



CHAIRS MESSAGE

Over the last number of years, it has been my pleasure to work with the Dispute Resolution Section. Throughout that time, I have worked with members of the Executive Committee and been impressed with their knowledge, dedication, and insight into resolving disputes. Each member of the Executive Committee, and Section for that matter, is dedicated to helping people involved in litigation find a better way.

My experience on the Executive Committee has also given me exposure to pioneers in the field. Each pioneer has made an impact on dispute resolution in Utah and has laid the ground-work for younger lawyers, like me, to take advantage of alternatives to an extremely costly system of resolving disputes. Pioneers in dispute resolution have given all of us options that were not available before their laudable contributions.


As you read this newsletter, note that as an Executive Committee we have talked with many of the pioneers in mediation and here share their words and wisdom with you so that we may all benefit from their experience and perspective. Also, please notice a calendar of events that will inform you of events the Dispute Resolution Section is participating in.

It is the Executive Committee's desire, by bringing you this newsletter and its content, that each of us will be able to enthusiastically support dispute resolution. It is also our goal to help members of the bar develop skills and build knowledge in the area. We hope you stay motivated to use techniques like mediation, arbitration, and other creative ways to resolve disputes.

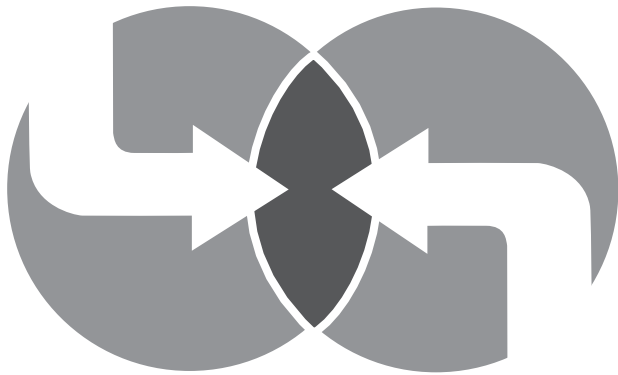
Thank you for your membership in the Section. We thank you for your participation and willingness to be involved as we have approached you for assistance. Please contact us with comments or questions that you may have about the Section. The Executive Committee is happy to serve you as we work toward greater exposure, knowledge, and skill building in the area of dispute resolution. It is my personal pleasure to serve with the Executive Committee and you this year. Thank you for the opportunity.

– Bryant J. McConkie

2009 Chair – Dispute Resolution Section



DISPUTE RESOLUTION SECTION



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PETER W. BILLINGS SR. AWARD

The Section was pleased to present the Peter W. Billings, Sr. Award for Excellence in Dispute Resolution at the Fall Forum in November. The recipient of this year's Award was Utah Dispute Resolution for its outstanding commitment to dispute resolution and the communities it serves. The Award is given annually by the Section for two reasons. First, to honor the legacy of Peter W. Billings, Sr., who was a pioneer and champion of dispute resolution in Utah for decades. Second, to recognize an individual or organization that has made a significant contribution and impact in the profession of dispute resolution in Utah. Through this Award the Section recognizes the dedication and commitment of UDR, including Nancy McGahey (Director), William Downes (Board-President) and all the UDR staff, case managers and volunteers. Over the years, UDR case managers have assisted over 40,000 people in conflict, and an estimated 500 volunteers have mediated over 8,500 disputes. This year was the first year the award was given to an organization.

MEDIATION - WHERE IS IT DESTINED FOR THE FUTURE?

by Carol Castleberry

No one can deny the rapid growth and the success of mediation within the legal profession. It certainly appears that it is here to stay, but with as with all social systems, there is continual growth and evolution in its development. Lawyers with an eye to the future will recognize the importance of getting on board one of the greatest additions to the practice of law since its inception.

Although it has taken off at levels never expected by most in the field, it has continually surprised us by the way it has expanded into areas and in ways never predicted. Like the universe in which we reside, mediation is expanding in every direction.

There are many excellent mediators in our area. I had the opportunity to sit down with just a few of our communities' pioneers and key players in the field of mediation and asked them these questions. First, how they view mediation or what prompted them to become involved. Second, how have they seen mediation evolve during their involvement within this field, and third, what their predictions and hopes are for where they would like to see for the future of mediation.

HERE ARE THEIR ANSWERS:

THE HONORABLE WILLIAM

BOHLING: Retired Judge, Mediator, past Chair of Court Annexed Mediation

Q: HOW DID YOU BECOME INVOLVED IN MEDIATION?

A: Prior to 1993, Jim Holbrook came to speak at a retreat about mediation. He was very inspiring. Bill Downs was also instrumental in my transformation. In 1993, prior to being appointed to the District Court, I was just beginning in mediation. I had been practicing as an attorney, but I did not find that law practice was fulfilling. It did not fulfill my spirit. I saw that mediators were peace makers; this came the closest to what I was looking for. When you successfully mediate and the parties come to agreement, it feels great. After attending a mediation symposium in Colorado with Rick Schwimmer, we were both inspired to do more to do more in

Utah. Rick Schwimmer ran legislation through in 1994 for the development of court annexed mediation that would allow Judges to order mediation and set some rules. To our great surprise it passed the first time!"

Q: HOW HAVE YOU SEEN MEDIATION EVOLVE OVER TIME?

A: Many lawyers really resisted mediation initially. Mediation slowly became an acceptable way to settle a case before trial. Defense lawyers began to see the advantage of mediating and plaintiffs had their cases moved off the calendar; it was the economic best interests of both.

Other judges began to notice that my own court calendar was being cleared off faster than theirs, so they began to refer cases to mediation. It was better for the parties, better for the courts, and the lawyers began to see the benefits. Training is important. There is so much technique and skill involved, so many aspects that can be affected by the right training. I don't like to think of myself as facilitative or evaluative because I would like to think of myself as more than a one trick pony. A competent mediator functions at all levels. Mediation is only as strong as the mediator. If they are adept, the mediation is much more likely to go well.

Q: WHAT WOULD YOU LIKE TO SEE FOR THE FUTURE OF MEDIATION?

A: Mediation has exceeded my wildest hopes. It has an enormous potential for being an instrument of peace on the world stage. I would like to see mediation embraced in all public and private institutions as a primary way of solving disputes and for the court or trial to be the last resort, instead of the first resort.

MICHELE MATTSSON: Chief Appellate Mediator for the Appellate Mediation Office, attorney

Q: HOW DO YOU VIEW MEDIATION IN THE LEGAL ARENA?

A: The judiciary helped launch the mediation movement in Utah and in the last decade, there has been a sea-

shift in how the Bar views and utilizes mediation. Attorneys have come to realize that their clients prefer the mediation process to going through the stress and expense of litigation. Judges have joined the movement too. They will often give parties a more favorable trial setting for being willing to mediate. Several statutes even require mediation. For those who are not ready to settle at the trial level, there is the option of appellate mediation. Often, the success of a mediation depends on timing. If people want to have their "day in court," that's fine. They may be more ready to mediate and settle a bit further down the road.

Q: HOW HAS MEDIATION EVOLVED DURING YOUR CAREER?

A: Thanks to the foresight of courts, attorneys, and community leaders, Utah got on the early wave of mediation. They set up a variety of mediation programs and looked to the 10th Circuit Court of Appeals for a model of appellate mediation. The idea that mediation could work at different junctures of disputes was very innovative. When I began mediating eight years ago, many attorneys were new to mediation, especially appellate mediation. Now it is rare to find an attorney who hasn't participated in multiple mediations, including some at the appellate level. Attorneys and their clients view mediation as a positive option. Settlement is nearly always the better way to go. The challenge at the appellate level is that in many cases we now see, the parties have often mediated once or twice before. This adds complicating layers to the mediation process.

One of the biggest surprises for me is how mediation has changed me as a person. I used to be highly competitive and hated to lose. Now I see winning in a new light. With mediation you learn to pick your battles. You realize that a "tie" is not always a bad thing and that an unbending quest for a win can have too high a price.

Q: WHAT DO YOU HOPE FOR THE FUTURE OF MEDIATION?

A: I don't think there is any limit to where mediation can go. The movement

has taken off with positive force and should continue to grow and expand. The new frontier I'd like to see is criminal mediation, especially in misdemeanor cases. Mediating such cases could lead to practical and mutually agreeable compromises. Criminal attorneys are pros at negotiating plea bargains. Why not find a way, such as we have in the civil context, to see if settlements could be pursued post criminal trial?

BRIAN FLORENCE: Mediator, attorney
Brian Florence was elementary in the Utah Supreme Court's adoption of amendment (2.4), which permits an attorney mediator who has helped the parties settle their dispute to reduce their agreements to the documents including the pleadings necessary to legally effectuate their settlement.

Q: HOW HAS MEDIATION EVOLVED DURING YOUR CAREER?

A: The face of mediation has changed through the years. Twenty years ago I had not imagined us being where we are now. We have covered more ground than I ever hoped for, and in all facets of disputes. When the rule was created that required mediation, there were a number of Utah attorneys who opposed it. During the initial phase of mandatory mediation, it was my experience that lawyers rarely accompanied clients to mediation. This has slowly changed. Lawyers began to see mediation as an extension of the court process. The role of lawyers has greatly improved over time. Now lawyers come prepared and as the problem solvers, but there is room for improvement. Lawyers need to improve their quality of skills in their participation in the process. They need to understand the benefits of interest based outcomes over zero sum outcomes, where one person's gain is another person's loss. Lawyers can do this by learning how to explore people's underlying interests.

Q: WHAT WOULD YOU LIKE TO SEE FOR THE FUTURE OF MEDIATION?

A: The arena where I would like to see mediation expand is in the area of consumer mediation. It is hard to imagine that mediation can continue to grow at the speed that it has; to see it maintain this momentum. I would like to see the quality of mediation grow rather than the quantity.

MICHELLE ROYBAL: ADR Administrator and Staff Attorney for the U.S. District Court for Utah

Q: HOW DID YOU BECOME INVOLVED IN MEDIATION?

A: I interned at the state courts, mediating child welfare cases for the administrative office of the courts. My mentoring relationships have included Diane Holbrook and Jim Holbrook. My role as ADR Administrator is two-fold: First, as a promoter of its use within the court system, to train, to co-mediate. Second, to model the values of ADR within the court system. I believe that the measure of success is not limited to outcome: loss is public perception. The realities of going to federal court are an expense of time, high cost, and emotion and the destruction of business relationships. It is exceedingly expensive. It is so lucky that practitioners are embracing ADR. 97% cases settle without going to trial in our federal system.

Q: WHAT WOULD DO YOU SEE FOR THE FUTURE OF MEDIATION?

A: I don't see a boundary or a limit for mediation. There is no aspect of any life, whether government, church, school, or family where a person is not negotiating. I would like to see more parties and counsel explore using the federal court's mediation service. I believe that in the future we will need to continue the traditions of the UCCR Symposium and the ADR Academy for our local community's development. We need to continue educating each other, the government, attorneys, the parties and the judges. There are many layers of conversation. A mediation is driven by the mediator's abilities and skills.

HARDIN WHITNEY: Mediator, attorney

Q: HOW DID YOU BECOME INVOLVED IN MEDIATION?

A: The American Arbitration Association (AAA) came to Utah in the late 1980s and gave a lesson. I listened and became interested in joining AAA. Judge Andersen was spearheading the building of Law and Justice Center. One of its purposes was to promote Alternative Dispute Resolution. Judge Jim Davis, who is now with the State Court of appeals, but who was then an attorney and the President of the Bar appointed me to

chair the Bar's Utah Dispute Resolution (UDR) Committee. Also, I was doing construction law, and I was on Licensing Board for Architects. This was significant because it was through the Department of Commerce License board that they were trying to get Mediators & Arbitrators licensed. The faculty of the University of Utah was advocating ADR training, but not for lawyers at that time.

Q: HOW HAS MEDIATION EVOLVED DURING YOUR CAREER?

A: There was antipathy early on from the legal community. The antipathy lawyers once had has dissipated. In large corporations mediation is now encouraged, and also in employment cases and in disputes between corporations. Arbitration has diminished because it has begun to look like a trial. It came to include the discovery process, witnesses, cross-examination. It could take up to 6 months for the whole process of arbitration. Mediation can work because people like to have a say in the process. If the parties can participate they are more inclined to settle. Also, people don't like to go to court. Mediation saves the parties in litigation costs and it also provides greater privacy to the parties, where a trial is open to the public and is public record.

Q: WHAT WOULD YOU LIKE TO SEE FOR THE FUTURE OF MEDIATION?

A: Mediation encourages negotiation, and it is here to stay. There is no telling how far mediation will go. It has had tremendous growth and continues to grow.

NINI RICH: Director Alternative Dispute Resolution Programs for the state courts

Q: WOULD YOU GIVE A SHORT OVERVIEW OF YOUR HISTORY/ EXPERIENCE WITH MEDIATION?

A: Prior to becoming ADR director, I worked for the Utah State Administrative Office of the Courts for eight years as a Child Welfare mediator. During that time I mediated over 1,600 multi-party cases involving child abuse, neglect and dependency. I worked in all 8 Utah judicial districts.

Q: WHAT WOULD YOU LIKE TO SEE HAPPEN WITH MEDIATION?

A: I would like to see a better general understanding of the process of mediation and what sets it apart from other forms of

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dispute resolution so that people can make informed choices about how they want to handle the conflicts in their lives.

KARIN HOBBS: Mediator and attorney.

Q: HOW DID YOU BECOME INVOLVED IN MEDIATION?

A: I was working at the Utah Court of Appeals as a Central Staff Attorney and was asked to research mediation as one way to reduce the court's caseload. I researched appellate mediation throughout the country and designed the Utah Court of Appeals' Appellate Mediation Program in conjunction with the judges of the Utah Court of Appeals.

I have handled all areas of mediation, including complex, emotionally charged cases. Mediation provides the opportunity to help people solve problems. I am also on the Board of The International Academy of Mediators (I.A.M.), a preeminent group of 111 full time commercial mediators throughout world who are seen as the premier mediators in their geographical areas.

Q: WHAT DO YOU SEE OR WOULD YOU LIKE TO SEE FOR THE FUTURE OF MEDIATION?

A: I would like to see professional mediation viewed as a distinct profession with extensive training and expertise rather than a job for untrained retired judges or untrained former litigators. To provide excellent mediation in Utah, we as mediators need to attend trainings and hone our skills or attorneys will find mediators out of state.

JIM HOLBROOK: University of Utah law professor, mediator, arbitrator

Q: TELL ME ABOUT HOW YOU BECAME INVOLVED WITH MEDIATION?

A: I became involved in mediation in 1985. I was the initial arbitrator for U.S. Arbitration & Mediation for 10 years, and trained mediators for them here and in New Orleans.

Q: HOW HAS MEDIATION EVOLVED DURING YOUR CAREER?

A: As mediation has matured, it has become more regulated and formalized.

A few years ago, the Legislature enacted the "Utah Uniform Mediation act", which gives clear guidance regarding mediator disclosures and privilege. The older ADR Act created confidentiality for court-annexed mediation. Privilege is an evidentiary restriction in adjudication, whereas confidentiality applies all of the time, everywhere. The state court ADR office has amended the state's ADR rules in regard to training, who can train, mentoring, and procedures to follow when ethical norms are breached. There has been explosive growth in mediation, especially in the last ten years as more and more law students have been trained in mediation. Collaborative lawyering is a new kind of advocacy where lawyers agree to represent their clients and use collaboration, negotiation and mediation to reach a result.

Q: WHAT DO YOU PREDICT FOR THE FUTURE OF MEDIATION?

A: Mediation is well established, is growing, and will continue to grow. I believe the issue of mediator qualifications will continue to be addressed. I believe that evaluative and directive "mediation" will remain controversial, but the market place will continue to support it. There still is a huge unmet need, especially for people unable to afford mediation. Lawyer-mediators will draft more and more pleadings in pro se divorce cases which have been resolved in mediation. Many of these parties do not have the skills or knowledge to represent themselves effectively. They need a lawyer-mediator to draft the court documents necessary to effectuate their mediation agreements. We also need more community mediation centers.

Carol Castleberry recently moved from southeaster Utah, and now practices family law in Salt Lake City. Historically, Carol began investing in property in 1990. At the time, she was a struggling single parent and began her property career by utilizing a small student loan. Since that time she has bought, sold, owned and managed several homes, a trailer court, a commercial warehouse, and building lots. In 1993, after she saw a friend struggling to find adequate daycare, Carol decided to open a daycare center in her area. Although she had been told by several within the community that it could not be done, that it had been attempted by several and failed, she took only two thousand dollars of investment cash, purchased a commercial building and developed a center there. Within one year she had 75 children enrolled and her center was functioning in the black. In the two years immediately prior to law school she worked for the state as a Foster Parent Trainer and Recruiter. During her two years in that position, by creating and implementing an assertive campaign to recruit new foster parents, the two counties in which she worked experienced the greatest growth of foster parents in its history, nearly doubling in numbers. During that time she also obtained the greatest growth of foster parents per capita within the shortest amount of time in the state. Her foster parents received the two consecutive annual Mother's Day awards from Governor Leavitt in each of the consecutive years that she was in that position. At age 46, she fulfilled her lifelong dream of applying to law school and was admitted to the Utah Bar in 2005. In law school, she found that she loved mediation and eagerly participated in the beginning, intermediate, and advanced classes, including domestic mediation, landlord-tenant, juvenile court, victim-offender, and small claims, and she is now excited to contribute to the mediation community in Utah within her new position with the ADR Board.

REESE V. TINGEY

The Supreme Court of Utah issued its opinion in Reese v. Tingey, 2008 UT 7, 177 P.3d 605, in early 2008. The court heard an interlocutory appeal from a trial court's order requiring an attorney for one of the litigants to testify on the mediation discussions. The court reversed the trial court's order, holding that the content of mediation proceedings is confidential. The court further held that agreements reached in mediation must be reduced to writing to be subsequently enforced.

An employee of a subcontractor sued a general contractor after being injured on a construction project. Thereafter, the employee and general contractor agreed to attempt to settle their dispute in mediation. The employee was covered by workers compensation insurance. As such, the insurance carrier hired an agent to represent its subrogation interests at the mediation.

The employee alleged that he and the agent reached an oral settlement agreement and that he relied on that agreement in settling his claim against the general contractor. Thereafter, the mediator drafted a Memorandum of Understanding based on the two agreements. The agent, however, refused to sign the Memorandum, arguing that it included a term to which the insurance carrier never agreed.

As a result, the employee and general contractor filed a joint motion to enforce the settlement agreement. The trial court then determined that the agreement between the agent and employee was nonconfidential. It ordered the attorney who represented the agent at the mediation to "appear and be deposed regarding the content of the mediation including the process of the mediation and the conversations and agreement that were made during the mediation." The agent's attorney opposed the order and filed a petition for discretionary interlocutory appeal with the Utah Supreme Court.

In its analysis, the Court recognized that Utah Code section 78-31b-8 (now 78B-6-208) establishes the purpose of mediation: to encourage the informal and confidential exchange of information in order to facilitate settlement. The Court then noted that "[t]his candid exchange of information and ideas can be achieved only when the parties are assured that their communications will be protected from post mediation disclosure."

The Court then took issue with the trial court's determination that the agreement at issue was nonconfidential. Specifically, the Court recognized that such a determination required a post mediation "fact sorting exercise" to distinguish between confidential and non-confidential matters. The Court then determined that if such an after-the-fact analysis and subsequent disclosure were allowed, parties' willingness to engage in mediation would be jeopardized.

The Court again referenced Utah Code section 78-31b-8 as prohibiting the subsequent disclosure of information obtained from dispute resolution proceedings unless all parties, including the mediator, agree otherwise. Based on such factors, the Court affirmed that the content of mediation proceedings is confidential. Thus, after finding that no statutory exceptions to preserving confidentiality applied, the Court vacated the trial court's order requiring the attorney to testify.

The Court also held that because oral agreements in mediation cannot be enforced without disclosing confidential information, all agreements reached in mediation must be reduced to writing to be enforceable.

PAST SECTION EXECUTIVE COMMITTEE MEMBERS MEET WITH CURRENT COMMITTEE TO DISCUSS HISTORY, FUTURE OF ADR

In May, a group of Utah's ADR pioneers that included Kent Scott, Steve Johnson, Michele Roybal, Karin Hobbs and Kenneth Rigtrup met with current committee members over sandwiches and soft drinks at the downtown offices of Strong & Hanni. In a wide-ranging, 90-minute meeting, attendees discussed everything from increasing public awareness about the viability ADR as a litigation alternative to how to best recognize the contributions of Utah's ADR pioneers to the difficulties of enforcing mediation judgments.

The meeting convened with a discussion about the current health of mediation, arbitration and negotiation. In the words of current chair Josh King, the section was currently benefitting from the efforts of past members. "Thanks to the ADR Academy, CLEs, fee mediation and other factors, there's a great deal of interest in alternative dispute resolution," King said, thanking those in attendance for their foresight and dedication.

But even as ADR has become more widely known and accepted, there is more to be done, as several of the participants pointed out. Both Hobbs and Johnson encouraged the current committee to use available resources, including the Utah Bar Journal and other media outlets, to educate both attorneys and the general public about the frequent advantages of ADR. Michele Mattsson, immediate past chair, noted that the Utah Bar Association had retained a public relations firm and said that the section should take advantage of the professional services to publicize ADR generally and activities like the Fall Forum, in particular.

Continuing that theme, Roybal related that the Bar's recent adoption of a reporting requirement for civility afforded the section an opportunity to offer a CLE focused on that topic. That suggestion was enthusiastically received, with King and vice chair Bryant McConkie agreeing to help research and possibility an event of that type.

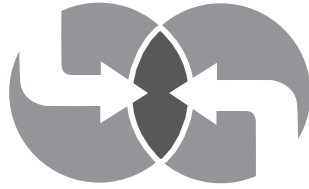
Other topics of conversation included Scott's suggestion that the section launch a semiannual newsletter to more effectively reach its membership and publicize future events. Beyond the newsletter, he recounted that the Utah Bar Journal was often willing to publish unsolicited submissions and said that the section should offer to provide the Journal with regular ADR columns.

Finally, the meeting wrapped with a focus on the present state of ADR. Johnson said that his experience suggested lawyers were more willing to engage in fee mediation than fee arbitration. In the meeting's final topic, Rigtrup and Hobbs discussed the problems of enforcing mediation judgments. Rigtrup said, "If mediation is a form of negotiated settlement, courts should recognize it as such."

All present concurred.

As the meeting wound down, the attendees agreed that the first meeting of past and present committee members had yielded a valuable exchange of information.

DISPUTE RESOLUTION SECTION



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CALENDAR OF EVENTS

SPRING BAR CONVENTION ~ MARCH 12-14, 2009 ~ ST. GEORGE, UTAH

Among the speakers at this year's Spring Convention, Bryant J. McConkie and Adam Mow, both members of the Dispute Resolution Executive Committee, will be speaking. Bryant will be speaking on Witness interviewing, and Adam will be participate on a panel discussing arbitration.

ANNUAL BAR CONVENTION ~ JULY 15-18, 2009 ~ SUN VALLEY, IDAHO

Among the speakers at the Annual Bar Convention in Sun Valley, Joshua King will be speaking on the use of mediation in the current housing crisis and foreclosure mediation.

COLLABORATIVE FAMILY LAW OF UTAH

The Collaborative Family Law of Utah group in Utah meets every other month on the second Tuesday. Meetings begin at 4:00 pm and are currently being hosted by Strong and Hanni law firm in Salt Lake City, Utah. The next meeting is on March 10, 2009. At the meetings, techniques are discussed and there is always a focus on learning a new skill that will assist in resolving disputes.

UTAH COUNCIL ON CONFLICT RESOLUTION ~ MAY 12-13, 2009

11th Annual Symposium ~ Build Upon SOLID Foundation ~ Featuring Nina Meierding & Jennifer Kresge. For more information call 801.685.UCCR (8227) or email info@uccr.net

ADR ACADEMY

As in years past, the dispute resolution section will be hosting their ADR Academy in October. The ADR Academy is the Section's premier event to learn and discuss cutting edge issues relating to dispute resolution.

