

ADR Across the Spectrum

Friday, November 2, 2018



CLE Information and Agenda



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Center for Legal Education
New Mexico State Bar Foundation
P.O. Box 92860
Albuquerque, NM 87199-2860
505-797-6020 or 1-800-876-6227
cleonline@nmbar.org
www.nmbar.org



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The issues discussed herein are intended as illustrative of the types of issues which can arise in the course of representation and are not intended to address, nor do they address the broad range of substantive issues which could potentially arise in the scope of such representation.

The authors/speakers suggest that careful independent consideration, to include a review of more exhaustive reference sources, be undertaken in representation of a client regarding this subject, and therefore the practitioner should not solely rely upon these materials presented herein.

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ADR Across the Spectrum

4.5 G

1.5 EP



Friday, November 2, 2018 • 8:30 a.m. -4 p.m.

State Bar Center, Albuquerque

\$99 Audit Fee (Not seeking CLE credit)

\$228 Early bird fee (Registration must be received by October 2)

\$251 ADR committee member, government and legal services attorneys, Young Lawyers and Paralegal division members

\$279 Standard/Webcast Fee

Registration and payment for the program must be received prior to the program date. A \$20 late fee will be incurred when registering the day of the program. This fee applies to live registrations only and does not apply to live webcasts.

Co-sponsor: Alternative Dispute Resolution Committee

Join the ADR Committee for their CLE pre-show on Thursday, November 1st, at the State Bar Center. Please contact Breanna Henley at bhenley@nmbar.org if you are interested in attending. The pre-show is not for CLE credit and is complimentary to anyone who wishes to attend.

Thursday, November 1

5:30 p.m. **ADR Pre-Show: Mindfulness in ADR Practices** (Optional and not for CLE credit)
Abby Foster, Magistrate Court Mediation Program

7 p.m. Adjournment of Pre-Show

Friday, November 2

8 a.m. Registration and Continental Breakfast

8:30 a.m. **Welcome and Introductions**
Shannon Driscoll, New Mexico Workers' Compensation Administration and Chair of the ADR Committee

8:45 a.m. **Unauthorized/Unethical Practice of Law in ADR (1.5 EP)**
Shannon Driscoll

10:15 a.m. Break

10:30 a.m. **Morning Breakout Sessions**
Track A – Beyond Mediation: Why Companies and Organizations Love Their Ombuds
Auditorium
Jon Lee, University of New Mexico Ombuds Services for Staff
Track B – Restorative Justice: A Survey of Programs and Logistics
Keleher
Jeff Newcomer Miller, Magistrate Court Mediation Program

Noon Lunch (provided at the State Bar Center)
Section Annual Meeting

1 p.m. **Afternoon Breakout Sessions**
Track A – Elder Mediation Training, Values and Legal Components
Auditorium
Wallace Ford, Diane Grover, Sue Thorson, Jocelyn Torres, Robert Rambo and Lori Millett, Elder Mediation Network
Track B – Unique and Unusual ADR Practices
Keleher
Peter Merrill, Construction Dispute Resolution Services

2:30 p.m. Break

2:45 p.m. **ADR Panel Discussion**
Jon Lee, Dathan Weems, Peter Merrill, Jeff Newcomer Miller, Abby Foster

4 p.m. Adjournment

Elder Mediation Network Presentation – 1:00 p.m.

Mediation



Our population is living longer and facing increased challenges with health and quality of life for Elders and their families. Sadly, these challenges often lead to family conflict regarding elder care, elder housing, economics, and other issues surrounding the family dynamic. Elder Mediation is a specialized field of mediation designed specifically to address the needs of families in this situation.

In this presentation, members of the Elder Mediation Network will:

- Provide information on Elder Mediation and how it differs from other types of mediation
- Review a scenario/fact pattern involving a family in conflict over issues regarding their elderly patriarch, and engage the audience in discussion and exploration into possible underlying issues and potential mediator approaches to assisting the family in resolving their conflict(s)
- Present and discuss information on the NM Guardianship Statute, 2018 Amendments, and other elderly care options (*CLEs available*)
- Answer all of your questions concerning this collaborative method of navigating through this highly critical landscape and provide information on how to get the specialized training in Elder Mediation

Whether you are an attorney, a mediator, or both, you will be well-served to know about the growing field of Elder Mediation, and you may find that you will want to add it to your repertoire of services. Join us for this engaging and dynamic presentation!

Presenter Biographies

Presenter Biographies

Shannon Driscoll is an attorney and graduate of the University of New Mexico School of Law. She has been mediating since 2007 and has been a mediation trainer and coach for almost as long. Driscoll is the chair of the State Bar Alternative Methods of Dispute Resolution Committee and serves as the vice president of the New Mexico Mediation Association Board of Directors. She currently works as a mediator for the New Mexico Workers' Compensation Administration.

Jon Lee is an Associate Ombuds at the University of New Mexico, a Certified Organizational Ombuds Practitioner (CO-OP®), and a graduate from the UNM School of Law. He is a volunteer mediator for the General Services Department/Risk Management ADR Bureau of the state of New Mexico and the Bernalillo County Metropolitan Court Mediation Division. Jon serves as vice-chair for the ABA Dispute Resolution Section Ombuds Committee and is a member of the ABA Ombuds Legislative Subcommittee. He is co-chair for the IOA Governmental Policy committee and a member of the IOA Communications and Mentoring committees.

Jeff Newcomer Miller is a mediator and trainer with over 17 years of experience in restorative justice and conflict resolution. Mr. Newcomer Miller holds a BA in Peace, Justice and Conflict Studies as well as a Masters of Arts in Theology and Ethics. He has worked with schools, colleges, the criminal justice system, non-profits, businesses, churches, and individuals in restorative justice and conflict resolution training, mediations and consultations. He serves as the regional coordinator for the Magistrate Court Mediation Program and a contractor with the Children's Court Mediation Program.

Lori L. Millet practices primarily estate planning, elder law, trusts, probate, guardianship and conservatorship law, and provides Guardian ad Litem services. Her firm is ABQ Elder Law, PC. Lori is an accredited attorney with the VA. She received her B.S. degree in medical technology from the University of Central Florida. She received her J.D. degree from UNM and also has an LL.M. (Master of Laws) degree in elder law through Stetson University College of Law. Lori is a member of the NM State Bar. She serves on several legal boards and committees, and is certified in general, as well as guardianship mediation.

Robert Rambo was trained as a community mediator in Philadelphia, by the Friends Conflict Resolution Program, and as a family mediator by the Good Shepard Neighborhood House Mediation Program in 1989. Law school followed and further mediation training with William F. Lincoln at the Conflict Resolution Research and Resource Institute in 1992. Robert has worked as a prosecutor for the Office of the District Attorney in Bernalillo County and a volunteer mediator for the Metro. Court Mediation Program. In 2003, Robert was hired as the mediator for the New Mexico Court of Appeals, which he did until retiring in 2017. He has presented at conferences for the American Bar Association and the New Mexico State Bar on mediation, negotiation and ethics.

Wallace Ford founded the Elder Mediation Network, which was incorporated on January 1, 2015. He received his BA at Texas Christian University in 1959; his M.Div. at Brite Theological Seminary in 1962; his Certificate de Theologie, at the University of Geneva in 1964; and his Ph.D. at the University of Denver in 1976. His career has involved responding to conflicts primarily involving faith communities

and non-profits. Wallace took mediation training in Boulder, CO; receiving an Associate Degree in 1994 and an Advanced Mediation Degree in 1995. Prior to retiring in 2000, his mediation work primarily involved volunteering for Metro. Court and church-related organizations. He thereafter took two advanced trainings focusing on family mediation and land use. He then initiated an informal conversation group of mediators to explore the application of mediation to elders and their families. The McCune Foundation Grant provided funding for Advanced Elder Mediation Training for mediators desiring to practice in this field. This mediation group evolved into the existing Elder Mediation Network.

Diane Grover has been a Mediator, Facilitator, Trainer and Communication Coach for 15 years with Lifedance Mediation Services. Clients include the City of Albuquerque and 13th Judicial District Court. She performed Restorative Justice mediation between juveniles and their victims for 11 years. Diane provides mediation training for UNM Law School, Anderson School of Management, UNM Continuing Education and for numerous private mediation trainers. She has mediated 850 cases. In 2015, Diane was voted one of five "Outstanding Mediators" in New Mexico Courts.

Sue (Hwasoon)Thorson is a Mediator/Senior EEO Investigator for the Federal Government and has been mediating since 2000. She is retired from Federal government and has mediation training in family/divorce, elder mediation, and extensive advanced mediation/conflict resolution training. She has nearly 2000 hours of mediation experience involving workplace/organizational disputes, family conflicts, and Metro. Court cases. She is a board member of mediation organizations as well as cultural and civil/human rights organized groups. Sue holds her MPA Degree from Pepperdine University, Malibu-Los Angeles, California.

Peter G. Merrill is the President and CEO of Construction Dispute Resolution Services, LLC. who is widely recognized as the largest exclusive provider of construction ADR in the USA as they have Construction ADR Specialists located in all 50 states, Washington DC and in several foreign countries. Mr. Merrill has served as a speaker and presenter for several trade associations and bar associations. He has had several articles on ADR topics published in various trade association and bar association magazines. Mr. Merrill serves on the Steering Committee of the New Mexico State Bar Association Dispute Resolution Committee. He is currently serving as the chairman of the American Bar Association (ABA) Arbitration Committee's Arbitration Rules Subcommittee. He has served on the Executive Board of the National Association of Home Builders for the past 9 years representing the State of New Mexico. CDRS website: constructiondisputes-cdrs.com. 505-473-7733.

Unauthorized/Unethical Practice of Law in ADR

The Un_____ Practice of Law

"I am not a/your lawyer, BUT..."

Not just a matter of _____, but a matter of _____.

Respecting the boundaries is important for your
_____ and your _____.

NEW MEXICO STATUTES ANNOTATED Rules Governing Legal Assistant Services Rule 20-102 (B).

Practice of law, insofar as court proceedings are concerned, includes: (1) _____ of parties before judicial or administrative bodies; (2) preparation of _____ and other papers, incident to actions and special proceedings; (3) management of such actions and proceedings; and (4) noncourt-related activities, such as: (a) giving _____ and _____; (b) rendering a service which requires use of _____ or _____; and (c) preparing instruments and contracts by which _____ are secured.

The State has an interest "in preventing legally untrained shysters who pose as attorneys from milking the public for pecuniary gain."

Hacker v. Arizona, 389 U.S. 151, 151-52 (1967)

The definition of "Practice of Law" is not a _____. The New Mexico Supreme Court ruled that each evaluation of the Unauthorized Practice of Law must be decided on the _____ and _____ of each individual case.



This is not legal advice, BUT...

Information vs. Advice

Good

You are giving information if you:

1. Explain _____.
2. Identify forms that must be filled-out.
3. Identify legal resources available to the parties.
4. Identify court _____ that definitely apply.
(What about might apply?)
5. Reality test using questions about _____ without _____.
6. Broad observations about the process.

Bad

You are giving legal advice if you:

1. Apply legal principles to the case.
2. _____ a specific outcome.
3. Direct, recommend, or urge a _____ toward resolving a legal issue.
4. Discuss _____ (requires interpretation).
5. Reality test with _____.
6. Evaluate the _____ of _____.

Be very careful with

“ _____

UPL doctrine limits the practice of law to licensed attorneys who have satisfied _____ and _____ requirements.

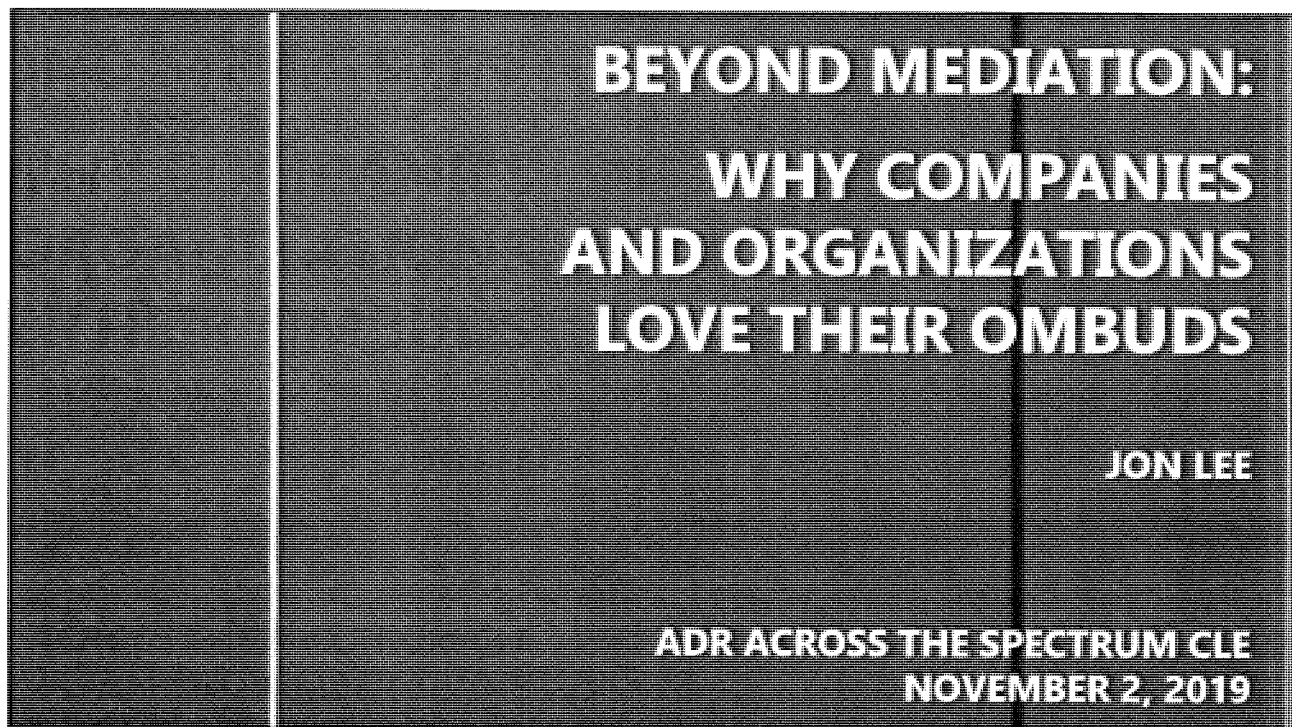
If your information can be _____ in a _____, you are _____!

Recommended Reading: Jacqueline Nolan-Haley, Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective, 7 Harv. Negot. L. Rev. 235 (2002)
Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/360



Dathan Weems Law Firm LLC

Morning Track A: Beyond Mediation: Why Companies and Organizations Love Their Ombuds



WHAT WE'LL BE COVERING TODAY

WHAT IS AN OMBUDS?

WHERE THINGS GO WRONG IN ORGANIZATIONS

THE ROLES & VALUE OF OMBUDS TO THEIR ORGANIZATIONS

HYPOTHETICAL: THE LAW FIRM OMBUDS

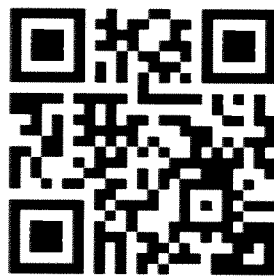
HOUSEKEEPING

CELL PHONES & ELECTRONICS

ASKING QUESTIONS

HOUSEKEEPING

DOWNLOAD HANDOUTS



<https://bit.ly/2q8Nd1J>

WHAT IS AN OMBUDS?

OMBUD

OMBUDSMAN

OMBUDS

OMBUDSPERSON

OMBUDSWOMAN

OMBUDS OFFICER

WHAT IS AN OMBUDS?

FORMAL DEFINITIONS

INTERNATIONAL OMBUDSMAN ASSOCIATION (IOA)

THREE TYPES:

The Classical Ombudsman “is typically appointed by a legislative body to represent the public with regards to the conduct of governmental agencies; they conduct formal investigations.”



Ohio

Bureau of Workers' Compensation



WHAT IS AN OMBUDS?

FORMAL DEFINITIONS

INTERNATIONAL OMBUDSMAN ASSOCIATION (IOA)

THREE TYPES:

The Advocate Ombudsman is defined as one who “advocates on behalf of a designated population by receiving complaints and offering services to provide relief, for example with patients in long-term care facilities and their families.”



Office of Children
and Family Services



WHAT IS AN OMBUDS?

FORMAL DEFINITIONS

INTERNATIONAL OMBUDSMAN ASSOCIATION (IOA)

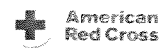
THREE TYPES:

The Organizational Ombudsman is defined as “a designated neutral who is appointed or employed by an organization to facilitate the informal resolution of concerns of employees, managers, students, and external clients of the organization.”

UNITED NATIONS



Los Alamos
NATIONAL LABORATORY



WHAT IS AN OMBUDS?

FORMAL DEFINITIONS

AMERICAN BAR ASSOCIATION (ABA)

Ombuds receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations.

WHAT IS AN OMBUDS?

EVOLUTION OF THE OMBUDS ROLE

EUROPEAN ORIGINS

- Medieval German Tribes
- King Charles XII: 1713 "Chancellor of Justice"
- "Justitieombudsman" codified in the 1809 Swedish Constitution

WHAT IS AN OMBUDS?

EARLY U.S. EFFORTS

- **University of Pennsylvania Law Review article by Professor Kenneth Culp Davis (1961)**

THE THREE MODELS:

- **1966: Eastern Montana College (Organizational)**
- **1969: Government of Hawaii (Classical)**
- **1972: Nursing Home Ombudsman Project (Advocate)**

WHAT IS AN OMBUDS?

EXPANSION TO CORPORATIONS

- **Estimated 200 corporate ombuds offices by 1987**
- **COA forms in 1985**

WHAT IS AN OMBUDS?

EXPANSION TO UNIVERSITIES

- **1966: Eastern Montana University**
- **1970: Commission on Campus Unrest following the Kent State Massacre**
- **Estimated 190 university ombuds offices by the 1970s**

WHAT IS AN OMBUDS?

EXPANSION IN THE FEDERAL GOVERNMENT

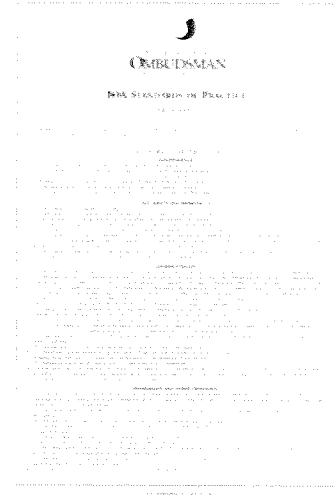
- **1972: Department of Health, Education, & Welfare**
- **1977: The Smithsonian Institute**
- **1978: Amendments to the Older Americans Act**
- **1987: U.S. Secret Service**
- **CFO forms in 1996**

WHAT IS AN OMBUDS?

GOING BACK TO THE ORGANIZATIONAL OMBUDS

IOA CODE OF ETHICS AND STANDARDS OF PRACTICE

- Confidentiality
- Independence
- Informality
- Neutrality



WHAT IS AN OMBUDS?

GOING BACK TO THE ORGANIZATIONAL OMBUDS



MISSION STATEMENT:

- To build a university community that manages conflict constructively
- To help people minimize the human and organizational costs of conflict
- To help people maximize the creative potential of transition, diversity, and transition

WHAT IS AN OMBUDS?

GOING BACK TO THE ORGANIZATIONAL OMBUDS

**COME WITH A(N) _____
LEAVE WITH A PLAN.**

**PROBLEM
QUESTION
ISSUE
GOAL
CONCERN**

**CONUNDRUM
IDEA
CONFLICT
THEORY
HUNCH**

**FEELING
DISPUTE
OPINION
CHALLENGE
NEED OR WANT**

WHAT IS AN OMBUDS?

GOING BACK TO THE ORGANIZATIONAL OMBUDS

SERVICES OFFERED:

- **INDIVIDUAL VISITS**
- **OMBUDS MEDIATIONS**
- **FACILITATION FOR DEPARTMENTS AND GROUPS**
- **POLICY & RESOURCE REFERRALS**
- **TRAININGS & PRESENTATIONS**
- **ANONYMOUS TREND REPORTING**

WHAT IS AN OMBUDS?

GOING BACK TO THE ORGANIZATIONAL OMBUDS



VISITS + MEDIATIONS = 100%

VISITS: _____ %

MEDIATIONS: _____ %

WHAT IS AN OMBUDS?

GOING BACK TO THE ORGANIZATIONAL OMBUDS



VISITS + MEDIATIONS = 100%

VISITS: 95 %

MEDIATIONS: 5 %

WHAT IS AN OMBUDS?

GOING BACK TO THE ORGANIZATIONAL OMBUDS



"I APPRECIATE HOW THE OMBUDS HELPED ME GET TO THE HEART OF MY PROBLEM."

"I FEEL BETTER, MORE PREPARED, FOCUSED, AND HAVE A GAME PLAN."

"BEING HEARD HAS HELPED ME SEPARATE WHAT'S IMPORTANT FROM WHAT'S NOT SO I KNOW WHERE BEST TO PUT MY ENERGY."

WHAT IS AN OMBUDS?

**THE CORE SERVICE OF THE
ORGANIZATIONAL OMBUDS IS THE
ONE-ON-ONE VISIT.**

WHAT IS AN OMBUDS?

WE'VE REACHED THE END OF THIS SECTION.

WHAT QUESTIONS DO YOU HAVE?

WHERE THINGS GO WRONG IN ORGANIZATIONS



WHAT IF UBER HAD AN OMBUDS?

WHERE THINGS GO WRONG IN ORGANIZATIONS

- **SIGNAL FAILURE/SIGNAL CEILING**
- **FAIRNESS & EMPATHY FAILURE**
- **NO WAY TO CHALLENGE EXISTING CONVENTIONS**
- **PERVERSE EFFECTS OF WELL-INTENTIONED CULTURAL VALUES**

WHERE THINGS GO WRONG IN ORGANIZATIONS

SIGNAL FAILURE/SIGNAL CEILING

CRITICAL MESSAGES DON'T MAKE IT TO THE PEOPLE THAT

- **ARE THE ONES THAT SHOULD BE HEARING THEM**
- **NEED TO HEAR THEM**
- **HAVE AUTHORITY TO INVESTIGATE AND ACT ACCORDINGLY**

WHERE THINGS GO WRONG IN ORGANIZATIONS

FAIRNESS & EMPATHY FAILURE

DECISIONS AND BEHAVIORS WHEN SOMEONE DOES NOT FEEL HEARD BY THE ORGANIZATION OR SOMEONE THAT SYMBOLIZES THE ORGANIZATION

- **WITHDRAWAL**
- **ESCALATION**
- **VIOLENCE**
- **LITIGATION**
- **RESIGNATION**
- **INSTIGATION**
- **RETALIATION**

WHERE THINGS GO WRONG IN ORGANIZATIONS

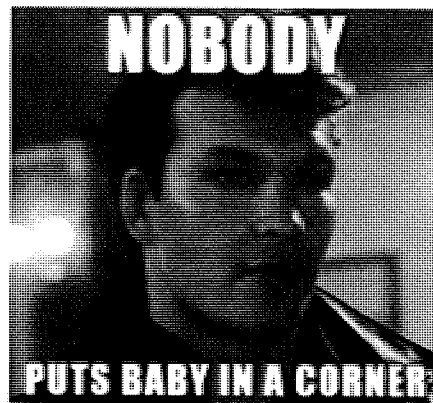
FAIRNESS & EMPATHY FAILURE

DECISIONS AND BEHAVIORS WHEN SOMEONE FEELS HEARD BY THE ORGANIZATION OR SOMEONE THAT SYMBOLIZES THE ORGANIZATION

- **THEY MOVE ON**
- **OFFER CONSTRUCTIVE CRITICISM**
- **TAKE OWNERSHIP**
- **BECOME INVESTED**
- **OFFER SUPPORT TO OTHERS**
- **VALUE THEIR WORK**
- **SEE THEMSELVES AS A PART OF A WHOLE**
- **DE-ESCALATION**

WHERE THINGS GO WRONG IN ORGANIZATIONS

NO WAY TO CHALLENGE EXISTING CONVENTIONS



WHERE THINGS GO WRONG IN ORGANIZATIONS

NO WAY TO CHALLENGE EXISTING CONVENTIONS

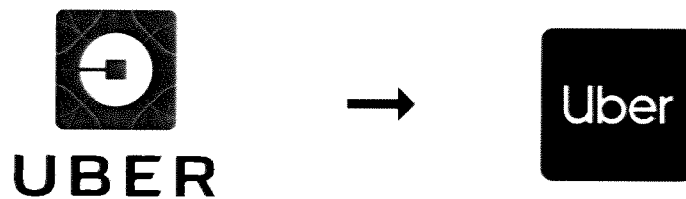


WHERE THINGS GO WRONG IN ORGANIZATIONS

PERVERSE EFFECTS OF WELL-INTENTIONED CULTURAL VALUES

"LET BUILDERS BUILD"	=	"DON'T ROCK THE BOAT"
"MAKE MAGIC"	=	"WINNING MATTERS MOST"
"BE OBSESSED"	=	"DO WHATEVER IT TAKES"

WHERE THINGS GO WRONG IN ORGANIZATIONS

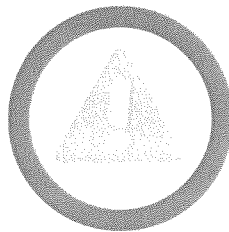


WHERE THINGS GO WRONG IN ORGANIZATIONS

WE'VE REACHED THE END OF THIS SECTION.

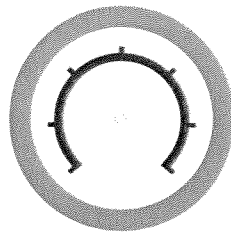
WHAT QUESTIONS DO YOU HAVE?

ROLES & VALUE OF OMBUDS TO THEIR ORGANIZATIONS



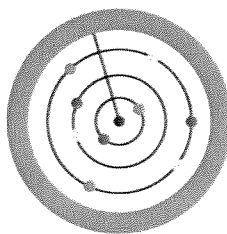
**THE ORGANIZATION'S EARLY
WARNING SYSTEM**

ROLES & VALUE OF OMBUDS TO THEIR ORGANIZATIONS



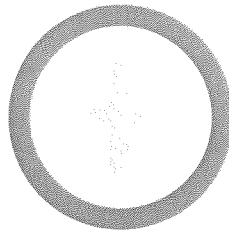
**THE ORGANIZATION'S
CONFLICT BAROMETER**

ROLES & VALUE OF OMBUDS TO THEIR ORGANIZATIONS



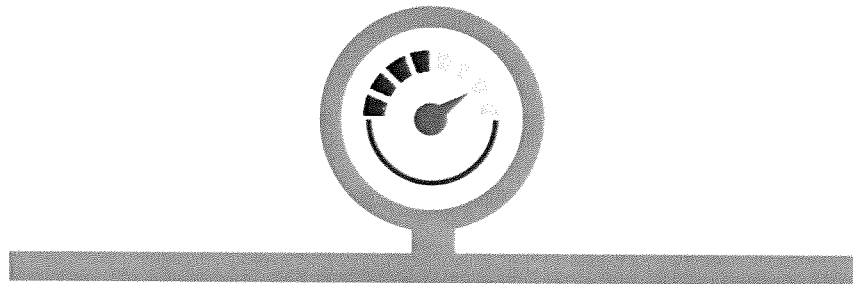
**THE RADAR OF THE
ORGANIZATION**

ROLES & VALUE OF OMBUDS TO THEIR ORGANIZATIONS



**PREVENT AND TREAT THE THINGS
THAT AFFECT THE HEALTH OF THE
ORGANIZATION**

ROLES & VALUE OF OMBUDS TO THEIR ORGANIZATIONS



**A PRESSURE VALVE FOR
THE ORGANIZATION**

ROLES & VALUE OF OMBUDS TO THEIR ORGANIZATIONS

WE'VE REACHED THE END OF THIS SECTION.

WHAT QUESTIONS DO YOU HAVE?

HYPOTHETICAL: THE LAW FIRM OMBUDS

WHY LAW FIRMS?

- **COMPLEX, MULTI-LAYERED ORGANIZATIONAL STRUCTURE**
- **LAWYERS: LONG HOURS, BILLABLE WORK QUOTAS, MUST PERFORM CONSISTENTLY AT HIGH STANDARDS, AROUND-THE-CLOCK AVAILABILITY TO CLIENTS AND PARTNERS, PRESSURES WITH TRYING TO MAKE PARTNER, DEMANDS OF LITIGATION PROCESS, STAFF MANAGEMENT, CLIENT MANAGEMENT**
- **PARTNERS: ALL OF THE ABOVE PLUS THE PRESSURES OF BRINGING ON NEW CLIENTS**

HYPOTHETICAL: THE LAW FIRM OMBUDS

WHY LAW FIRMS?

- **DEPARTMENTS/PRACTICE GROUPS LED BY SUCCESSFUL ATTORNEYS BUT MAY NOT HAVE LEADERSHIP OR MANAGEMENT EXPERTISE**
- **HR FOR STAFF ISSUES BUT NOT ATTORNEY ISSUES**
- **POWER DIFFERENTIALS (THE JUNIOR ATTORNEY/PARALEGAL PARADOX)**

HYPOTHETICAL: THE LAW FIRM OMBUDS

ATTORNEYS LIABILITY ASSURANCE SOCIETY (ALAS) RECOMMENDATION

- **INSURE OVER 60,000 ATTORNEYS AT OVER 200 FIRMS**

Law firms should adopt ombuds programs as an additional resource in recognition of the fact that some people are just not comfortable raising their concerns through traditional channels, such as the partner in charge of a matter.

HYPOTHETICAL: THE LAW FIRM OMBUDS

HOW OMBUDS ARE DIFFERENT FROM HR AND PARTNERS

- **HR & FIRM MANAGEMENT ARE EMPOWERED (AND IN SOME CASES COMPELLED) TO CONDUCT INVESTIGATIONS, MAKE DECISIONS, IMPOSE SANCTIONS, ETC.**
- **PARTNERS, AS OWNERS AND AGENTS OF THE FIRM, HAVE LIMITED ABILITY TO PROTECT THE CONFIDENTIALITY OF COMMUNICATION TO THEM**
- **CONFLICTS OF INTEREST WITH PARTNERS (AND POSSIBLY HR)**
- **OMBUDS CAN PROVIDE SERVICES AT ALL LEVELS AND STAGES**



**WHAT QUESTIONS DO YOU HAVE?
(THIS WILL BE THE LAST TIME I ASK)**

THANK YOU

QUESTIONS? COMMENTS.

jonlee@unm.edu

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This image shows a single page of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page, leaving small margins at the top and bottom. There is no handwriting or other markings on the paper.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

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Morning Track B: Restorative Justice: A Survey of Programs and Logistics



Restorative Justice in New

Mexico: Current Challenges and Possibilities for the Future

October 18, 2018

Jeff Newcomer Miller





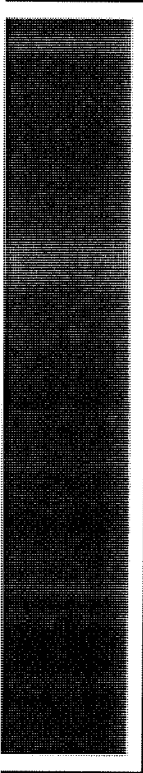
Questions for you?

- Who are you?
- A little something about yourself
- What about this topic interests you?



Basics....

- Harm/Needs
- Obligations
- Engagement
 - Values: Respect, Responsibility & Relationship



Principles of Restorative Justice

- A way of **thinking and responding to conflicts**, disputes, or offenses.
- Our **response to conflicts, disputes or offenses** is important.
- Is **not permissive**.
- Violations of rules and laws are also indicators of transgressions and **offenses against persons, relationships, and community**.



Principles Continued

- Addresses the **harms and needs** created by, and related to, conflicts, disputes and offenses.
- Holds **disputants and offenders accountable** to recognize harm, repair damages as much as possible, and creates a civil future.
- Empowers **victims, disputants, offenders** and their communities to assume central roles in recognizing harm, repairing damages, and creating a safe and civil future.

How is RD Different

Punitive Approach

- A School Rule is Broken
- Justice is focused on establishing guilt (WHO?)
- Accountability = Punishment
- Justice focused on offender & victim is ignored
- Rules and intent outweigh whether outcomes is positive/negative

Restorative Approach

- People and relationships are harmed
- Justice identifies needs and responsibilities of all impacted
- Accountability = understanding impact & repairing the harm
- Victim, offender, and school community have a role in justice
- Offender responsible for behavior and repairing the harm, working toward positive outcomes



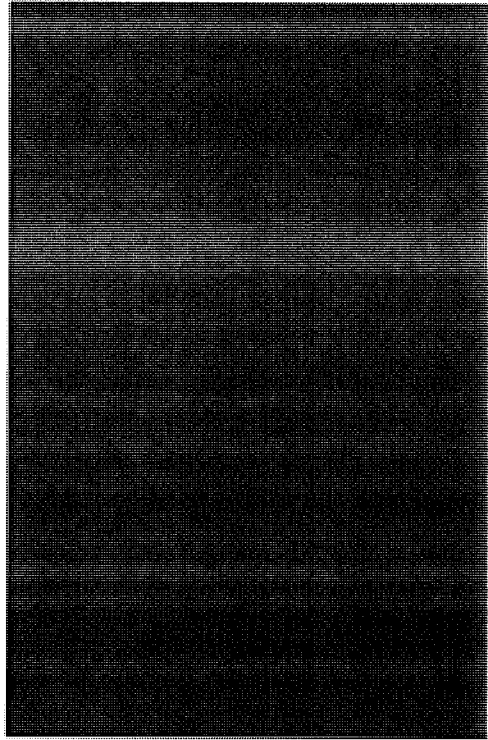
Applications

1. Victim Offender Mediation
2. Victim Impact Panels
3. Parent/Adolescent Mediation
4. Restorative Justice Circles
 1. **Circle Process**
 2. **Conferencing**
3. Family/Group Conference
5. Bullying Prevention
6. **Peer Mediation**
7. Informal Practices
8. Cases of severe violence



RJ in the Schools

- **Peer mediation** is problem solving by youth with youth. It is a process by which two or more students involved in a dispute meet in a private, safe and confidential setting to work out problems with the assistance of a trained student mediator.
- **Circles:** Talking Circle, sometimes called a Peacemaking Circle, uses a structural framework to build relationships and to address conflict within a community. But Talking Circles serve other purposes as well: They create safe spaces, build connections and offer teachers a unique means of formative assessment.
- **Conferencing:** A restorative conference is a structured meeting between offenders, victims and both parties' family and friends, in which they deal with the consequences of the crime or wrongdoing and decide how best to repair the harm. Neither a counseling nor a mediation process, conferencing is a victim-sensitive, straightforward problem-solving method that demonstrates how citizens can resolve their own problems when provided with a constructive forum to do so (O'Connell, Wachtel, & Wachtel, 1999).



RJ in Albuquerque



Current RJ Programs

Organization	Funding Source	Contact	Activities	Who is served
YDI	CYFD's JJAC	Jeanette Martinez Judy	Victim Offender Mediation	Pre-adjudicated youth
Outcomes	CYFD's JJS	Tonya Covington	Alternatives To violence Circles	Pre-adjudicated youth
APS	Grant USDOJ and USDOE	Pat Ruiloba	RJ and mediation Circles	All students in six Middle Schools
JDAI	Bernalillo County	Gerri Bachicha	Screening and assessment, RRED, alternatives to detention	All detained youth.
Peace through Education	JJAC	Emma Greene	RJ Circle Process for Diversion Youth	Pre-adjudicated youth



Colorado RJ

- Colorado's Statutes implement restorative justice through a declaration of legislative intent
 - in CRS 19-2-102 and
 - through provisions enacted pursuant to five bills; HB 07-1129, HB 08-1117, HB11-1032, HB13-1254 and HB15-1094.1
- Colorado Coordinating Council on Restorative Justice (*RJ Council*)



Colorado Continued...

- Restorative Practices in Schools
- RJ in Victims Services
- RJ in the Justice System
- RJ in Communities
- Restorative Mediation



Oakland Restorative Community Conferences

and San Francisco's "Make It Right"

- o Who is served: Youth under 18 who have arrest and not yet adjudicated.
- o What they do:
 - o Preparation: Coordinators hold multiple pre-conference meetings with responsible youth and then with person harmed and stakeholders
 - o Conference and accountability plan: offender is made aware of harm done and group agrees on plan for make amends.
 - o Follow-through: Coordinator stays connected with youth until all elements of plan complete.
 - o DA drops charges.



SNAPSHOT OF ALAMEDA COUNTY & SF PROGRAMS

- ❖ Funded primarily by 4 year Federal Grant – Alameda
- ❖ Funded from SF city budget – SF
- ❖ Serves 100 Alameda County youth per year
- ❖ Serves 25 San Francisco youth per year
- ❖ Diverts high-level misdemeanors/low-level felonies
- ❖ Pre-adjudicated Model
- ❖ Diversion from criminal justice system/alternative to school expulsion
- ❖ Surrogates used - Alameda
- ❖ Successful program completion results in no charges filed
- ❖ More than 95% of victims say they would recommend process - Alameda



Circle questions

- What do you know about RJ in New Mexico?
- Challenges of utilizing RJ in New Mexico
- Opportunities of utilizing RJ in New Mexico?

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Afternoon Track A: Elder Mediation Training, Values and Legal Components

ELDER MEDIATION ETHICS LEGAL OPTIONS GUARDIANSHIP AND CONSERVATORSHIP



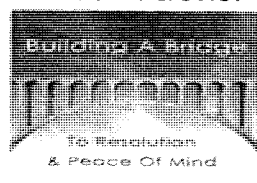
**Jocelyn M. Torres, Esq.
Robert Rambo, Esq.
& Lori L. Millet, Esq.
Fall, 2018**



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• JOCELYN M. TORRES, ELDER MEDIATION ETHICS

- Mediations involving elderly citizens and their families differ in many ways from those involving the general public.
- This presentation addresses key legal ethics issues that arise in elder law mediations.



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Elder Mediation

- Elder mediation requires specialized knowledge regarding elderly individuals, their families and needs.

E L D E R L Y

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NM Mediation Procedures Act

- The New Mexico Mediation Procedures Act (“MPA”) governs mediations conducted within its jurisdiction. NMSA 1978, §44-7B-1 through §44-7B-6.

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NM Mediations

- New Mexico mediations are conducted by attorneys and non-attorneys in several different venues throughout the State.



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Ethical Standards for Attorneys

- New Mexico Attorneys are governed by the **Rules of Professional Conduct.**

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- **Rules of Attorney Professional Conduct**
- **Rules 16-100 NMRA, et. seq.**, govern attorney responsibilities towards clients, courts, mediation, opposing counsel and parties, as well as the legal profession.

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Rules of Attorney Professional Conduct

- Rule 16-112 NMRA generally requires, with limited exceptions, **that a lawyer or firm formerly acting as a neutral not serve as a future advocate or employee.**

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Rules of Attorney Professional Conduct

- Rule 16-204 NMRA outlines the responsibilities of a lawyer serving as a third-party neutral, and requires that the attorney not mediate for clients; and explain the difference between the roles of an attorney and a third party neutral.

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Rules of Attorney Professional Conduct

- Pursuant to these Rules, attorneys must also be **competent** [16-101]; **diligent** [16-103]; **maintain client confidentiality** [16-106]; **avoid conflicts of interest** [16-107, 16-108];

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Rules of Attorney Professional Conduct

- pursue **meritorious claims** [16-301]; display **candor** towards the tribunal [16-303]; and be **fair** towards opposing parties and counsel [16-304].

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- NM Rule 16-504 – Professional independence of a lawyer
 - “C. Influence by nonclient. **A lawyer shall not permit a person** who recommends, employs or pays the lawyer to render legal services for another **to direct or regulate the lawyer’s professional judgment in rendering such legal services.**” [*emphasis added*].

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- **Regulation of Mediator Conduct**

- The Rules of Professional Conduct regulate licensed attorney mediators, in addition to other applicable mediation standards for attorney and non-attorney mediators.



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National Standards for Court Connected Mediation Programs

- Center for Dispute Settlement, Institute of Judicial Administration - §8.0 ETHICAL STANDARDS FOR MEDIATORS.
- Impartiality
- Conflict of Interest
- Advertising by Mediators
- Disclosure of Fees
- Confidentiality
- Role of Mediators in Settlement

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Model Standards of Conduct for Mediators,
August, 2005

- *American Bar Association & American Arbitration Association & Association for Conflict Resolution*
- **STANDARD I. SELF-DETERMINATION**
- **STANDARD II. IMPARTIALITY**
- **STANDARD III. CONFLICTS OF INTEREST**
- **STANDARD IV. COMPETENCE**
- **STANDARD V. CONFIDENTIALITY**
- **STANDARD VI. QUALITY OF THE PROCESS**
- **STANDARD VII. ADVERTISING AND SOLICITATION**
- **STANDARD VIII. FEES AND OTHER CHARGES**
- **STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE**

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- **Unauthorized Practice of Law**
 - **NMSA § 36-2-27. Practice without admission; contempt of court; foreign attorneys**

No person shall practice law in a court of this state, except a magistrate court, nor shall a person commence, conduct or defend an action or proceeding unless he has been granted a certificate of admission to the bar under the provisions of Chapter 36 NMSA 1978....

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**Unauthorized Practice of Law,
NMSA § 36-2-27.**

- “No person not licensed as provided in that chapter shall advertise or display any matter or writing whereby the impression may be gained that he is an attorney or counselor at law or hold himself out as an attorney or counselor at law, and all persons violating the provisions of that chapter shall be deemed guilty of contempt of the court in which the violation occurred....”

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**Unauthorized Practice of Law,
Rules 17B-001 through 17B-009 NMRA**

- Supreme Court rules govern proceedings concerning the unauthorized practice of law. See Rules 17B-001 NMRA, et. seq.

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•COURT MEDIATIONS

- Magistrate and Metropolitan Court mediations are conducted by volunteer mediators, including attorneys and non-attorneys. NMSA 1978, §§ 34-8A-10(B) & 35-6-8(B).
- Children's Court Mediations are conducted by attorneys and non-attorneys.

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•COURT MEDIATIONS

- District Court domestic relations mediations are conducted by "counselors", meaning a person who by training or experience is qualified to work with individuals in a mediation situation and to perform assessments. See §§ 40-12-1, et. seq.; and District Court LR2-504 NMRA.
- First Judicial District Court settlement conferences are conducted by attorneys trained as settlement referees. LR1-405 NMRA.

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•COURT MEDIATIONS

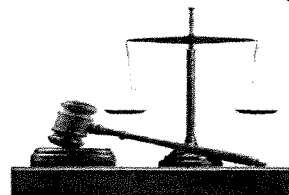
- Court of Appeals mediations are conducted by Staff Counsel, pursuant to Miscellaneous Order No. 01-42, filed August 19, 2009; Rule 12-313 NMRA; and “Mediation Conference Procedures,” which opt out of the MPA.



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CONCLUSION

- Mediators facilitate communication and settlement on behalf of mediation parties. Disputes involving the elderly require mediator expertise pertaining to elder dynamics and mediations. Legal and ethical mediation standards must be met in meeting these goals.



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- **ROBERT RAMBO, MEDIATING ALTERNATIVES TO GUARDIANSHIP**

- The stated goal of the Guardianship Act is to: "... permit the protected person to care for the protected person's own self commensurate with the protected person's ability to do so." NMSA 1978, Sec. 45-5-312(A)(2018).
- This standard is consistent with the mediation values of party autonomy and self-determination and should also apply to the alternatives to guardianship.



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- Capacity, Consent, Competency
- **Capacity to Mediate** – both a mediation ethics issue and a legal issue.



- **Informed consent** – The ability to understand and make decisions.

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- Capacity, Consent, Competency, continued
- **Competency** – A legal standard that includes both informed consent and capacity to contract.
- **Continuum/Spectrum of limitations** - From slightly impaired to completely incapacitated.

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- **Least Restrictive Means to Assist Elders**
- **A trusted family member or friend** - To help with finances, assist with healthcare appointments and make decisions. The downside to this approach involves the lack of monitoring and risk of elder neglect and exploitation.

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- **Least Restrictive Means, continued**
- **Supported decision making** – A team approach of trusted persons to assist the elder in financial and healthcare decision making.

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- **Planning Finances and Managing Assets**
- **Often requires the assistance of an elder law attorney.**



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- **Bank Accounts**

- **Add trusted person to a checking account to pay bills**
 - This is not really recommended, because the added person has the status of a co-owner on the account, which creates a risk for financial abuse and exploitation.

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- **Power of Attorney (POA) for financial decisions**
- A POA creates a fiduciary duty to the elder. A POA can include specific instructions for handling the finances such as requiring periodic accounting.



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- **Trusts**

- There are a wide variety of trust options that can address specific needs of the elder person for financial planning and for eventual transfer of assets. Consultation with an attorney is critical in choosing the appropriate trust for the circumstances.

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- **Trusts, continued**

- Revocable living trust
- Family trust
- Credit-shelter trust
- Supplemental needs trust
 - Irrevocable trust
 - A-B trust
 - Pour over trust

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- **Warning!!!!!!**

- Putting an elder's home in a trust, or transferring ownership of the home to a family member may seem to help the elder when Medicaid calculates the asset value/income in determining eligibility benefits.
- **However, Medicaid looks back 60 months (five years) on asset transfers, and can characterize the value of the asset transferred as available income when determining eligibility for benefits.**

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Deed Transfers

- **Joint Tenancy** - The holding of an estate or property jointly by two or more parties. if one owner dies, that share passes to the other owner(s).
- **Tenants in common** - A shared tenancy in which each holder has a distinct, separately transferable interest. Upon death, the share does not pass to the other owner(s) but goes into the deceased's estate.

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- **Deed Transfers, continued**

- **Ownership as: “husband and wife”** – In New Mexico this phrase is interpreted to mean tenants in common. These words do not create a joint tenancy, and the deceased’s share does not transfer to the spouse, it goes into the deceased’s estate.

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- **Deed Transfers, continued**

- **Adding co-owners on deeds can be dangerous** – This approach may expose the elder to the risk of exploitation. Consultation with an attorney is recommended to determine the appropriate deed for the particular circumstances.
- **Transfer on death deeds (TODD).** Consider the legal and practical implications of such deeds.

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- **Power of Attorney (POA)**

- There are 17 separate powers that a person can grant to the person chosen to act in their stead. The person chosen is referred to as the attorney-in-fact, or the agent.
- **Durable POA** – Begins immediately and may end when the person becomes incapacitated, or can last until the person dies.

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- **Power of Attorney (POA), continued**

- **Springing Power of Attorney**– Begins upon some pre-determined point such as incapacity.
- **Limiting Powers** – On the POA form, check the powers granted and cross out the ones not granted. (See POA form).

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- **Planning Healthcare**

- **Advance Healthcare Directive –**

- A form document authorized under the Uniform Health Care Decisions Act that allows a person to pre-determine the level of medical treatment and intervention permitted should that person become incapacitated.

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- **Planning Healthcare, continued**

- **Power of Attorney for Medical Decisions –**

- Also authorized under the Uniform Health Care Decisions Act, designates a proxy to make decisions for the incapacitated person. The proxy has the ethical duty to make decisions based on what the incapacitated person would want, not what the proxy or others may desire.

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- **Planning Healthcare, continued**
- **EMS DNR** – A form instructing emergency medical service personnel to **NOT** perform cardiopulmonary resuscitation (CPR) in the event of a medical emergency.

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- **Conclusion**
- When mediating cases involving elderly citizens and their families, mediators should be aware of estate planning options in addition to the legal formalities involved in guardianship and or conservatorship cases.

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- LORI MILLET, UPDATE ON NM GUARDIANSHIP AND CONSERVATORSHIP LAW
- The revised Guardianship statute expands the list of people entitled to notice and to participate in the proceeding.
NMSA 1978 § 45-5-303.

Elder Law
101



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NM Guardianship Statute, continued

- **Those entitled to notice include the following:**
- Spouse [unchanged] or domestic partner [this term fits the definition in the statute];
- Adult stepchildren whom the alleged incapacitated person (AIP) actively parented during the child's minor years AND have had a relationship with for two years immediately preceding the filing of the Petition;
- Person responsible for care, including a facility administrator;
- Attorney representing the AIP;

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NM Guardianship Statute, continued

- **Notice continued:**

- Rep payee for Social Security or VA fiduciary;
- Guardian/Conservator from another jurisdiction;
- Agents under powers of attorney;
- Anyone nominated as Guardian/Conservator by the alleged incapacitated person;
- The proposed Guardian/Conservator; and
- Anyone known to have: "routinely assisted the AIP with decision making during the six months immediately preceding the filing of the Petition."

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- **Conservators Must Post Bond**

- The amount of bond required for conservators is defined as follows: "amount of the aggregate capital value of the conservatorship estate, plus one year's estimated income, less the value of property deposited under an arrangement requiring a court order for its removal and real property the conservator lacks power to sell or convey without specific court authorization". NMSA 1978 § 45-5-411.

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- **Conservators Must Post Bond, continued**
 - Judges have discretion regarding the posting of bond.
 - Not all judges address bond in the same way
 - An Order to Secure or Waive Bond required in each case.

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- **Courts Prefer to Designate One Guardian/Conservator**
- Naming a Co-Guardian or Co-Conservator is not favored by courts:
 - Must have a tie breaker named in documents in event of disagreement;
 - There is still potential for future court proceedings.

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- Court Ordered Notice

- Reports:

- A separate Order will name those entitled to future notice and copies of reports.
- This list is not necessarily the same as parties originally entitled to notice; the parties and judge decide.
- Judges currently have discretion regarding this list.
- There is no iron clad rule at this time.

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- Limiting Contact

- The revised Guardianship Statute requires Court approval to limit contact with anyone.
 - This is a desired solution when an abuser or exploiter involved.
 - The parties must now proceed with the process provided in the Statute.

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- Medical Confidentiality

- Medical or diagnostic information must be kept confidential even though these cases are no longer sequestered.
 - Practically, this can be problematic because of the lack of sequestration.

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- Medical Confidentiality, continued

- Visitor and GAL reports do not go to everyone entitled to notice. These reports go to the Court and are “available” to the Petitioner and his counsel; the alleged incapacitated person; and anyone else ordered to receive it by the Court.

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- Medical Confidentiality, continued
 - Therefore, the reports may not be available to all parties entitled to notice who are part of the mediation.

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- Medical Confidentiality, continued
 - Practice tip – All reports require a Court Order permitting access to the mediator and mediation parties. Elder law mediators should ensure that this requirement is met, prior to receiving/reviewing highly confidential reports or distributing them to the mediation parties.

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• Caution!!!!

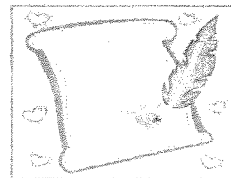
- Avoid solutions that include transfers to others.
 - Transfers (including to a trust) are likely to impact the elder's eligibility for Medicaid or some VA benefits.
 - Medicaid has a five year lookback.
 - VA now has a three year lookback.
 - Refer disputants to knowledgeable counsel.



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• Conclusion

- Avoid the unauthorized practice of law.
- Maximize the elder's ability to participate given his limitations.
 - Lighting
 - Frequent breaks
 - Comfortable seating
 - Wheelchair/walker access
 - Accommodate hearing loss
- Recommend legal representation when necessary.




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Afternoon Track B: Unique and Unusual ADR Practices



“Discourage litigation. Persuade
your neighbors to compromise
whenever you can. Point out to
them how the nominal winner is
often a real loser — in fees,
expenses, and waste of time.”

—Abraham Lincoln

American Bar Association
Just Resolution Article – May 2018 Issue
Binding Mediation – A Great ADR Process Who's Time Has Come
By: Peter G. Merrill

When I first heard of "Binding Mediation", I told myself that it was an oxymoron and couldn't possibly work in settling disputes. My first introduction to binding mediation was when I attended an "Advanced Mediation" program at the Straus Institute for Dispute Resolution at the Pepperdine University School of Law in 2004. Prior to attending that program, I thought that I had a full comprehension of all forms of ADR, however, binding mediation was a new term for me, so I decided to look into binding mediation to see if there was any validity to it being an effective form of ADR. I found that I needed to have an open mind to really appreciate the value of binding mediation. I had to put aside my belief that mediation would only be a successful ADR process if the parties reached a mutual settlement to their dispute.

Alternative Dispute Resolution (ADR), according to *Black's Law Dictionary - Second Pocket Edition* is: "A procedure for settling a dispute by means other than litigation such as arbitration, mediation or mini-trial". Any dispute resolution process other than litigation can be specified in a contract as long as it is not contrary to law. Two or more parties can write into their contract any method of settling disputes such as "any and all disputes shall be settled by flipping a coin – the party who wins two out of three flips is the prevailing party". If both parties understood that process, agreed to it and signed a contract specifying the flipping of a coin as the process to settle any and all disputes, that would be the process that they would be legally bound to follow. If the parties specify binding mediation in their contracts or agreements to settle all disputes, understood the process, and signed the contract, that process must be followed and should be enforced by the courts.

Binding Mediation is an ADR process that has been utilized to settle disputes for many years. At Pepperdine, I purchased a copy of John Cooley's book, *Arbitration Advocacy (Second Ed. 1997)*. It states: "Med-Arb is often confused with a relative newcomer to the ADR Process spectrum – "binding mediation". Insurance companies and plaintiffs' lawyers in search of finality in smaller-damage personal injury cases are turning to binding mediation routinely to avoid the disadvantages of arbitral or court adjudication – namely the substantial delay and costs associated with discovery, trial preparation, trial and possibly appeal." Until I read this, I was under the impression that arbitration was most likely the least expensive, most expeditious and simplest process to settle a dispute with guaranteed finality, as opposed to litigation. It brought to mind President Abraham Lincoln's quote "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time".

My company, Construction Dispute Resolution Services, LLC (CDRS) has grown to be widely recognized as the largest exclusive provider of construction ADR services in the USA as we have construction ADR Specialists located in all 50 states and Washington DC. I attribute much of our growth to our promoting and conducting the binding mediation process. Binding mediation offers an inexpensive, expeditious and simple process especially for remodeling and smaller construction projects. Having now been involved with the conducting of several binding mediation cases across the USA, in my opinion; binding mediation is the least expensive, simplest and fastest ADR methodology to settle a dispute with finality. It is difficult in a short article to cover all aspects of the binding mediation process, however, I will be pointing out the strengths, weaknesses, advantages and disadvantages, enforcement differences and other important information related to binding mediation as it compares with

arbitration and litigation, which are the two most recognized methods utilized to settle disputes that basically guarantee a final and binding resolution.

Arbitration is generally considered to be far less expensive, more expeditious and simpler than litigation, however, it can become more costly and drawn out timewise if the parties pursue many of the tenants of litigation such as extensive discovery, interrogatories, depositions, the issuance of subpoenas, exchanges of documents, use of multiple testifying experts, witnesses, etc. One of the few reasons that the Federal Arbitration Act, Section 10, specifies that an Arbitration Award may be vacated is: ".....refusing to hear evidence pertinent and material to the controversy.....". As you know, there is the Federal Arbitration Act, Uniform Arbitration Act, State Arbitration Acts, State Codes of Civil Procedure, etc. that specify rules and procedures that must be followed in conducting the arbitration process. There are no "Binding Mediation Acts" or any other rules and procedures that I am aware of that govern the binding mediation process. It is basically in the hands of the mediator and the parties to agree on the process to be followed in conducting a binding mediation. Many states have Mediation Acts, however, they generally relate only to the confidentiality of the mediation process and the documents and testimony exhibited and introduced during the mediation process.

Binding Mediation is a simple process that commences with a standard mediation process. Should the parties reach impasse on any issue(s) in dispute and not be able to resolve any issues through the standard mediation process, the mediator will be called upon to make a final and binding decision that will settle the unresolved disputed issues. It is important to recognize that the mediator is a mediator and not an arbitrator.

As I mentioned above, binding mediation is, in my opinion, the most expeditious ADR process that offers finality to a dispute. As an example: CDRS had a request from a contractor who indicated that he needed a decision on a dispute that he was having with a homeowner "As soon as Possible". The contractor was in Santa Fe, NM where CDRS has its office. That was on a Friday afternoon. I contacted a mediator in the area, got the parties to sign a Binding Mediation Agreement, which CDRS emailed to them and had them drop off the signed Agreement in the CDRS mailbox with a check to cover the expected time of the mediator. We held the binding mediation session that next Monday, which was one business day after the request had been made. The mediator was called on to render his decision which the parties accepted and then went on with their construction project. Should that dispute have been sent to court or even arbitration, it most likely would have caused that construction project to shut down pending the arbitration award or court decision.

If the parties have multiple issues being addressed through the binding mediation process, should the parties come to an agreement on any of those issues during the mediation session, a standard Mediation Settlement Agreement should be written to reflect the agreement between the parties and signed by the parties prior to the mediator continuing on with the binding mediation process. If the parties have come to an agreement on any of the issues in dispute and have not agreed to settle all disputed issues, the binding mediation process will require two different Settlement Agreements. (1) A standard Mediation Settlement Agreement should cover those issues that were agreed to by the parties which should be signed by the parties and (2) a Binding Mediation Settlement Agreement, written by the mediator, which will reflect the decision of the mediator on the remaining issues in dispute. Both the standard Mediation Settlement Agreement and the Binding Mediation Settlement Agreement should be signed by both parties, however, it is not required that either or both parties sign the Binding Mediation Settlement Agreement.

Should the parties have reached a resolution on any of the issues in dispute, it is important for the parties to first sign the Mediation Settlement Agreement that will reflect the issues in dispute that were settled by the parties prior to having the mediator render his/her (his) decision on the unresolved issues. If the mediator renders a decision on the unresolved issues prior to the parties signing the Mediation Settlement Agreement and one of the parties does not like the mediator's decision, which is most likely the case, and that unhappy party gets upset and walks out of the mediation session, then

there will be no signed Mediation Settlement Agreement on the issues that were agreed to by the parties. Always get a signed Mediation Agreement on the resolved issues prior to issuing a decision by the mediator on the unresolved issues which will be contained on the Binding Mediation Agreement.

As it is the responsibility of the mediator to render a decision on any unresolved issues, he/she (he) will be rendering his decision based on the information that was provided during the mediation session including information that was shared with the mediator during any private caucus meetings with either or both of the parties. Should the mediator have any questions of the parties that he would like answered prior to him rendering his decision, he is free to ask them of the parties. Unlike an arbitration award where the arbitrator can take up to 30 days to issue, the mediator is charged with rendering his decision at the conclusion of the mediation process to allow the parties to sign the Binding Mediation Settlement Agreement. He should not allow for post-mediation submittals or other information to be submitted to him after he has closed the mediation session. Some attorneys have a problem allowing the mediator to render a decision if normal discovery and submittals were not made prior to the mediation session.

There is one major disadvantage of utilizing binding mediation as opposed to standard mediation. I would like to point out that a mediator, in conducting a binding mediation, must have a different behavior or should handle the binding mediation differently than is customary in a standard mediation. In a standard evaluative mediation, the mediator shares his thoughts on the merits of the case with the parties, usually in a caucus setting. A "binding mediator" must be careful to not indicate to the parties what they are thinking on who is right or wrong, what might be a fair settlement offer, etc. as it might influence the parties into settling or not settling based on what they perceive might be the mediator's decision should the parties not settle their dispute. If a party perceives that the mediator is favoring their position on the dispute, they might not settle and will take their chances on the mediator deciding in their favor when you issue your decision. Conversely, if the mediator gives a party the feeling that the mediator is favoring the position of the other party, they might tend to try to settle the case prior to the mediator rendering his decision, which they perceive would most likely be favoring the other party. As I mentioned above, as a result of the limitations of the mediator in the discussions with the parties, it should be expected that the possibility of reaching a settlement through the mediation process is somewhat diminished. **The lower possibility of settlement by the parties during the Binding Mediation process is perhaps a small price to pay to avoid the more costly, lengthy and more complicated arbitration or litigation process.** Binding mediation does offer the parties a chance to settle the dispute but if settlement is not reached through mediation, the mediator will have a much better understanding of where the parties are in their positions related to the dispute.

Many contracts specify Med-Arb to settle disputes. If mediation is not successful, it will be followed by binding arbitration. CDRS does not allow the same person to be pre-selected to serve as both the mediator and arbitrator for the same reasons mentioned above related to serving as a binding mediator. We don't want the parties to hold back any information to the mediator which would most likely be the case if the mediator would be continuing on to be the arbitrator. Should the parties not reach a settlement in the mediation portion of the Med-Arb process, only with the agreement of both parties and with the agreement of the mediator will the mediator be allowed to continue on to serve as the arbitrator.

There are basically two primary ways that binding mediation can be utilized. It can be written into a contract or the parties may elect to utilize binding mediation should they come to an impasse at the conclusion of the mediation process. How many times have you been involved in a mediation where the parties come close but do not reach a settlement? Wouldn't it be great if the mediator could then be called upon to make a decision which would keep the dispute from continuing on with a more costly and lengthy arbitration or litigation to settle the dispute? Virtually every time that a CDRS ADR Specialist serves as a mediator, he has a copy of a Post-Mediation Binding Mediation Addendum ready to present to the parties and or their attorneys should they reach impasse. The parties have not been told of the

binding mediation option prior to the mediation as it is important that the parties not hold back on sharing all information with the mediator which will increase the chances for settlement during the mediation session. If the parties understand that the mediator will not be involved in rendering a decision on this dispute, they should be open to share anything and everything with the mediator which should add to the chance for success in the mediation process. Note that it is only with the agreement of both parties in the mediation and the mediator that the binding mediation process can be utilized at the end of a mediation session. Should the parties reach impasse, If the mediator does not feel comfortable in offering the binding mediation process and having the responsibility to render a final and binding decision, he should not offer it to the parties at the end of the mediation session.

When binding mediation is specified as the exclusive ADR process to settle all disputes in a contract, it must be utilized. As mentioned above, there is less chance of settling the dispute through the standard mediation process, however, the benefits of settling the dispute with one simple, inexpensive and uncomplicated process should outweigh the negative aspect of knowing that the parties might not come to an agreement during the mediation session and the mediator may be called upon to render a final and binding decision. Especially on smaller disputes, when there is virtually no discovery necessary, binding mediation should prove to be the best ADR method to settle a dispute.

With binding mediation, there is no need for a pre-mediation conference call to set up discovery as is customary with arbitration. Without any formal "Binding Mediation Rules", the mediator has the authority to allow limited discovery and other processes that he feels should be required for the binding mediation process. The mediator has the authority to allow whatever he feels is appropriate for the binding mediation process. Although it is not required, in binding mediation it is recommended that the parties submit a list of those participating in the binding mediation process to allow the mediator to do a conflicts check. In binding mediation, there are no requirements related to mediator disclosure that would not normally come into being for a normal mediator although it is recommended that the mediator not have any conflicts that might have influenced his binding mediation decision.

I mentioned earlier in this article that a mediator always should have the option to recommend that the mediation become a binding mediation should the parties reach impasse. The primary responsibility of the mediator is always to put his best efforts into having the parties reach a settlement during the mediation process. Only if the mediator feels that he can render an unbiased and fair decision should he recommend binding mediation to the parties at the end of an unsuccessful mediation. The mediator will most likely have already formed an opinion or might even have decided how he would settle the dispute by the end of the mediation session. If the parties are close to settlement, your recommendation of moving on to the binding mediation process may be able to save them a great deal of time, money and anguish. Should the parties have come close to a settlement, you may suggest to the parties that your decision as a binding mediator will be between the two last offers of each party, similar to a "high-low" or "bounded" arbitration. You will have a better acceptance to the binding mediation process if you indicate that you will stay within the last offers of the parties.

Although I mentioned that binding mediation generally is used on smaller cases, there is one notable case where binding mediation was specified in a contract of a rather large case, and the decision of the mediator was enforced by the California Appeals court. *Bowers v. Raymond J. Lucia*, 12 C.D.O.S 5876, 206 Cal. App 4th 724 (2012). It was a "Baseball Binding Mediation" case where the decision of the mediator was \$5,000,000.00 which was then upheld by the California Appeals Court. If you have time, you really should look at this case. It really strengthens the courts enforcement of ADR methodologies, specifically Baseball Binding Mediation.

The enforcement of a Binding Mediation Agreement is different than the enforcement of an arbitration award. As the Binding Mediation Settlement Agreement is a contract and is not subject to any of the provisions of any arbitration acts, should one of the parties not comply with the decision of the mediator, the Binding Mediation Settlement Agreement will need to be presented to the courts as a

breach of contract issue. Should one of the parties not comply with an arbitration award, a simple “Motion to Enforce” can be filed with the courts.

One of the advantages that an arbitrator has over a mediator who renders a final and binding decision is that an arbitrator has “arbitral immunity” similar to “judicial immunity” that is granted to judges. In all Binding Mediation Agreements or Binding Mediation Addendums, the mediator (and mediation provider such as AAA, JAMS, CDRS, etc.) should be granted “the same legal immunity that is afforded to arbitrators”. CDRS does not recommend that a person (and the mediation provider) serve as a mediator in a binding mediation without being afforded the same legal immunity as is granted to an arbitrator or judge. It is assumed that each ADR professional carries the appropriate insurance to cover any possible legal action against them, however, the granting of arbitral immunity in a contract calls attention to the parties that the mediator (and mediation provider) is basically not subject to any future court action should one or both of the parties be unhappy with the service of the mediator in the binding mediation process.

The selection of the proper ADR process to settle future disputes is always a difficult decision, especially on large projects where one specified ADR process might not be appropriate for all disputes. If it is a very large dispute, most likely a panel of three arbitrators would be the best method to settle the dispute. A lesser dispute might be best handled by a single arbitrator. If the dispute was of a minor nature, perhaps binding mediation would be best. CDRS has recommends on larger projects that there be multiple ADR processes specified in the construction contract such as: EXAMPLE: “All disputes under \$25,000.00 shall be settled through binding mediation. All disputes between \$25,000.00 and \$500,000.00 shall be settled through arbitration with a single arbitrator. All disputes over \$500,000.00 shall be settled through a three person arbitration panel.” Of course there is more to the contract language; however, this should give you an example of the use of multiple ADR processes that can be specified in a single construction contract. Regardless of the language that is specified, the process should yield a final and binding resolution to the dispute. Mediation alone may not yield a resolution to a dispute. As you know, standard mediation can always be specified prior to arbitration or litigation. Binding mediation encompasses both standard mediation and a similar decision making process that is generally exhibited by a single arbitrator. As mentioned above, **the mediator in a binding mediation is not an arbitrator.**

It is important that a Binding Mediation Agreement or Addendum state these very important provisions:

1. Should one or both of the parties neglect to sign the Binding Mediation Agreement, it shall be binding upon the parties by virtue of signing this Binding Mediation Agreement (Addendum, Contract, etc.).
2. The parties understand that the mediator may have been privy to private and confidential information that was provided to the mediator during the mediation process that might affect or be used in the decision of the mediator.
3. The mediator (and mediation provider) shall be granted the same legal immunity that is afforded to an arbitrator.

In recent years, California, in the California Code of Civil Procedures and Maryland in their Arbitration Rules have specified that much of the information that is usually considered confidential related to arbitration hearings be published on the website of the arbitrator or arbitration provider including the name and fees of the arbitrator, what percentage of the fees was paid by each party, the name of the non-consumer party, the results of the arbitration award including the amount of the claim and the amount of the award, other relief granted in the award, and other information that is generally considered confidential. In addition, there are specific requirements related to arbitrator disclosure that go well beyond what is usually required of an arbitrator including a requirement that the arbitrator issue a disclosure statement within 10 days of his appointment. CDRS has a special Binding Mediation Agreement that we use when parties, especially in California and Maryland, wish to change to binding

mediation to settle a dispute where their contract specifies binding arbitration to settle their disputes. Most states have "Mediation Confidentiality Acts" or similar acts or regulations which should afford almost the same degree of confidentiality that you would expect through the arbitration process.

Binding mediation may not be the best methodology to settle all disputes; however it certainly has its place in the ADR industry and should prove to be the least expensive, most expeditious and simplest ADR process to settle a dispute. If you have an open mind and consider the nature of possible disputes, the size of the potential disputes, the time and energy that might be required in settling disputes, binding mediation might be the best ADR methodology to be specified in an agreement or contract to settle future disputes. Please also consider offering binding mediation should the parties in a mediation come to impasse. Binding mediation works.

Article – 3834 words

Peter G. Merrill

Peter G Merrill is the President and CEO of Construction Dispute Resolution Services, LLC. who is widely recognized as the largest exclusive provider of construction ADR in the USA as they have Construction ADR Specialists located in all 50 states, Washington DC and in several foreign countries. Mr. Merrill serves on the Steering Committee of the New Mexico State Bar Association Dispute Resolution Committee and chairs the Arbitration Subcommittee. He is currently serving as the chairman of the ABA Arbitration Committee's Arbitration Rules Subcommittee. He also serves on the Executive Board of the National Association of Home Builders. CDRS website: constructiondisputes-cdrs.com.

Track B: Binding Mediation Agreement



SPECIALIZING IN MEDIATION & ARBITRATION & DISPUTE REVIEW BOARDS

PO BOX 8029
Santa Fe, NM 87504

CONSTRUCTION DISPUTE RESOLUTION SERVICES, LLC

New Mexico: 505-473-7733 Toll Free: 888-930-0011
Fax Phone: 505-474-9061 Email: cdrs@cdrsllc.com
Website: www.constructiondisputes-cdrs.com

BINDING MEDIATION AGREEMENT

REVISED JUNE 1, 2018

1. If a dispute develops between the Parties to this agreement and it cannot be settled between them, the Parties agree to submit to Binding Mediation to be conducted by and according to the Rules and Procedures of Construction Dispute Resolution Services, LLC, of Santa Fe, New Mexico.
2. The process will begin with standard mediation where the Parties shall make every effort to resolve disputed items with the assistance and direction of the mediator(s).
3. If the mediation efforts conclude without a total settlement resolution on all disputed items, a Settlement Agreement will be written to reflect the successfully resolved items, and signed by all Parties. The Mediator(s) shall then render a decision on any of the disputed items that could not be resolved by the clients during the mediation. If a Settlement Agreement exists, the decision(s) of the mediator(s) shall be written on a new Settlement Agreement and shall be signed by all Parties. If no Settlement Agreement exists, a new Settlement Agreement shall be written that reflects the decision of the Mediator(s) and shall be signed by all Parties. Both Settlement Agreements shall be final and binding on the parties. **If any of the Parties fails to sign that Settlement Agreement, that Settlement Agreement shall be binding on the Parties as a result of signing this Binding Mediation Agreement.**
4. The Parties acknowledge that the Mediator(s) will be privy to certain personal, private, and confidential information that is volunteered by the Parties during the mediation session. The decision(s) of the mediator may be due in part to this information.
5. The Parties agree that the mediator and CDRS shall be afforded the same immunity that is afforded to an arbitrator.
6. The decision of the mediator shall be a non-reasoned decision unless the mediator and parties all agree that the decision of the mediator should be a fully reasoned decision.
7. Unless a written agreement specifies the allocation of the filing fees, dispute resolution fees and related costs, the Parties shall share the cost of the binding mediation process equally although personal attorneys and witnesses or professional experts and other specific expenses are the direct responsibility of each Party.

ACCEPTANCE

By: _____
Signature – Party

Date: _____

Print Name

Print Company Name

By: _____
Signature – Party

Date: _____

Print Name

Print Company Name

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Track B: Binding Mediation Addendum



PO BOX 8029
Santa Fe, NM 87504

CONSTRUCTION DISPUTE RESOLUTION SERVICES, LLC

SPECIALIZING IN MEDIATION & ARBITRATION & DISPUTE REVIEW BOARDS

New Mexico: 505-473-7733 Toll Free: 888-930-0011
Fax Phone: 505-474-9061 Email: cdrs@cdrsllc.com
Website: www.constructiondisputes-cdrs.com

BINDING MEDIATION ADDENDUM

POST-MEDIATION
REVISED 01/01/18

The provisions of this addendum shall supersede all applicable provisions of the Agreement to Mediate.

1. The Parties have made every effort to resolve the disputed items with the assistance and direction of the mediator.
2. As the mediation efforts have concluded without a total settlement resolution on all disputed items, a Settlement Agreement was written to reflect the successfully resolved items and signed by the Parties. The Mediator shall now be authorized to render a final and binding decision on any of the disputed items or issues that could not be resolved by the Parties during the mediation. A separate Settlement Agreement shall be written to reflect the Mediators' decision(s) and it shall then be accepted and signed by the Parties. If any or both of the Parties fail to sign that Settlement Agreement, the terms of that Settlement Agreement shall be binding upon the Parties as a result of signing this Binding Mediation Addendum.
3. The Parties acknowledge that the Mediator(s) may have been privy to certain personal, private, and confidential information that is volunteered by the Parties during the mediation session. The Mediator's decision(s) may be due in part to this information.
4. The Parties realize that the Binding Mediation Process is different than the Binding Arbitration Process. The Parties also realize that the enforcement of the Binding Mediation Settlement Agreement is different than the enforcement of an Arbitration Award.
5. The Parties understand that the Mediator and CDRS will be granted the same legal immunity as is granted an arbitrator.

ACCEPTANCE

By: _____	Date: _____
Signature	
_____	_____
Print Name	Print Company Name
By: _____	Date: _____
Signature	
_____	_____
Print Name	Print Company Name
By: _____	Date: _____
Signature	
_____	_____
Print Name	Print Company Name

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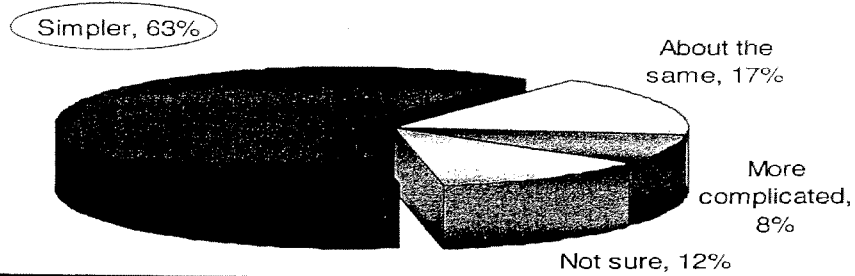
Track B: Arbitration Pie Chart

Arbitration: Simpler, Cheaper, and Faster Than Litigation

Perceptions: Faster, Simpler, Cheaper

Q455: Do you think the arbitration was simpler than going to court or was it more complicated?

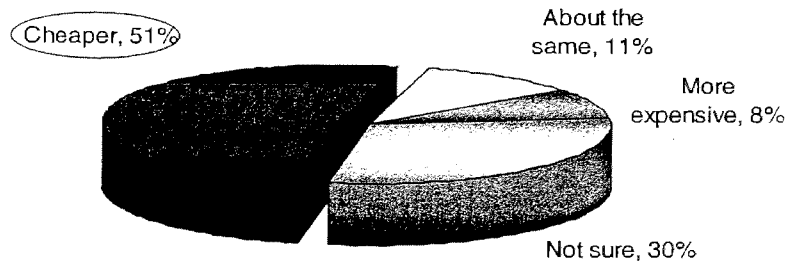
Base: All respondents (n=609 adults)



Perceptions: Faster, Simpler, Cheaper

Q445: Thinking about the total costs (including filing fees and lawyers' fees), do you think arbitration was cheaper or more expensive than going to court?

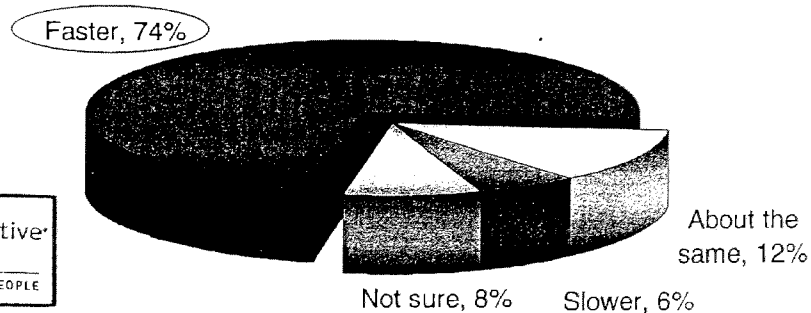
Base: All respondents (n=609 adults)



Perceptions: Faster, Simpler, Cheaper

Q460: Do you think arbitration was faster or slower than going to court?

Base: All respondents (n=609 adults)



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Track B: Mediator's Med-Arb Addendum



Case # M-

SPECIALIZING IN MEDIATION & ARBITRATION & DISPUTE REVIEW BOARDS

PO BOX 8029
Santa Fe, NM 87504

CONSTRUCTION DISPUTE RESOLUTION SERVICES, LLC

New Mexico: 505-473-7733 Toll Free: 888-930-0011
Fax Phone: 505-474-9061 Email: cdrs@cdrsllc.com
Website: www.constructiondisputes-cdrs.com

MEDIATOR'S MED-ARB ADDENDUM

The provisions of this addendum shall supercede all applicable provisions of the Agreement to Mediate and the Med-Arb Addendum.

1. The Parties acknowledge that they have made every effort to resolve the disputed items during the mediation session with the assistance and direction of the Mediator.
2. The mediation session has concluded without a total settlement resolution on all disputed items. A Mediation Settlement Agreement has been written to reflect the successfully resolved items, (if applicable) and signed by the Parties. Although the Parties may or may not have previously selected an Arbitrator to handle the unresolved issues at the end of the mediation, the Parties do hereby request that the Mediator be empowered to continue on as the arbitrator as the Parties have full confidence in the Mediator that he/she will issue an award that will be both fair and equitable to the Parties and the arbitration process should be less costly due to the limited discovery that the Mediator/Arbitrator will require to render his/her award.
3. The Parties acknowledge that with the Mediator serving as both the Mediator and the Arbitrator, the Mediator/Arbitrator may have been privy to certain personal, private, and confidential information that was volunteered by the Parties during the mediation session. The Mediators'/Arbitrators' decisions on the unresolved items may be due in part to this information.
4. The Arbitrator's award will be issued according to the CDRS Arbitration Rules and Procedures and is subject to be appealed or vacated only according to the Federal Arbitration Act and the CDRS Arbitration Rules.
5. The parties acknowledge that the mediator, serving as the arbitrator is afforded the same immunity as is normally afforded to an arbitrator.

ACCEPTANCE

CLIENTS:

By: _____ Date: _____
Signature

Print Name Print Company Name

By: _____ Date: _____
Signature

Print Name Print Company Name

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Track B: Graduated Processes

Contact Language

Binding Mediation – Arbitration (Graduated Processes)

Mindful of the high cost of litigation, not only in dollars, but also in time and energy, the parties intend to and do hereby establish the following out-of-court alternate dispute resolution procedures to be followed in the event any controversy or dispute should arise out of, or relating to this contract or relating to any change orders or other changes or addendums to this contract.

- Any dispute less than \$ _____ in value shall be subject to binding mediation as conducted by and according to the Rules and Procedures of Construction Dispute Resolution Services, LLC where the parties acknowledge that if there is one or more disputed items that remain unresolved at the end of the mediation, the mediator will render a final and binding decision on those unresolved items and his/her decision will be binding on the parties. A Mediation Settlement Agreement shall be written to reflect the terms and conditions as agreed to by the parties and a separate Mediation Settlement Agreement shall be written to reflect the decisions of the mediator in reference to the unresolved issues after the mediation session has been completed. Those Mediation Settlement Agreements shall be enforceable in any court of competent jurisdiction.
- Any dispute over \$ _____ but less than \$ _____ in value shall be subject to mediation followed by binding arbitration by a single arbitrator as conducted by and according to the Rules and Procedures of Construction Dispute Resolution Services, LLC. A Mediation Settlement Agreement shall be written to reflect the terms and conditions as agreed to by the parties during the mediation session. After the mediation session has concluded, the parties shall select an arbitrator according to the Arbitration Rules and Procedures of Construction Dispute Resolution Services, LLC. The arbitration shall be conducted by and according to the Rules and Procedures of Construction Dispute Resolution Services, LLC. The Arbitration Award shall be binding on the parties and shall be enforceable in any court of competent jurisdiction.
- Any dispute over \$ _____ in value shall be subject to mediation followed by binding arbitration by three arbitrators as conducted by and according to the Rules and Procedures of Construction Dispute Resolution Services, LLC. A Mediation Settlement Agreement shall be written to reflect the terms and conditions as agreed to by the parties during the mediation session. After the mediation session has concluded, the parties shall each select one arbitrator from the CDRS National Panel of Construction ADR Specialists. The two selected arbitrators shall mutually select a third arbitrator from the CDRS National Panel of Construction ADR Specialists who shall serve as the Chief Arbitrator. The arbitration shall be conducted by and according to the Rules and Procedures of Construction Dispute Resolution Services, LLC. The Arbitration Award shall be binding on the parties and shall be enforceable in any court of competent jurisdiction.
- Any dispute whose value can not be determined or can not be agreed upon by the parties shall be subject to either binding mediation, mediation-arbitration – single arbitrator or mediation-arbitration – three arbitrators as mutually agreed to by the parties. If the parties can not come to an agreement as to the process to follow to settle the dispute, the dispute shall be settled using the mediation-arbitration process as conducted by a single mediator and a single arbitrator. Whichever process is utilized, the process shall be conducted by and according to the Rules and Procedures of Construction Dispute Resolution Services, LLC. The Mediation Settlement Agreement and/or Arbitration Award shall be enforceable in any court of competent jurisdiction.

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ADR Panel Discussion

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