 6:00 pm - May 24, 2010 (not on last Monday due to Memorial Day)

Monday - 6:00 pm - July 26, 2010

Monday - 6:00 pm - September 27, 2010

Annual Meeting of Members - Texas Wesleyan University School of Law 1515 Commerce Street, Fort Worth

Monday - 6:00 pm - November 22, 2010 (not on last Monday due to Thanksgiving)

Roundtable Meetings - To be announced

Holiday Party - To be announced

Board Meetings - Texas Wesleyan University School of Law 1515 Commerce Street, Fort Worth

Monday - 6:30 pm - February 22, 2010

Monday - 6:30 pm - April 26, 2010

Monday - 6:30 pm - June 28, 2010

Monday - 6:30 pm - August 30, 2010

Monday - 6:30 pm - October 25, 2010



2010 TCAM Board of Directors

President: Mark W. Batchelder

First Vice President (Chair of Program and Development Committee): Ben Adkins

Second Vice President

(Chair of Publications, Public Relations, and Outreach Committee): Tammy Gordon

Secretary (Chair of Membership Committee): Paul Belisch

Treasurer (Chair of Finance Committee): Pete Conlon

Directors: Mason Chevallier, Tracy Herek, Marty B. Leewright, Nicki Matranga, Kweethai Neill,
David Nelson, Diane Oyler, Steve Stork, Geoffrey Trait, Trudy E. Termini

Here is our new TCAM Board of Directors!

TCAM Board and Member Minutes

Tarrant County Association of Mediators Board Meeting Minutes For November 23, 2009

The Board of the Tarrant County Association of Mediators met on November 23, 2009. The item discussed was the meeting place for the bi-monthly meetings of the association during the 2010 calendar year. David Nelson made a “motion that the meetings be held at the Texas Wesleyan Law School in Ft Worth, Texas.” Member meetings and board meetings could both be held at the law school. Tamara Gordon seconded the motion. The motion passed with a unanimous vote of the board of directors.

Submitted by Paul Belisch, board member

Tarrant County Association of Mediators Annual Meeting Minutes For November 23, 2009

The Annual meeting of the Tarrant County Association of Mediators met on November 23, 2009, to elect board members for the 2010 calendar year. Ballots were distributed to the members present. Kay Elliott made a motion “that nominations be accepted from the floor for board members.” Lisbett Christensen seconded the motion. Members nominated from the floor were Diane Oyler and Tracy Herek. Mason Chevallier moved “the nominations cease.” Seconded by Ben Adkins. Voting by the members was conducted, with the results listed below.

President----- Mark W Batchelder
1st Vice President--- Ben Adkins
2nd Vice President-- Tammy Gordon
Secretary----- Paul Belisch
Treasurer----- Pete Conlon

Directors elected by the membership:

Diane Oyler
Mason Chevallier
Marty Leewright
Nicki Matranga
Kweethai Neill
David Nelson
Steve Stork
Geoffrey Tait
Trudy E Termini
Tracy Herek.

Motion to “destroy the ballots as soon as possible” was made by Lisbett Christensen, and seconded by Emily Vimmett. Motion passed unanimously, by voting members. Motion “to adjourn” was made by Paul Belisch and seconded by Ben Adkins. Motion Passed.

Submitted by Paul Belisch, board member

2009 ~ A Year of ADR Ideas

By Kay Elkins-Elliott, TCAM Member

In keeping with the beginning of a new year, and borrowing from the New York Times magazine December 13, 2009 issue, this first column in 2010 will be my highly arbitrary selection of the best ideas that first came to my attention in 2009. Using the metaphor of the magazine, like a magpie building its nest, I have hunted eclectically but, hopefully with discrimination, for ideas that not only intrigue me but seem to have some future usefulness for conflict resolution specialists. These noteworthy ideas, like string and fabric scraps of creativity, when woven together, just might create a new cognitive nest for the future of ADR, a place in which your curious minds can incubate, hatch and take flight. The Times covered the entire alphabet - don't panic, I won't do that! Here are the top 5 ideas from me to you. If you will write to me at k4mede8@swbell.net with your top tips I will include them in future columns, giving you attribution!

1. Peter Reilly published a provocative paper in the Ohio State Journal on Dispute Resolution (2009) - Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self Help-arguing that we will never effectively prevent lying in negotiation through ethics rules or legislation, so we need to combat it in practice. Acknowledging the many law review articles written on ethical issues surrounding lying, he proposes techniques for minimizing exploitation. Acknowledging that information exchange (or the lack thereof) is the lifeblood of any negotiation, he believes "behaviors influencing whether, when, and how information is obtained and/or exchanged are extremely important in the process of defending oneself (or one's client) against lying and deception."

Basic assumptions of the article include the normalcy of lying and that lying is more often unconscious than analytical. Lawyers lie, even mediators. Robert Benjamin, a mediator, is cited: The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators, 13 Mediation Quarterly, 3, 17, 1995. He describes "noble lies" told by mediators as ways to "shift and reconfigure the thinking of disputing parties, especially in the midst of conflict and confusion, and to foster and further their cooperation, tolerance and survival."

Departing from the belief in trial as the best process for obtaining the truth, Reilly references Donald Langevoort (Half - Truths: Protecting Mistaken Inferences by Investors and Others, 52 Stan. L. Rev. 87, 89, 1999) who observed that "Instructions to tell the 'whole truth' notwithstanding, it is generally not considered perjury in a trial or deposition for a witness to give a technically true but evasive answer."

Twenty years ago (In Settlement Talks, Does Telling the Truth Have Its Limits?) fifteen lawyers were surveyed on four negotiation situations presenting various ethical challenges. In 2008 Reilly surveyed thirty different lawyers on the same situations. Let's look at two of those situations:

Situation 1: Your clients, the defendants, have told you that you are authorized to pay \$750,000 to settle the case. In settlement negotiations after your offer of \$650,000, the plaintiff's attorney asks, "Are you authorized to settle for \$750,000? Can you say, "No I'm not"?"

1988: Yes: Seven (47%) No Six (40%) Qualified: Two (13%)

2008: Yes: Eight (27%) No: Eighteen (60%) Qualified: Four (13%)

Situation 2: You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing?

1988: Yes: One (7%) No: Fourteen (93%) Qualified: None (0%)

2008: Yes: Six (20%) No: Twenty (67%) Qualified: Four (13%)

What would you say?

Reilly found that strong differences of opinion still exist and in situation 2 there is less consensus today than in 1988. He also believes that, because settlement negotiations are private, enforcement of even the clearest ethical rules and standards will always be difficult if not impossible. Some of his specific defense tactics follow:

- a. Use the Internet to do background research on

(Continued on page 5)

(Continued from page 4)

the other parties to the negotiation or mediation. Look at websites established by private companies, government entities, and various nonprofit groups for criminal, financial, and other background checks. (My law students negotiation class use information about their opponent law student, such as conflict style, prior profession, age, culture, gender, class standing and prior negotiation behavior in the class, as part of their external preparation.). People develop a “reputation” based on previous negotiation behavior so talk with their colleagues and previous counterparts.

b. When possible, be proactive in selecting potential negotiation counterparts by using referrals, recommendations, or outside introductions. Indicate that you prefer a long-term relationship with this counterpart. Research suggests that even the possibility of this type of relationship “raises people’s ethical standards and lowers exploitative conduct such as lying.”

c. Create a relaxed atmosphere in which empathy, sincerity, impartiality and civility will flourish. This is the special talent of good mediators! Such an environment does not guarantee candor, but it does encourage the responder to share increased amounts of information. Specific tactics include the following: exclamations of encouragement; requests for clarification or elaboration of information; using playful questions such as “May I play the devil’s advocate?” Research also shows that people are “more inclined to lie by omission” than to create elaborate fabrications, according to Reilly, so asking for more data may motivate them to back away from a previous statement. In a recent mediation, I used these tactics to get some trust and information from a participant who was reputedly manipulative, deceptive and narcissistic. I obtained a wealth of information that was useful in getting the case resolved.

d. Ask the counterpart to justify her position by demanding she reference an objective standard. People are less inclined to lie when objective standards are constantly sought by the other party. The caveat is that no standard is the whole story. Use many of the tactics listed to come up with the most favorable deal.

e. Ask the magic question near the end: “Is there something important known to you, but not to me,

that needs to be revealed at this point?” The answer should be written down and, if necessary, used later to support a claim of fraudulent non-disclosure.

Informed with the above assumptions and tactics, advocates and mediators will be able to minimize the risk of exploitation and, in Reilly’s words, “understand, interact with, and protect themselves from others who would try to gain unfair advantage through lies and deception.” Offense may well be the best defense.

2. A smarter future for conflict resolvers may emerge from neuroimaging. In the November/December 2009 issue of *Scientific American Mind* (Volume 20, Number 6) an article on how brains function (What Does a Smart Brain Look Like? 26-33) shows that not all brains work in the same way, even though the IQ scores of those people may be identical or quite similar. Brain structure and metabolic efficiency may underlie individual differences in intelligence, and imaging research is pinpointing which regions are key players. Smart brains work in many different ways, and men and women with the same IQ show different underlying brain architectures. In children, girls show increasingly well defined paths between two disparate brain regions - in their right hemisphere- as they age. Boys, however, show this developmental trend in their left hemisphere. Every individual uses some combination of intelligence-related brain areas in a unique way.

In 2007 neuropsychologist Rex E. Jung of the University of New Mexico, and Richard J. Haier, of the School of Medicine, University of California, Irvine, reviewed 37 neuroimaging studies on intelligence. They found 14 separate areas, from structural and functional brain studies, distributed throughout the brain, refuting the earlier belief that the frontal lobes are primarily responsible for intelligence. Areas of both the parietal (known to be involved in sensory integration) and frontal lobes form a network of intelligence, called the P-FIT, parieto-frontal integration theory of intelligence. The identification of the P-FIT network provides a new definition of general intelligence based on the brain’s measurable characteristics.

In March, 2009, psychologist Roberto Colom and colleagues of the Autonomous University of Madrid reported on the relation between gray matter volume and different intelligence factors in 100 young adults.

(Continued on page 6)

(Continued from page 5)

One of the findings of this study is that a positive correlation exists between scores on general intelligence (the g factor) and the amount of gray matter in certain areas. Another is that there is a positive correlation between scores on the g factor and the amount of gray matter in several brain areas predicted by the P-FIT. Also, gray matter volume in certain brain areas is related to the other specific intelligence factors.

The ideas coming from these studies are startling: neuroimaging could one day become a supplement or even a substitute for traditional intelligence testing and, in education, a learning program could be tailored for an individual student, at any age, based on that student's brain characteristics. Vocational success might also be predicted - patterns of gray matter across some areas would predict who would be the best mediators or negotiators. But as we know the brain is plastic! A brain profile using these sophisticated technologies would be merely a guide - not a prescription. Could we not even imagine that the brains of people with low empathy or poor EQ could be "taught" these skills and would therefore be better able to prevent and resolve their own or other people's conflicts?

3. *Analytical Methods for Lawyers* (2003), a book, has been used for years at Harvard Law School, but only came to my attention in 2009, when it was first used at Texas Wesleyan School of Law. The book focuses on the skills of problem solving and analysis, based on the mastery of language and techniques derived from disciplines such as economics, accounting, finance, and statistics, notably absent from many law school classrooms. The first chapter introduces students to decision analysis, a set of techniques traditionally taught to first-year MBA students. Because practicing lawyers increasingly make use of decision trees to review litigation strategies and settlement offers, mediators and negotiators must understand these decision tools. The concept of a BATNA becomes much clearer when a settlement offer is compared to various branches on a decision tree. Concepts such as probability, expected values, sensitivity analysis, risk aversion and the value of obtaining additional information are explained in the book and can be practiced with the many examples and exercises. Although most lawyers still do not give legal advice based on these tools, because the explicit study of decision analysis is totally absent from the traditional law school

curriculum, computer programs and this text equip any negotiator, any mediator, to do so.

Texas mediation trainings do not include this information, as far as I know. I will be incorporating it into my mediation courses this year for the first time. It is already a feature of my negotiation course and may well be taught by my colleagues. This year I taught a course in Negotiation Skills with Don Philbin at the office of the Attorney General of Texas. Don, a brilliant attorney and mediator from San Antonio, has written extensively on this subject and has created a computer program to enable negotiators and mediators to create decision trees in cases to facilitate settlement. You can learn more from his website at www.adrtoolbox.com.

4. There are wars that cannot be won with guns or bombs. This is not news. Martin Luther King and Gandhi and Mandela have all said this, in one way or another. Kenneth Cloke wants to drop mediators, not bombs, to achieve peace. Recently I became aware of a remarkable movement that is combating terrorism in Pakistan and Afghanistan. Greg Mortenson, director of the Central Asia Institute, and David Oliver Relin have written a book, *Three Cups of Tea*, to describe their answer. The governments of Pakistan and Afghanistan are failing their students on a massive scale, particularly the girls. In an age when politicians have little but rhetoric to offer for the seemingly irreconcilable mess of warfare and cultural conflicts awash in the Middle East and Islamic territories in Central Asia, Mortenson's solution is stunningly simple: make peace by building schools for girls. When girls are educated, teen pregnancy rates go down, family income goes up and the entire community benefits. The latest book, *Stones Into Schools*, takes us further down the journey Mortenson is making. A few women have already graduated and returned to their remote villages to provide medical services. Journalists report that the accomplishments of this American say more about our country's commitment to the region, to the people who live there, than the more expensive and elaborate aid programs we have established for the region.

As of 2009 Mortenson had established eighty-one schools, including fifteen new schools in Afghanistan and additional schools in regions of Azad Kashmir, Pakistan that were devastated by an earthquake in 2005. *Three Cups of Tea* is a freshman, honors or campus-wide required reading selection in over

(Continued on page 7)

(Continued from page 6)

eighty universities and hundreds of schools. It is required reading for senior U.S. military commanders, Pentagon officers in counter-insurgency training, and Special Forces deploying to Afghanistan. The book is being published in over thirty-one countries. For more information visit the Web site www.threecupsoftea.com. The answer to war may very well be a dedication to achieving universal literacy and education for all children, especially for girls. Since more than 145 million of the world's children are deprived of education due to poverty, exploitation, slavery, gender discrimination, religious extremism and corrupt governments, this one book can be a catalyst to bring the gift of literacy to each of those children says the author.

In our own country where free education for all children is the law, we can support this movement and give thanks that hundreds of years ago our founding fathers realized the necessity for schools. The CAI movement also serves as another example of the power of a single person and a single idea to promote peace.

5. During 2009 I made 4 presentations to mediation groups on the subject of creating and finalizing Mediated Settlement Agreements. Most lawyers, as you know, expect the mediator to do this task. Most mediators do so; however Ethics Opinion No. 583 (2008) from the Professional Ethics Committee for the State Bar of Texas is clear and uncompromising:

“Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effect an agreement resulting from the mediation.

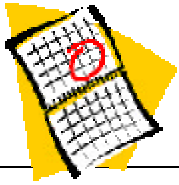
Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce.”

Why this needed to be explicitly prohibited is not clear, but we all know that before there was an ADR statute in Texas there were dispute resolution centers and the custom in those centers has been that the mediator prepares the final mediated settlement agreement. Every dispute center has forms for that purpose. Mediation trainers typically teach (though I do not) how the mediator should prepare the mediation agreement. Many reasons are given for this practice: the parties are illiterate or at least incapable of doing this task; the mediator can do it better than anyone else because only the mediator knows exactly what has been agreed; the lawyers expect the mediator to do so as part of the mediation fee and because that is the way it has always been done. None of these reasons trump the ethics opinion cited. There is another problem. In at least one Texas case, the Unauthorized Practice of Law Committee sued a mediator for doing exactly this. That case did not go to trial on the merits, but the mediator incurred hefty legal expenses defending the suit. Despite the absence of numerous law suits against mediators, there is danger and this is unethical. We need a professional protocol that does not subject mediators to liability, adverse scrutiny or any other negative consequence.

At the 2010 TAM conference this will be debated further. Whether you are an attorney or a non attorney, once you step into the mediator's chair, you are not practicing law but when you prepare a binding contract for, you are practicing law. There are no perfect answers to this question, as the lively discussion at the 2009 TMCA symposium illustrated!

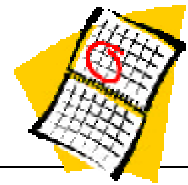
Have a very happy 2010 and send in your ideas for best practices for mediators and mediation advocates!





Save the Dates

Trainings and Meetings



TCAM member, Stan Parker, reports that he will attend a 24-hour Spanish course for mediators in Dallas. The course takes place on three Saturdays in February, 2010.

The instructor, Irene Zucker, has done bilingual mediation for 12 years. She teaches a Spanish course for the building industry and is President of Verbacom Executive Development.

Stan believes that Irene teaches just what mediators need to know to start correctly pronouncing useful basic ADR terminology, mediation-related phrases, and simple sentences in Spanish. Attendees can reduce miscommunications and develop trust and rapport with their Spanish-speaking parties and clients.

In an announcement, Irene Zucker gives the following information:

WHAT: Spanish Course for Mediators

WHEN: February 7, 14, and 21.

WHERE: 7920 Belt Line Road at Coit, Dallas, Texas 75254

WHY? So you can do bilingual mediations.

HOW? To Register, Call Irene at 972-386-8372 or go to www.verbacom.com

HOW MUCH? \$339 includes all materials.

The hands-on course is for busy ADR professionals. The fast paced sessions actually WORK.

Recommended for mediators, attorneys, judges, arbitrators, and other people in the Alternative Dispute Resolution field who the need to interact with Spanish speaking clients. Classes will be limited to 20 persons.

Do you know of other meetings, trainings, or courses in the North Texas area during the next 3 months? Please let us know by contacting Newsletter@TCAMediators.org

TCAM Newsletter Submissions

Thanks to the TCAM members who submitted articles to the Newsletter for 2009!

Here are the deadlines for the 2010 issues:

Mondays • March 15 • May 10 • July 12 • Sept. 13 • Nov. 8

Please submit all articles, book reviews, news, minutes, features, program announcements, speaker bios, and other items by these dates which are two weeks before the regular meeting for that month.

Purpose of TCAM

Tarrant County Association of Mediators is a non-profit corporation organized for the following purposes:

To promote the increased use of mediation to resolve all types of disputes; To provide support for the concepts of public dispute resolution centers and volunteer mediation; To provide an information exchange within the association and for the benefit of the public; To provide access to training and development;

To promote a high standard of ethical behavior in the practice of mediation;

To enhance the professional standing of all members of the association.

—From the Bylaws of Tarrant County Association of Mediators

TCAM Newsletter

Production:

Faeda Batchelder

Please contact for questions,
comments, or contributions:
Newsletter@TCAMediators.org

THE *TCAM* NEWSLETTER
©2010, Tarrant County Association of Mediators
(a Texas non-profit corporation) All rights
reserved. The views expressed in The TCAM
Newsletter are those of the individual authors
and, unless otherwise stated, do not necessarily
reflect the views or policies of TCAM.

TCAM's Website

www.TCAMediators.org

Fort Worth, Texas 76101

P.O. Box 1771

TARRANT COUNTY ASSOCIATION OF MEDIATORS

THE *TCAM* NEWSLETTER