For a PDF copy of the newsletter, please click here.

ADR SECTION E-NEWSLETTER

January 24, 2023

Vol. 1

Editor in Chief: Gregory (Greg) Bownik

EDITOR'S CORNER

Please submit upcoming news and highlights to greg.bownik@aol.com.

My name is Greg Bownik and I am the current editor of the MSBA ADR section newsletter. Welcome to our inaugural issue that contains an eclectic variety of articles pertaining to civil, family, and international mediation. I hope you find significant value in the articles and if you have an idea for a topic or would like to write an article for the newsletter, please let me know at greg.bownik@aol.com. Meanwhile, enjoy reading about the various topics and send any "letters to the editor" to my e-mail address above.

Greg Bownik, MAOL
MN Rule 114, Civil Mediator

COUNCIL MEMBER SPOTLIGHT

Michael A Gregory (Mike)

Work Experience:
US. Army Corp of Engineers (civil engineer, study manager, project manager).
IRS (engineer and valuer, manager, R&D operations, controller, executive, territory manager).
Michael Gregory Consulting, LLC (Entrepreneur, mediator, professional speaker, author).

Why did you originally join the ADR section:
Having taken mediation training at Hamline Law School (1999) and volunteering with the Dispute Resolution Center since 2004 this was a natural fit with my own business oriented towards conflict resolution and mediation with the IRS and others related to valuation.

Best advice ever received:
Do the right thing. Do what it takes. Have fun!

Something about you not many people know:
I have a twin brother.

How do you define success:
Be kind, care, and make a positive difference.

Most important skill developed:
Listening actively.

Favorite book:
What I am currently reading related to leadership, neuroscience, collaboration, or conflict resolution. My latest book is Atomic Habits by James Clear.

Favorite Movie or TV show:
I think the TV show MASH had some of the best writers in television.

Hobbies/Interests:
Social justice issues, overcoming racial discrimination, environmental issues, mediation, volunteering at church, supporting family and friends, exercise, and grandchildren.

The Mediation Story-Building Process

As civil attorneys, our job at its core is to be a storyteller. From the moment we agree to represent a client, we agree to be the vehicle to tell that client's story and use the law in a way that persuades the other side, the judge, or the jury to provide the justice they are seeking. Mediation is often the first time in the litigation process that attorneys and clients get to tell that story to a neutral third party. As the client's story was told during the mediation process and they see how their story is portrayed and received, they form opinions about the fairness of the civil justice system. Were they heard? Were they understood? Are the laws fair? Does the process work?

Mediators and attorneys have a lot of power to shape the opinions clients have about the civil justice system. Money damages are the only form of justice we have in our civil system. However, any attorney representing civil litigants can tell you, money is rarely the only reason people bring a claim, and even more rarely, the only reason why people settle a claim. When clients first reach out to a lawyer, they often say things like, "I just want what's fair." They believe that when people hear what happened to them, the just outcome will automatically follow. However, by the time they go through discovery, sit through a deposition, and see the other side's expert reports, they often feel like they are being called a liar, a fake, and fraud or are being told that their harm just isn't that big of a deal. If the client gets to mediation and the attorney and mediator make them feel heard and understood, clients can often move past the hurt and anger that has built up in the litigation process and make a reasoned decision about settlement that feels like a just outcome. If the client gets to a mediation and they don't feel heard and understood, all too often they feel that a trial is their option to have their story heard and understood.

We know how important it is that clients feel heard and understood, but what do we need to do as attorneys to ensure that happens? First, we need to understand ourselves. How do we communicate? What do we value? What biases do we have? Once we've taken the time to get to know ourselves, we need to get to know the client. We need to understand what the client lost, why it matters to them, and why they decided to take legal action. To do that, we need to know who the client was before the case started, what they value, and what their belief system is. This is not a process that happens in passing or in a single meeting or phone call. Learning a client's story takes time, effort, and energy, but it's truly the only way to effectively meet our obligation to be a storyteller.

So we've done the work to get to know ourselves, our client, and tell their story, what does the mediator need to do? The mediator needs to create the space to hear and understand the client's story. Telling a client the perceived strengths and weaknesses of their case and the risks of going to trial is important, but it's unlikely to make a client feel like they are receiving the "justice" part of the civil justice system. The beauty of good storytelling is everyone listening should be able to find something in the story they relate to personally. Mediators should consider taking the time to show clients that they not only heard the client's story and understand why they're there, but also share with clients how they relate to their story. It's a truly powerful moment when two people actual hear and relate to each other. This seemingly simple moment can make the difference in the dispute resolution process. If as attorneys and mediators we can do the work to make this moment happen, we are likely to help get clients what they are seeking through litigation and help them feel like the laws and civil justice system are fair regardless of the outcome.

Jennifer Olson
Partner, TSR

Expressing Love

What does love mean to you? What feels loving to the people around you? As we begin this Valentine's month, I reflect on various ways people express love. Just the other day, a woman told me, she felt her choices were to shut down and withdraw or yell and scream when frustrated with her husband. She is not alone. I see people silently begging for love yet avoiding conversations. I also see people abrasively begging for love through harsh attacks. Desperate over the lost connection, their actions cause greater harm and separation. Human behavior often proves counterintuitive. Does it make sense to "love" someone so much that you cause them physical and emotional injury? Is the goal to create love or instill fear? In mediation, I help people talk about their needs to help them find some resolution. Doing so means providing a safe space to discuss what each person needs, and what that looks like. Sometimes love means sharing time and space, and other times it means sending good vibes from afar as the loved one lives their best life separately. While I enjoy helping people at any point along their path, there is something about the couples who come to me before they start the divorce process. Whether they end up staying together or proceeding with the divorce, they hold respect for each other. They really wish for each other to live a fully happy and satisfying life. That looks like love to me. What does love look like to you?

Sherry Ann Bruckner, J.D.

The Challenge of Creating a Flourishing Human Society

All human societies confront certain challenges that constitute a threat to creating a flourishing human being and human society. While humanity has achieved a lot in past the past centuries, we still have certain challenges that still need to be addressed. Some scholars for instance, argue that there are three questions to ask about whether a country is developed or developing. The questions are:

1) What is happening to poverty?

2) What is happening to inequality? and

3) What is happening to unemployment?

If anyone of these is increasing, the country cannot be said to be developed in a genuine sense even if it is growing economically. Although these are major challenges that constitute a threat to a flourishing human society given that when inequality, poverty and unemployment exists, they further complicate peace and stability in society by giving birth to other social problems, some scholars go beyond that by perceiving a deeper problem that is a threat to human flourishing.

A major threat to human and societal flourishing is when a society becomes incapable of effectively sublimating crude human instinctual desires, which in their very nature are amoral. Some scholars believe we cannot totally sublimate such instinctual desires and so the best we can do is to channel them to something very productive and constructive in society. Yet, there are some scholars today who argue that in order to have a dynamic market economy, such instinctual human desires have to be allowed to express themselves freely because it is through their expression that human creativity and innovation can be achieved and that these are human qualities that are highly valued in a dynamic capitalist economy. When the government institutes public policies to help tame and control human institutional desires in especially the public sphere, some complain that it is too much regulation and such regulation constitute a great suffocation of the optimum functioning and productivity of the economy. On their part, others believe that when the government regulates the economy and society, it is often done in a manner that benefits the privileged social classes, thereby widening social inequality in society and resentment between the rich and poor. Without achieving consensus on how to moderate human instinctual desires, such powerful but amoral desires can end up creating a situation where people become excessive in pursuing their goals and desires, or deficient in how they pursue their goals and desires.

It is obvious that in the past few decades, the "dog eat dog" brand of free market economy was adopted. What this ended up becoming is that American society and the world globally have for the sake of promoting rapid economic growth created a high toleration of inequality. The situation is so because rapid economic growth often is not necessarily accompanied by fair distribution of the benefits of the growth, The lasting solution to this problem is to create a society with social institutions that help citizens to effectively cultivate themselves so that commitment to the common good and a deep sense of shared humanity disciplines and tames people's instinctual desires. When the preceding recommendation is coupled by the nurturing and cultivation of a group of elder statesmen and stateswomen, who have the gravitas to bring the diverse communities in society together by building bridges across social and cultural divides, then human creativity and innovation will be channeled to the promotion of the common good and the wellbeing of all. Although doing these might slow the pace of economic growth, the question to answer is: should we pursue rapid economic growth in an unregulated economy that diminishes the significance of the human wellbeing, and welfare of all? Regulating the economy, taming, and sublimating crude human instinctual desires does not mean the economy and society has become socialist but rather the goal of society is reoriented to create a compassionate free market economy where the pursuit of economic growth, human creativity and innovation is balanced out with the creation of flourishing human being, human society, and a deep commitment to the common good.

Wherever we are and whatever we do, let us in our local contexts commit ourselves to practically balancing the pursuit of economic growth in our community with the commitment to creating an inclusive, flourishing human being and society that will cater to everyone's life. If we decide to change the whole world with its problems, we will be overwhelmed and likely to become cynical. The result will, however, be different, if we create a niche in our context and make deliberate effort to create social groups or join social groups that are working sincerely to build bridges across social and cultural divides. Such groups will enable the creation of a public sphere of overlapping consensus that will enable all to work together to create a flourishing human being and society. When this is accomplished, its aggregate effect will positively transform the United States and set an example to other nations.

Dr Samuel Zalanga
Professor of Sociology Emeritus
Bethel University

How Conflict Coaching Can Enhance Your Mediation Practice

In recent years, conflict coaching has developed into a distinct ADR process emphasizing conflict engagement and skill development for individuals experiencing conflict situations. In this one-on-one, forward-focused process a coach works with an individual to increase their competence in engaging in, managing, or productively resolving conflict. Common steps in the conflict coaching process include assisting the individual to: (1) develop clarity about the conflict by exploring the roles of emotion, identity, and power in the conflict; (2) understand their perspective, needs, and interests and the other party's perspective, needs, and interests; (3) explore and evaluate possible plans of action for engaging in and addressing the conflict; and (4) identify and develop the skills needed to effectively engage in conflict and achieve their goals.

Many of the techniques in the conflict coaching process can also be beneficial to mediators. I am not suggesting that mediators engage in teaching communication skills, mid-mediation, but there are two points in the mediation process that are particularly suited for the use of conflict coaching tools: the pre-mediation conference and caucus. Mediators can use the pre-mediation conference not only to discuss logistics, build trust with the parties, and get a sense of the dynamics of the dispute, but they can also take this opportunity to begin to move the parties into a resolution mindset by assisting the parties to articulate what is most important to them and challenging them to begin identifying mutual interests and expand their thinking about potential options. If parties can develop an understanding of one another's interests prior to mediation, they'll be more prepared to shift their mindset from focusing on fault to focusing on finding a resolution to the conflict. Another technique from conflict coaching that can be used in the one-on-one pre-mediation session is assisting parties to recognize and acknowledge their emotions and how those emotions might be playing a role in the conflict. Addressing this prior to sitting down in the joint mediation session, where the emotional and expectation threshold is higher, may help the party over a hurdle that would be more difficult during the joint session.

Conflict coaching techniques can also be useful during caucus. For instance, the mediator can help parties better understand their perspective of the conflict by encouraging them to look closely at the factual information presented within their narrative and the assumptions they are making about the other party that may be interfering with their ability to move toward resolution. In caucus, a mediator may also assist a party to gain clarity on their viewpoint or a possible solution to more clearly express it in the mediation process.

While mediators must use conflict coaching tools with care to avoid championing one party rather than supporting both parties in reaching a resolution, the principles underlying conflict coaching are consistent with mediation, and mediators can effectively utilize conflict coaching techniques to enhance their repertoire of tools and process interventions.

Dawn Zugay
Founder of ReZolve Conflict

Mediation in Africa - OHADA Rules

OHADA is the French acronym for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires". This translates in English to: "Organisation for the Harmonization of Business Law in Africa". The result of a Treaty signed by 17 French-speaking African countries in 1993, one could make an opening case that the acronym should be changed to OHADAAF: "Organisation pour l'Harmonisation du Droit des Affaires en Afrique Francophone (OHADAAF)" or "Organisation for the Harmonization of Business Law in Francophone Africa", as this is closer to the reality on the ground – in Africa. The amount of work that has gone into the OHADA project is commendable and helpful to its member countries – all mostly former

French colonies. However. questions arise when other countries want to justify why they should sign a treaty with African countries that are joined at the hip with France in several ways that these other countries are not. This gives room for pause by these other countries as they try to get into the devil in the details of what getting involved in OHADA really implies. Since 1993, it has been quite a pause – no other country but the French speaking countries are members. Is there something wrong with this picture? Yes, and there's more. As a tool for resolving legal issues between business partners across multiple African states, OHADA is a clever attempt at trying to reign in what I call endemic bureaucratic dysfunction which is an offshoot of a neo-colonial system of government that is not rooted in the interests of these nations but in that of the overarching master of OHADA ceremonies – France. Rehash: OHADA is a misnomer. It should be OHADAAF for the simple reason that it is composed of 17 members mostly former French colonies, but for one exception of the English speaking region of the Cameroons, where there is an ongoing genocide since 2016. As a former citizen from this region, I know where the shoe pinches - the arc of justice bends better with common law than with civil law.

It is a known fact that the decolonization of Africa is more of theory than practice, given that most of the institutions established by colonial powers to rule the colonies were barely revised or retooled for the said decolonized countries to actually "rule" themselves. Some statements have been made alluding to the fact that colonial powers like France "at decolonization went out through the front door and came back in through the back door". OHADA is but a small section of a post-colonial system that has its roots in the colonial Civil Law system of France as implemented in colonized territories. In other – simpler – words, it is a discreet transfer of the Civil Law Culture of one country to the other(s). Similarly, in former British colonies, there was the transfer of the Common Law Culture. There seems to be an earnest effort to perpetuate and propagate for all intents and purposes. In this case – OHADA – in the area of Business in Africa is a case of the propagation of facets of French Civil Law culture into the Culture of African Business Law. Is that a good thing? Out of the fifty or so countries in the African Union, one should wonder what gives pause to the other countries from joining a seemingly benign business law machine that could engulf all of 1.5Billion Africans. It is obvious that with various civil, common and hybrid law systems in African countries there would be a real need for harmonizing policies, processes, and legal procedures between all of them. The reasons why some countries are dragging their feet can help shed light on the darker areas of a process that is aimed at All African countries but mostly endorsed by France and its former colonies in Africa. The OHADA system does not operate in a vacuum – it does so easily in a Civil Law system, but it is questionable if its operations can be similarly compatible in a Common Law ecosystem. The total population of Africa is estimated at about 1.5Billion. The current 17 member countries of OHADA make up about 350 million people – significantly less than a third of Africa. Marketing OHADA as an African entity with an open invitation to African Union members to "join" is a strategy that could work – or not. 2 There are 3 African countries that make up almost half a billion in population: Nigeria (200 million+), Egypt (100 million+), Ethiopia (114 million+). None of them are members and are not former French colonies; the legal system in Nigeria is based on Common Law, Egypt's legal system is a mix of European, French and Islamic Law, Ethiopia's system is based on Courts – Federal/State ... How does one do business across African borders with this many legal systems? Is OHADA the gateway to harmonizing business laws on the African continent? See part 2 next issue.

Kenn Wanaku
Indigenous Culture Activist

Opening to the Possibilities

What do you see as possible? Watching the Olympics, I notice top athletes doing what they love and pushing themselves to be even better. Seeing Chloe Kim and Nathan Chen earn gold medals causes me to wonder about possibilities. At one time, it may not have been considered possible for a skater or snowboarder to perform at that level of technical difficulty. Yet, they do. Not only do they perform at a top level, but they push the envelope further. Did you see Kim attempt an even more difficult move in her final two runs after securing the gold? She sees possibility. She believes in what is possible. So often in conflict,

focus goes to the beliefs about what is not possible. I hear employees and supervisors saying the "other" just will not listen, and a co-worker say their colleague does not share information. The "other" states they are not the issue. This also happens during mediations among couples and co-parents. Yet, who really takes the time to talk about what this looks like? What does it mean to listen or share? What ways could this happen that would be acceptable to everyone involved? Focusing on who is not doing what hinders creating ideas for resolution. Options exist beyond what you might consider possible. When working from a vision, you start to notice the possibilities. Considering what might be possible, it becomes more likely to create a resolution that meets everyone's needs. What possibilities do you see? Do you really believe they might be? What if an idea leads to conflict resolution? How open are you to the possibility?

Sherry Ann Bruckner, J.D.

Think Outside the "Arbigation" Box

In medieval times, when merchants and craftspeople disagreed they would often ask others in the trade to make the call as to who was right and who was wrong. In the West that was the origin of arbitration – dispute resolution by people who knew the field and did not need to ask much help from governments. It was fast, efficient, flexible and fair.

Is arbitration any of those things today? Has this method of dispute resolution become just an etiolated court trial, with a hazier shape and style? Many think arbitration nowadays is just a private trial with a private judge, complete with delay, out-of-control discovery and soaring costs. It has earned the sobriquet of "arbigation," a fanciful term that conveys the bad marriage of litigation and arbitration to create a vehicle with the advantages of neither. Can anything be done to fend off arbigation and restore the vigor of true arbitration?

Much has already been done to curb the trend. Administrators have moved to streamline rules, limit discovery, set firm deadlines, encourage arbitrations to move along swiftly. But even better solutions lie in the hands of the advocates who must make the process work. Arbitration is still flexible at its core and advocates can genuinely rethink how to more efficiently present and persuade. Counsel can work together to create a freer format, with witnesses taken out of order; experts testifying by report; witnesses appearing more than once and addressing discrete issues in bifurcated chunks of time; opposing witnesses appearing together for a conversation; harnessing technology. Make it easier for the decision-maker too: summarize testimony as it comes in; redefine what a "brief" means – perhaps it shows up as bullet points or even slides; encourage arbitrator questions; ask the decision-maker what more they want to hear. Condense, summarize and keep it moving.

It will take a little creativity to renew and reap the promises of arbitration. The next time you have a hearing coming up, challenge yourself to think outside the box. What might make your presentation more convincing, the budget leaner, the time frame shorter, all the while preserving fairness? Solutions are in your hands!

Madge Thorson
Professor of Law
University of Minnesota
****

The Governing Council will meet next on Tuesday **February 14, 2023 at 11:00 A.M.**

Minnesota State Bar Association
600 Nicollet Mall Suite 380, Minneapolis, MN 55402 | 612-333-1183
Hennepin County Bar Association
600 Nicollet Mall Suite 390, Minneapolis, MN 55402 | 612-752-6600
Ramsey County Bar Association
332 Minnesota Street Suite 2550, St Paul, 55101 | 651-222-0846