Association of Attorney-Mediators

AAM-*a*-gram

June 2012

"...to support and promote professional and qualified attorney-mediators who are committed to the proposition that the existing dispute resolution system can fulfill its intended purpose through the use of mediation."

Association of Attorney-Mediators

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As the twenty-first president of the Association of Attorney-Mediators my term of office ended just as it had begun, that is with "the best AAM Annual Meeting ever!".

Thanks to the hard work and dedication of its members and local chapters, its Officers and members of the Board of Directors, and its Executive Director (the indefatigable Brenda Rachuig), my presidency in AAM's twenty-first year was equally full of superlatives, among which was the development of a new and improved website making registration for AAM conferences, search for mediators, membership applications and membership renewals as easy as a few clicks on the computer. As a result, either directly or indirectly, of the new website, membership has grown dramatically nationwide so that we now have members in twenty states.

Not only have we grown in numbers, we are also growing in inclusiveness and diversity. No longer are we a group of (mostly) male mediators, but as attendance at the Chicago Annual Meeting demonstrated, we are attracting more women mediators nationwide; no longer are our areas of practice and experience limited to business and commercial cases, but we have expanded into probate, family law, public policy, labor and employment and a myriad of other fields of interest and experience; no longer are we a homogeneous group of mediators with one level of experience, but we are an assemblage of like-minded professional mediators who have mediated from five to five thousand cases. In other words, we are not remaining stodgy and static, but instead are vibrant, growing and dynamic.

I wish I could take credit for such dynamism, but I can't. The Association of Attorney-Mediators was born twenty-one years ago of the genius of Steve Brutsche' and his small but enthusiastic band of believers. It has grown on the shoulders of hundreds like them, and although it has a ways to go, (we still need to attract some younger, more gender, ethic and racially diverse members for example) I take great pride in believing that I played some small part in it's growth and its progress, and as one attendee pointed out in his/her evaluation of the meeting in Chicago, I believe that one of the most positive aspects going forward with AAM will be "watching Steve's child grow up and move on".

~ Suzanne Mann Duvall

Now, What Are You Going To Do?

My father asked me that question after I turned 21 and graduated from college. I thought it wonderfully ironic that AAM celebrated its 21st birthday in what was formerly a "speak-easy" run by Al Capone back during Prohibition. What a wonderful experience the AAM Annual Meeting in Chicago was! Thanks so much to the speakers who gave their time and talent, and also to our Chicago contingency.

So, what are we as an organization going to do now that we are of majority? As the incoming President of this organization, I, too, went back over the past issues and remarks of my predecessors. I also perused notes from the AAM Strategic Planning Meeting held in Santa Fe in March, 2007. That was the last session devoted to strategic planning. The AAM Board will have another planning session on Saturday, November 10, 2012, in conjunction with our Advanced Attorney-Mediator Training in Austin, Texas. My review of these materials reminds me that I follow some very wonderful people in this office, and I hope I am up to the task. I will do the very best that I can.

But what shall we do now?
I suggest that we focus on just three very attainable goals, and that we do them well:

a) ***Continue to encourage growth and diversity.*** We begin this process by having speakers and Board members who are a little younger than before and who are more diverse both demographically and geographically. Just look at what the Illinois Chapter has added to our organization! We are looking at the prospect of similar growth in Florida and Indiana, just to name a couple of new areas. I want us to continue the idea of having the "New Masters" speak at our CLE programs about what is relevant to their age group. I can assure all that this Board will be finely attuned to thoughts of growth and diversity.

b) ***Continue to be relevant.*** We begin this process by listening to our membership. We plan future educational opportunities largely based on evaluations of past programs and suggestions for the future. We must continue the marketing segments and assist others in building their practices. We must continually look for opportunities to serve our constituents with new and improved dispute resolution alternatives. A case can be made that court-annexed mediation has peaked. I know it has in Texas. In what other areas may we be of service? Health care? Elder care? Here, we truly need participation from all of our members and the infusion of new and creative thoughts and ideas.

c) ***Continue to be good stewards.*** We are so fortunate to have the gift of effective dispute resolution. We are actually helpful, and make a difference in the lives of real people. Ever think about that? We must continue to protect and nurture our practice and do everything we can to foster and encourage the growth and use of what we do. That means being ever diligent in monitoring proposed legislation that might, however well-intended, be harmful to the dispute resolution community. It also means practicing our profession in *the grand manner* and in recognition of the high ethical standards we place on ourselves. Our behavior is our bond.

And, so, let's set out on the next leg of our voyage with renewed enthusiasm and respect for what we do and who we are. Let's work together on attaining the three goals. Much like the kid leaving home and school, the future is boundless and we are only limited by the level of effort and enthusiasm we devote to the task.

Bill Lemons

AAM Welcomes New Members

We are pleased to announce the following new AAM members since the beginning of 2012:

Bobby Dallas, *Ridgeland, MS*
Gerald DeNotto, *Mount Prospect, IL*
John Franco, *San Antonio, TX*
Christopher Gomlicker, *Little Rock, AR*
Ronald Grais, *Chicago, IL*
A. Chris Heinrichs, *San Antonio, TX*
David Henry, *Orlando, FL*
Michael Kinard, *Magnolia, AR*
Lawrence Langer, *Palm Beach Gardens, FL*
Bonnie Leggat Hagan, *Marshall, TX*
Ann Lockwood, *Austin, TX*
Mark Mayer, *Chicago, IL*
Adam McGough, *Dallas, TX*
Craig McKee, *Terre Haute, IN*
Scott McLain, *McAllen, TX*
Charlie McNabb, *El Paso, TX*
D. Pat Moloney, *Lexington, KY*
C. Mike Moore, *Dallas, TX*
Terry Moritz, *Chicago, IL*
Francis Neuner, *St. Louis, MO*
Kevin O'Dwyer, *Little Rock, AR*
Michael Orfinger, *Daytona Beach, FL*
Timothy Patula, *Chicago, IL*
Gale "Pete" Peterson, *San Antonio, TX*
George Sang, *Chicago, IL*
John Schickel, *Jacksonville, FL*
Mark Snow, *Libertyville, IL*
Philip Stahl, *Chicago, IL*
Mecca Thompson, *Chicago, IL*
Bruce Waugh, *Overland Park, KS*
Shannon Yeaton, *Port Barrington, IL*
Jay Zeleskey, *Dallas, TX*

We welcome you to the **Association of Attorney-Mediators** and look forward to your active participation within this organization! Please let an officer of a local chapter or a member of the national board of AAM know what AAM can do for you and how you would like to become involved in AAM's activities.

Welcome to the East Texas Chapter

The East Texas Chapter was officially organized in May of 2011 (and we neglected to officially welcome them in the December, 2011 edition – oops!). This chapter roster currently shows thirteen members – some new, some returning, and some existing AAM members. We welcome you to the AAM "family" of chapters and look forward to a long relationship with you.

Special Thanks!

We want to extend a special thank you to the outgoing AAM National Board Members, **Mike Schless** and **Alice O'Neill**. Thank you for volunteering your time and energy to the AAM Board!

Welcome New AAM Board Members

New Board of Directors were voted in at the AAM Annual Meeting on May 5, 2012. Welcome to **Gloria Portela** of Houston, Texas and **Elizabeth Woodruff** of Jackson, Mississippi.

AAM Chapter News

Each chapter has a web page on the AAM National website with an easily accessible chapter directory. Go to: www.attorney-mediators.org and click on Chapters – no login necessary. Have Chapter news to share? Send it in to aam@attorney-mediators.org. After local board approval, we can place it on the Chapter page. Want to start a chapter? Call or email the AAM National Office – we can email you the information.

AAM Advanced Training in Chicago – Really Great Show!

The AAM Advanced Attorney-Mediator Training in Chicago on May 4 & 5, 2012 was such a rewarding experience for everyone! The Millennium Knickerbocker Hotel was a wonderful, historic venue and it was quite fun to learn the stories of our penthouse level meeting room and the "hidden" stairway in the wall, intended to hide Al Capone from the officials This training offered something for everyone, with outstanding speakers and panelists. A very special thank you to **Jeff Kilgore, Katheryn Dutenhaver, Kim Kirn, Jim Young, Sid Davis, Beverly Tarr, Trey Bergman, Honorable Michael Getty, Frosty Pipal, Kent Lawrence, Elizabeth Simon, Tracy Gilroy, Dean Kilgore, Stephen Glickman, Irving Levinson, Kevin Cloutier, Ross Stoddard, Michael Leech, Stuart Robbins, Ron Wiesenthal, John Trimble and Bill Lemons**. Whew! Quite a line-up! And all were just splendid to have on the program.

Friday night's social time was especially fun as we ate "birthday" cupcakes to commemorate the 21st birthday of AAM. Jazz artist, **Erin McDougald**, and her ensemble entertained us during this time together. Thanks to **Jeff Abrams,** of Houston, for pulling the jazz entertainment together – both Friday evening and Saturday at the AAM private concert.

We, once again, followed up the Annual Meeting with a special marketing segment moderated by **Bill Lemons, Jeff Kilgore** and **Trey Bergman**. The attendance at this segment increases each time it is offered. Such a great sharing of ideas in the room!

A special thank you to the Illinois Chapter for hosting our "dinner with a group" on Friday evening and other special events on Saturday – including John Hancock Tower, walking downtown tour, private jazz concert. This was a great way to see the city, get to know other AAM members and enjoy wonderful food with reservations at area restaurants, just waiting for us to arrive. Thank you to **Dennis Passis** for taking on the responsibility of organizing this great feat!

Evaluations show the number one reason to attend an AAM function is the fellowship time with other mediators from around the country and what we learn from each other. We hope to see you at a future event! If you have never attended, give it a try!

Illinois Chapter Recognized – Again!

The Illinois Chapter was recognized at the AAM Annual Meeting 2012 for the *"Most Growth in a Chapter"*. The Illinois Chapter currently boasts of sixty-seven members and they continue to grow! This is their second year to receive this accolade. Way to go!

AAM Texas Legislative Fund

By law, the State Bar ADR Section and local bar sections cannot engage in lobbying activities. We will work closely with our lobbyist during the upcoming session to identify any actions which may impact mediation. You are welcomed and encouraged to notify us of any matters of interest. AAM membership dues cannot be used for lobbying efforts. Lobbying efforts must be supported wholly by voluntary contributions. Texas members were recently sent a survey to give guidance to the Legislative Committee for the upcoming legislative session. Texas members may complete the survey at http://attorneymediator.polldaddy.com/s/texas-legislative-survey?tli=1926677 before July 31, 2012.

Donations to the AAM Texas Legislative Fund may be made on the website at www.attorney-mediators.org*;* ***Legislative Fund – Texas*** *by check or credit card. Checks should be mailed to the AAM national office at P. O. Box 741955, Dallas, Texas 75374-1955 and marked "Lobby Fund".*

Brutsche´ Award Recipient 2012
Peter S. Chantilis

Peter S. Chantilis

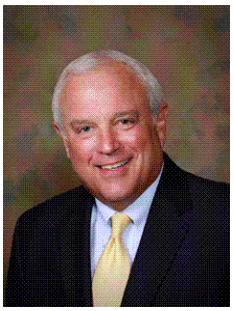
The Brutche´ Award is a very special and prestigious award ***"Given to the person(s) personifying the principles of service and commitment to the profession that are the foundation of the ADR movement."***

The 2012 Brutsche´ Award was given to **Peter S. Chantilis**, posthumously, for his hard work and dedication to the mediation profession and to AAM. Peter's son, **Dr. Sam Chantilis** of Dallas, joined us in Chicago to accept this award on behalf of his father. It was a very special time for Sam to meet friends of his father and to hear special remembrances from several members of the original AAM training team.

2012 President's Award Presented to
Mike Schless

Each year the outgoing President of AAM is given the option of a personal privilege to bestow a special President's Award to an individual who has demonstrated outstanding service to the Association of Attorney-Mediators.

For the year 2011-12 the award was presented to **Michael J. Schless** of Austin, Texas, the Immediate Past-President of the Association for his continuing dedication to AAM, not only through his diligence in working with Texas legislators and monitoring Texas legislation in ensuring that the interests of AAM as well as all ADR professionals are protected, but also for his continuing dedication to serve in whatever capacity he is called upon to do so. In short the President's Award is given to **Michael J. Schless** for "being there" whenever and wherever he can further the goals of the Association of Attorney-Mediators. Thank you, Mike, for your service and dedication.



The AAM Board of Directors Introduces New President and President-Elect for 2012

William H. Lemons, President 2012

Bill Lemons is engaged in all aspects of Alternative Dispute Resolution, practicing full-time as Arbitrator and Mediator, and counseling companies and individuals on implementing ADR programs. He is an Arbitrator on the Employment Law, Commercial Dispute and Large Complex Case panels of the American Arbitration Association, and is a member of the Panel of Distinguished Neutrals of CPR (International Institute for Conflict Prevention and Resolution), a panelist of the American Health Lawyers Association ADR Services and a Member (MCIArb) of the Chartered Institute of Arbitrators in London. He maintains an active mediation practice, and is a Qualified Neutral for the United States District Courts for the Western and Southern Districts of Texas. He currently serves as President of the San Antonio/Bexar Chapter of the Association of Attorney-Mediators and has served as Chair and earlier was Treasurer of the ADR Section of the State Bar of Texas. Bill is a member of the College of the State Bar of Texas, Association of Attorney-Mediators, Texas Association of Mediators, Texas Mediator Credentialing Association, Institute for Responsible Dispute Resolution, and is a Life Fellow of the Texas Bar Foundation. Bill has served as a National Trainer/Facilitator in mediation/arbitration skills for the American Arbitration Association, teaching the 40 hour basic mediation skills course to Alamo Community College District, Southwest Foundation, Coca Cola Enterprises, Inc., Zachry Construction Corporation and many others. He also teaches the AAA course "*Arbitration Advocacy,*" and designs dispute resolution programs. Bill is a permanent neutral for Kraft Foods, Toyota U.S.A., Inc., Neiman Marcus and the Alamo Community College District. He sits as a panel member on the Southwest Airlines Company/TWU Local 555 arbitration board and the Montana Labor Relations Board. Now in his 36th year of practice, Bill was a Shareholder with what is now the Cox Smith Matthews law firm in San Antonio immediately prior to this career, and before that was in house labor counsel for Braniff Airways in Dallas.

Mike Patterson, President-Elect 2012

Mike Patterson is an attorney-mediator in Tyler, Texas and has been a member of AAM since 1996. He has been licensed to practice law in Texas since 1977, after receiving his law degree that year from Southern Methodist University. In 1996, Mike got smart and quit practicing civil trial law to start a full time mediation practice involving state and federal litigation. He has been president of the East Texas Chapter of the American Board of Trial Advocates, the East Texas Trial Lawyers Association, the Smith County Bar Association and the Smith County Bar Foundation. Mike has served on the Council for the Alternative Dispute Resolution Section of the State Bar of Texas. Currently, Chairman of the City of Tyler's Historical Preservation Board, Mike is married to Penny Patterson, and they have five children and nine grandchildren. In addition to spending time with his family, he enjoys backpacking in the mountains, reading a good novel and sipping on an adult beverage. Mike recently helped organize the AAM East Texas Chapter.

Save the Date - November 9, 2012

The AAM Advanced Attorney-Mediator Training will be held in Austin, Texas on Friday, November 9, 2012. Our goal is to keep the travel expenses as low as possible for this one day event. No cab fares – with free shuttle to the hotel. This hotel is literally within the airport facility.

We will begin around 8:30 am and adjourn in the afternoon around 5:30 pm. If you are able to "fly-in, fly-out" this is a great time to get together with your AAM colleagues. A hotel room block is in place for both Thursday and Friday nights. More information will be placed on the website as it is available. www.attorney-mediators.org Hotel: Hilton Austin Airport, 9515 Hotel Drive, Austin, Texas 78719. Phone: 512-385-6767

With or Without Prejudice

By Charla Beall, *AAM Member, Olathe, Kansas*

Two parties are in a dispute. A request for mediation is submitted to the appropriate agency. Per the applicable regulations, the parties are to be provided a list of the available qualified neutrals to choose from. An administrative assistant with the agency is given the complete roster of mediators, and per instructions, starts calling the neutrals. During one of the many calls, she asks a mediator, "Are you available to mediate this case?" The mediator says, "Yes." Then, the assistant chuckles a bit and asks, "Is there anything that would prevent *you* from mediating this case?" The mediator replies, "No, well, there's nothing no other mediator wouldn't have to deal with; there would be travel time involved since the location is on the other side of the state."

The assistant again chuckles, "But, heh heh, is there *anything*, ha ha, you know, that would prevent *you* from mediating this case?" The mediator without humor says, "No." The assistant loudly clears her throat and concludes the call. The mediator hears nothing further about the mediation.

Mediators have the obligation to be impartial in the mediation process. Kansas Supreme Court Rule 903(b) states: "A Mediator Shall Conduct Mediation in an Impartial Manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he can remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw. Comment: A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. … A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation."

While mediators are obligated to be impartial, the parties are not. Thus, in choosing a mediator, parties may choose to find a mediator believed to be impartial. Or, in the fashion of a trial attorney who looks for a jury that the attorney believes will find in favor of his/her client, a party may try to find a mediator he/she believes can be swayed to a particular position. This is not entirely unrealistic.

In Kansas, parties aren't even obligated to choose a trained qualified mediator to handle their mediation process. Kansas Supreme Court Rule 902: "Qualifications of Dispute Resolution Providers Under the Dispute Resolution Act. The qualifications for dispute resolution providers and trainers apply to individuals who handle cases referred by the state courts or under the Dispute Resolution Act, K.S.A. 5-501 et seq. No standards or qualifications should be imposed upon any person chosen and agreed to by the parties. The qualifications should not prevent parties having free choice of process, program, and the individual neutral."

See also K.S.A. 5-509(a): "Upon finding that alternatives to litigation may provide a more appropriate means to resolve the issues in a case … a judge may order the parties to the case to participate in a settlement conference or a non-binding dispute resolution process conducted by: (2) an individual licensed to practice law in the state of Kansas."

The parties might even consider whether a mediator is popular, famous, well-known, and respected by his/her peers in the profession of mediation and/or law.

Consider another scenario: During a conversation between an attorney and an employee of the agency that oversees CLE compliance and accreditation, the subject of accommodations during CLEs comes up. The employee suggests that the attorney file for disabled status in order to get more flexibility in fulfilling requirements.
If this conversation had taken place in Kansas, the attorney might have looked up Kansas Supreme Court Rule 208, Registration of Attorneys. "(a) …. Attorneys may register as: active; inactive; retired, or disabled due to mental or physical disabilities. Only attorneys registered as active may practice law in Kansas."

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Thus, the employee's suggestion infers that individuals with disabilities (as defined by Americans with Disabilities Act or ADA) can do without accommodations, or get accommodations and not practice law. In this light, the suggestion infers prejudice and discrimination. Surely, this was not the intended result.

Well, another consideration is terminology. The term "disabled" is not interchangeable from statute to statute, nor does the term mean the same thing from person to person. Even the U.S. Congress has acknowledged this reality in enacting the ADA Amendments Act of 2008 (Pub. L. 110-325. Section 2, Sept. 25, 2008, 122 Stat. 3553):

"Findings. (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled."

Perhaps in evaluating the suggestion further, the attorney might have looked for any rules that mentioned the term accommodations, and found Kansas Supreme Court Rule 711: "Rules Relating to Admission of Attorneys. Non standard Testing Accommodations for Written Examination. (A) The bar examination shall be administered by the Board to all eligible applicants in a manner that is fair. (B) Applicants needing non-standard testing accommodations on the examination shall file a non-standard testing application and all supporting documentation … (C) The board may, upon favorable review of the non-standard testing application, modify the manner in which the examination is administered to an applicant while maintaining the security and integrity of the examination. [History: New Rule effective July 1, 2009.]"

Though not so helpful to an attorney already licensed to practice law, the information can provide some general insight. Generally speaking, receiving approval for accommodations from the board and receiving those accommodations has not always been so straight forward and easily done.

The Maryland case of Elder, Blackfield, and Witwer vs. National Conference of Bar Examiners (NCBE), was filed in 2010 (See Note 1 for case citation). The plaintiffs were legally blind, covered by ADA as individuals with disabilities. Each requested examinations be administered on laptop computer, with JAWS or ZoomText screen reader programs. The Maryland Board of Examiners granted the request. NCBE denied the request. Plaintiffs filed for injunctive relief. The court issued a one page order denying the request for preliminary injunction, stating the need for a more developed factual history, and denied NCBE's motion to dismiss.

One source indicates the Elder case was later dismissed (Nov 29, 2010) without prejudice as all plaintiffs had passed the Maryland bar exam. Another source indicates Elder filed a lawsuit in California and received a preliminary injunction (Feb 16, 2011).

Later cases illustrate the continued difficulties in obtaining such accommodations even if state approval of testing modifications has been given. 2011 cases include: Enyart v. NCBE (Ca.); Bonnette vs. DC Court of Appeals, NCBE (DC); and, Jones v. NCBE, (Vt). In these cases, the plaintiffs obtained injunctions against NCBE, requiring NCBE to provide computer with screen reader capabilities. (See Note 2 for case citations.) NCBE did appeal the Enyart appellate decision to the US Supreme Court. Writ of cert was denied. These courts established applicable ADA provisions for professional testing and licensing situations:

In Title III, 42 U.S.C. Section 12189 states: "Examinations and courses: Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post secondary education, professional or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals."

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The "best ensure" standard applies to NCBE. 28 C.F.R. Section 36.309(b)(1)(ii) requires a private entity offering licensing examination to assure that "the examination is selected and administered so as to best ensure that, when the examination is administered to an individual with disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual's aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills."

Title II (42 U.S.C. Section 12131 et seq) applies to DC Court of Appeals of Bonnette case. The "most effective" standard applies to public entities. "A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination," and "a public entity shall take appropriate steps to ensure that communications ... are as effective as communications with others" (28 C.F.R. Section 35.130).

Courts rejected the "reasonable" standard; it applies to employment situations. (The reasonable standard as used in Title I of ADA is taken from the Rehabilitation Act of 1973/Section 504.) NCBE also argued (in Enyart) that Enyart could still pursue work within the legal field without a license. Court stated that doing legal work under the supervision of a licensed attorney was just not the same as being an attorney in the practice of law LSAT test-takers face similar concerns and difficulties when requesting accommodations. According to "ABA Joins Disability Advocates in Pressuring Law School Admission Council" by Karen Sloan (National Law Journal February 9, 2012), the ABA's House of Delegates unanimously adopted a resolution on February 6, 2012 urging the council to "ensure that the exam [LSAT] reflects what the exam is designed to measure , and not the test-taker's disability," and called for the council to make policies clear regarding communication of decisions and appeal processes to applicants. It is noted that the ABA has no authority to mandate these changes. LSAC receives 2,000 requests for accommodations per year and makes decisions on a case-by-case basis.

Let's shift back to that scenario with the attorney and the employee of the CLE agency. Given Rule 711, it would seem unreasonable to infer that the Court would tell an attorney who used accommodations in passing the bar exam that he/she couldn't practice law because of a continued need for accommodations, for example, while attending CLEs.

The search goes back to the rules governing CLEs. Court Rule 804 states: "Standards for Program Approval. The following standards shall be met by any program for which credit approval is sought: (d) Thorough, high quality, readable, useful and carefully prepared written materials must be made available to all participants at or before the time the program is presented, unless the absence of such materials is recognized as reasonable and approved by the Commission. A brief outline without citation or explanatory notations will not be sufficient."

So, for an individual with visual impairments, being one of those "all participants," it seems rather obvious that readable should also involve any (ADA) accommodations to make the handouts readable for *all* participants.

Consider training scenario one: A mediators' professional organization is putting on a conference to introduce a new trainers' manual. The manual has been put together by a select group of experienced trainers and mediators pursuant to the requirements of a government grant that also states that products and services must be accessible per the requirements of the ADA.

A mediator sends in the registration with a note next to the credit card number that large print is needed. At the conference, no large print manual is provided. A few days later, one of the trainers quietly sends an e-mail apologizing on behalf of the trainers, stating that no one knew who was going to be at the training and no one knew what to expect. The e-mail concludes with: the manuals were printed before the training so there were no large print formats for the training, and does the mediator still want a large print manual?

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Consider the second training scenario: A conference with several break-out sessions. Handouts are provided for all sessions and are organized in a three-ring binder. Everyone attending gets one. Individual requests a large print version. Individual receives a book approximately 18 x 24 x 4 inches, weighing in excess of twenty pounds. Agenda is not included Maintenance is called in to provide a screwdriver so that the book can be taken apart and relevant poster-sized pages can be carried to the various break-out sessions.

Consider the third training scenario: Moderated monthly teleconference call for mediators. Agenda/training outline is sent via e-mails. Agenda file format allows the page style to be modified and printed out in a sufficient size. Moderator updates computer. Agenda format is changed, but page style can still be modified. Some of the callers complain they can't access the file. Moderator changes to another format that doesn't allow for modification. The individual contacts the moderator about this issue. Moderator explains that she just can't change it back, because others wouldn't be able to open the file. During the next phone call, the moderator asks the individual a question about one of the agenda items. After getting silence, the moderator says, "Sometimes circumstances beyond our control prevent us from participating on these phone calls." Soon after that, the moderator included the following on the still unmodifiable agenda: "If accommodations are required, contact …"

Eventually CLE rules are updated. In Kansas, new and amended rules became effective July 1, 2011. Rule 803(e) "Exemptions for Good Cause. The commission may grant an exemption to the strict requirement of these rules to complete continuing legal education because of good cause, e.g. disability or hardship. A request for exemption must be submitted to the Commission in writing with full explanation of the circumstances necessitating the request. An attorney with a disability or hardship that affects the attorney's ability to attend CLE programs may file annually a request for a substitute program in lieu of attendance and must propose a substitute program the attorney can complete. The Commission must review and approve or disapprove a substitute program on an individual basis. …"

Rule 802 "Definitions, (k) Nontraditional programming: means CLE programming accessed solely by an individual attorney, including teleconference, internet-based conference, audiotape, videotape, CD, podcast, CD-ROM, DVD, or another format approved by Commission and defined in its Guidelines for Nontraditional Programming."

In Kansas, other rules cover Continuing Mediation Education (CME). The following has been available for quite a few years, and appear on the Calendar for Approved [CME]: "There have been a number of complaints from rural mediators that they can not easily obtain CME credits. The Council received approval from OJA to implement the following policy for allowing credit towards completion of the 6 hour CME requirement. The Dispute Resolution Coordinator will be given discretion in approving any of the following:

Discussion Group: Approved mediators can receive up to half their CME credit (3 hours) through participation in discussion group meetings. The purpose of a discussion group is to review problems which have developed in mediations. Each discussion group must be made up of three or more approved mediators … Videotape: Approved mediators can receive up to half their CME credit (3 hours) by participating in a videotape mediation presentation. The videotapes must be approved in advance …"

In the ADA, Congress has stated in Section 12101: Findings and purpose. (A) "The Congress finds that (2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem…."

Despite changes and greater awareness …. Staff at a law library located in a courthouse joke that they can't provide an accessible computer system, there isn't enough money in the budget for an accessible entrance. A law school's ADR graduate program pulls the phrasing, "we accommodate the busy working students so they can get their degrees" after an applicant asks for an ADA-type accommodation.

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An online system that allows people to submit admission applications to several law schools simultaneously is inaccessible to blind individuals as it required the assistance of sighted individuals to use the system. A mediator refers to another mediator, an individual covered by ADA, as "unprofessional" for requiring an accommodation.

At an IEP meeting, a blind parent is provided with the required "Parental Rights in Special Education (Procedural Safeguards)" in 12 point font, 31 pages long. Eventually, the school employee admits that it wasn't possible to make the large print format because it took too many (poster size) pages. When the parent explained the state agency's website had a word format that could be modified and it could also be printed out on standard 8.5 x 11 inch paper, the employees stated, "Good. You can download them yourself and print them out." The employee tells the parent to also sign the form acknowledging receipt of parental rights.

Then, there is the case of U.S. v. Lehouillier (See Note 3 for case citation). Access to a deposition in a law office was denied to an individual with a service animal. The applicable provisions of ADA are:

A law office is a place of public accommodation under Title III of the ADA and is prohibited from discriminating against persons with disabilities (42 U.S.C. Section 12182(a).)

ADA requires a public accommodations to make reasonable modifications in policies, practices, and procedures to permit the use of service animals by persons with disabilities in places of public accommodations (42 U.S.C. Section 12182(b)(2)(A)(ii); 28 C.F.R. Section 36.302(a),(c).)

ADA prohibits discrimination against an individual because of that individual's known relationship or association with an individual with a known disability. (42 U.S.C. Section 12182(b)(1)(E), 28 C.F.R. Section 36.205).

The conditions of consent decree, dated 29 March 2010, had a duration of three years, and included: establishment and publication of compliant policies regarding service animals; staff training; fine (payment $2500 per month for 20 months); and payment of $40,000 for damages.

And even Congress has had its moments. During summer of 2011, the Senate Committee on Health, Education, Labor, and Pensions (HELP Committee) was considering legislation – Workforce Investment Act (WIA) which contained language reauthorizing the Rehabilitation Act of 1973, as amended. The Rehabilitation Act is supposed to provide services to disabled Americans so that they can obtain competitive employment, but Title V, Section 511 of the proposed Rehabilitation Act language referenced Section 14(c) of the 1938 Fair Labor Standards Act (FLSA) which allows certain entities holding special wage certificates to pay workers with disabilities less than the federal minimum wage. The scheduled vote (Aug 2011) on this legislation was postponed. In October 2011, the Fair Wages for Workers with Disabilities Act of 2011 (H.R. 3086) was introduced. If passed, the bill would phase out Section 14(c) of the FLSA.

Let's reconsider the phone call with the administrative assistant and the mediator. "Is there *anything* that, ha ha, you know, prevents *you* from mediating this case?"

Would it make a difference to know that the claims deal with the delivery of accommodations and other services, or lack thereof, to individuals with disabilities covered by the federal statute? Should it? Would it make a difference to know the mediator happens to be an individual with disabilities? Should it? Would it make more sense to have as mediator one that happens to be a most qualified trainer who won't modify the font size in a training outline purportedly written by the trainer in order to make available a large print version? Should it? Would you prefer this kind of phone call with or without prejudice?

(continued on next page)

NOTE:
1. Elder, Blackfield, and Witwer vs. National Conference of Bar Examiners (NCBE), U.S. District Court for District of Maryland (Northern Division) Case 1:10-cv-01418-JFM; filed June 2, 2010.
2. Stephanie Enyart (plaintiff-appellee) v. NCBE (defendant-appellant) U.S. District Court of Appeals, 9th Circuit, 630 F.3d 153; Stephanie Enyart, Plaintiff, v. NCBE Defendant. (No. C 09-05191 CRB; United States District Court, N.C. Calif. October 24, 2011; Cathryn Bonnette, plaintiff, v. District of Columbia Court of Appeals, [NCBE] et al, Defendants. Civil action No. 11-1053 (CKK), U.S. District Court, District of Columbia, July 13, 2011; and, Deanna Jones, Plaintiff v. NCBE, Defendant; No. 5:11-cv-174; United States District Court, D. Vermont. (August 2, 2011)
3. U.S. v. Patrick Lehouillier as an individual, and d/b/a Lehouillier and Assoc. PC, In the District Court Court of Colorado, Civil Action, No. 1:09-cv-02582-MSK-MFH.Consent decree dated 29 Mar 2010.

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Special thanks to John Feather, Newsletter Editor, for his work on this great newsletter!