The Advocate, Vol. 14, No. 1, 1982

Suffolk University Law School

Follow this and additional works at: https://dc.suffolk.edu/ad-mag

Recommended Citation
https://dc.suffolk.edu/ad-mag/43

This Magazine is brought to you for free and open access by the Suffolk University Publications at Digital Collections @ Suffolk. It has been accepted for inclusion in The Advocate by an authorized administrator of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.
Bateman & Slade has outgrown its quarters at 11 Beacon Street, Boston and has been fortunate enough to acquire two lovely buildings in the Custom House/Broad Street district in downtown Boston. The two contiguous buildings are located on the south corner of Broad and Water Streets.

45 Broad Street, designed in 1876 by Carl Fehmer, is an unassuming but interesting structure in a modest site. The slightly angled edges follow an earlier street pattern. The bevelled corner, second-story pediment, ornamentally shaped windows, and the polychrome brick and stone are characteristic of the structure's High Victorian Gothic style.

Bateman & Slade's editorial and business offices, library, proofrooms and typesetting facilities will occupy the entire second floor of both buildings. Our pressroom and bindery will occupy the first floor of 119-121 Water Street. We're proud of our new home and would enjoy visitors. Please drop in.

Bateman & Slade, Inc.
Printers & Publishers to the Legal Profession.
45 Broad Street, Boston, Massachusetts 02109
(617) 423-5556
DISPUTE RESOLUTION ALTERNATIVES

Introduction ........................................................................................................... 3

Family Mediation is at a Critical Point by John A. Fiske ......................................... 3

Mitigating Litigating:
   An Analysis of Mediation within
   Small Claims Courts by Karen F. Green ............................................................. 9

Boston Municipal Court/Criminal Justice
   Foundation Mediation Project by Pattie Fowler ................................................... 20

The Massachusetts Bar Association's Fee
   Arbitration Board by Alex Moschella .................................................................... 21

The Rabbinic Court: An Alternate Forum by Jane Leiken ......................................... 26

Christian Conciliation Service by Faith M. Lane ..................................................... 26

Teaching Alternate Dispute Resolution by Bernard Ortwein .................................. 29
The Connecticut Lemon Law: Lemon-Aid
for the New Car Buyer by Frederick J. Watson .................. 32

This Katz Got More Than Nine Lives:
An Interview with Professor Milton Katz by Jeremy Silverfine .............. 35

Looking For Mr. Defense Bar: An Interview
with Alan M. Dershowitz by Gary A. Modafferi ..................... 37

Book Reviews .......................................................... 41

Notes
Alumni
Faculty
In Memoriam
Miscellaneous
Quod Nota .............................................................. 43

The objectives of The ADVOCATE are to publicize the activities and outstanding achievements of the Law School and to present articles by students, faculty and guest writers on timely subjects pertaining to the law.

All articles and editorials reflect the personal views of the authors and are not necessarily the views of the administration or faculty of Suffolk University Law School.

Guest editorials by students and faculty are welcomed by The ADVOCATE, which recognizes its obligation to publish opposing points of view. Persons desiring to submit manuscripts, to be put on the mailing list or to communicate with the staff please address all letters to: The ADVOCATE, Box 122, Suffolk University Law School, 41 Temple Street, Boston, MA 02114.

All Rights Reserved
Dispute Resolution Alternatives

Introduction

There has been an astronomical increase in cases filed in our state and federal courts within the past decade, so much so that Chief Justice Burger warns of the breakdown of our court system by century's end.

The frustration that clients and their attorneys experience due to our clogged system is well known to the legal profession. Yet, the immediate response of many is that we must increase the number of courts, judges, prosecutors and defense attorneys so that the wheels of justice will turn more freely.

In contrast to those with the opinion that more of the same is better, some concerned attorneys and laymen are experimenting with alternative ways to resolve disputes. These alternatives include mediation, negotiation and arbitration. Arbitration is closest to the traditional judicial resolution of claims with a third party imposing a resolution on the disputing parties. Mediation is the farthest removed from the courtroom in that its goal is to draw the parties together to resolve their own disputes.

These alternative methods are actually not new, but newly rediscovered, means of resolving claims. Eastern cultures have been using these methods for centuries, considering litigation a distasteful option.

The reemergence of these alternatives in our society raises many questions in application, organization, participation and enforcement. Yet the need is so great that ways must be found to make use of whatever means exist to restore individual relationships. Many of these questions concerning alternative dispute resolution are considered in this issue of The Advocate.

Family Mediation Is At a Critical Point

by John A. Fiske, Esq.

(John A. Fiske is a partner of Healy, Lund and Fiske, a Cambridge, Massachusetts law firm concentrating in family law and mediation. In the past three years he has mediated approximately 125 marital disputes, in over half of which one or both parties were represented by counsel. He is a member of the Family Law Committees of the Massachusetts and Boston Bar Associations, and Vice-President of the Massachusetts Council on Family Mediation.)

Since the Divorce Resource and Mediation Center began helping people to resolve divorces in a non-adversarial mode in about 1977, Massachusetts has seen the vigorous growth of mediation in the private and public sector. In some counties, mediation by probation officers in the Probate and Family Court is required before a judge will hear counsel on issues involving custody or living arrangements. Attorneys throughout Massachusetts are holding themselves out as mediators of family disputes, and therapists and family counselors are actively promoting themselves for the same purpose. Hundreds of families have benefited from this opportunity to work out acceptable resolutions with the aid of neutral third persons.

The Directory of Mediation Services, published in 1982 by The Divorce Mediation Research Project, lists 13 different family mediation organizations or individuals in Massachusetts. The recently formed Massachusetts Council on Family Mediation already lists over 50 members, and is growing rapidly.

Mediation, it seems, is here to stay. Yet there is growing and legitimate concern that real and potential drawbacks to the process will hurt its growth and potential usefulness. We are at a critical time in the development of family mediation, for this reason.

The purpose of this article is to examine the mediation process and the opportunities and hazards it poses for the legal profession, and to suggest the need for a code of ethics or other minimum standards to which mediators may adhere if they expect to be regarded as professionals. The article concludes by suggesting 12 ethical principles or guidelines for lawyers who practice or consider practicing mediation. The author offers these ideas to stimulate the focus on this important subject, and welcomes criticism and suggestions from lawyers and others who share concern for ways to improve the resolution of family disputes.
The Mediation Process

"Mediation," as used in this article, is a voluntary process in which two people hire a neutral third person to help them define a mutually acceptable resolution of a dispute.

"Mediation," as used in this article, is not:

a. Arbitration, whereby two people hire a neutral third person to decide for them the terms of a resolution of a dispute.

b. Conciliation, whereby two people hire a neutral third person to help them reconcile their marriage.

c. Negotiation, whereby two people each hire his or her lawyer to negotiate an agreement for them.

d. Adjudication, whereby two people go to court to have a judge decide for them the terms of a resolution of a dispute.

Where Does Mediation Come From?

The use of neutral third persons to help people resolve disputes on a voluntary basis probably predates the Bible, and is found extensively in other cultures such as Chinese, Jewish and African. The recent spread of no-fault divorce to 48 states has lent enormous impetus to the concept of divorcing spouses talking with each other without discussion of fault, or what went wrong in the past, and focusing entirely on the fact of the end of the marriage and the need to plan a new and workable relationship around their common bond of children. There is a highly functional quality to a framework that promotes this planning process.

Part of the impetus for mediation comes from the frustration of many experienced divorce lawyers with the adversary process. "The adversarial process is grotesquely inappropriate for the resolution of most marital disputes." A major difficulty of family law is that the problems brought by clients are frequently not primarily legal problems; they are deep human problems in which law is involved." Instead of a win-win situation, war between spouses often brings out the worst qualities in each, not to mention their lawyers. Judith Wallerstein and Joan Kelly have written extensively on the harm done to children by prolonged fighting during a divorce, yet the very nature of a system in which the role defined for each lawyer is to zealously advocate the position of his or her client seems designed to promote this conflict. Of course, many domestic relations lawyers keep a higher sense of purpose: 90% of all divorce cases are settled without trial. Nonetheless, the obstacles created by the adversarial system take their toll, on parties and lawyers alike. The dissatisfaction of the consuming public drives people to seek alternatives. According to Howard Irving, there is an old Asiatic curse: "May you have a lawsuit in which you know you are right!"

Part of the impetus for mediation comes from the courts themselves. Chief Justice Warren Burger, in his consistent and outspoken commitment to reducing the administrative and adjudicatory burden on the state and federal court systems, has repeatedly encouraged the wider use of mediation, arbitration and other diversion systems to keep cases from the courts. Chief Justice Edward Hennessey of the Supreme Judicial Court and Chief Justice Alfred Podolski of the Probate and Family Court have given public encouragement to the concept of family mediation and the latter has supported the development of appropriate mediation programs. Many of the Probate and Family Court justices have been using mediation in one form or another for several years as a way to advance the time of settlement or to reduce the number of cases requiring judicial time. Chief Justice Lawrence Cooke of the New York Court of Appeals spoke recently at the Community Dispute Resolution Center in New York in praise of community mediation, pointing out studies that approximately 85% of the participants live up to their agreements.

In 1981, the Massachusetts Special Commission on Probate and Family Court Procedures issued a report addressing various issues affecting court procedures and the integrity of the family unit. The report recommended further development of court mediation programs, a listing in every Probate and Family Court of private and public mediation services available to litigants in that court and the careful monitoring of existing and newly developed mediation programs. The report noted one form of mediation with considerable promise is mediation by a trained, neutral attorney, and urged "approaching the various Bar associations to develop a standardized, statewide mediation service, with appropriate mechanisms for monitoring and quality control." p. 41.

As one divorce lawyer put it recently: "I think the search for an alternative is important enough that I must take the risk. Somebody's got to do it."

What Are The Risks?

Behold the turtle who makes progress by sticking its neck out. The lawyer who decides to mediate a divorce does the same. Approximately 20 bar associations have examined the path, and some have found more obstacles than others. Boston and Oregon reach one conclusion, New York City and Maryland a second and New Hampshire and Connecticut seem to be going through a metamorphosis from negative to positive, or at least neutral. The main obstacles are the risk of dissatisfaction from one or both members of the couple, and the professional or ethical risks. I begin with the latter, which are carefully explained by Professor Linda Silberman in "Professional Responsibility Problems of Divorce Mediation," 16 Family Law Quarterly 107 (Summer, 1982). They are essentially as follows:

a. Canon 5 of the ABA Code of Professional Responsibility requires the lawyer to exercise independent professional judgment on behalf of his or her client. Therefore, the lawyer cannot represent husband and wife simultaneously, and as mediator runs the risk of being considered by one or the other as
his or her lawyer at some point in the process.

b. The mediator runs the risk of giving legal facts to one party that may be to the detriment of the other, despite his or her promise, and their expectation, of neutrality.
c. The mediator may be accused of partiality, of taking sides for one against the other.
d. The mediator must avoid a partnership or other collaboration with a non-lawyer if the relationship interferes with his or her independent judgment as an attorney.
e. No attorney-client privilege exists to protect the confidentiality of communications made in mediation, thus allowing the risk of disclosure at trial.
f. If the parties go to court pro se, they run the risk of being subsequently harmed by never receiving competent legal advice as to their rights and responsibilities under the divorce agreement, or as to alternatives other than the ones they arrived at through mediation.

In “Mediation and Divorce: The Dark Side Is Still Unexplored,” (see footnote 8), Richard Crouch reiterates these risks, and adds some of his own: the danger of exploitation of one party by the other, the possibility of independent counsel for husband or wife causing the renegotiation of the entire agreement or else refusing to accept the ambiguous role of “back-up lawyer;” the failure of the Kutak Commission to unmuddle the already muddled subject of dual representation, and the dilemma of continuing or curtailing a mediation when imbalance of power is leading to an unfair or distorted agreement.

There may be others. Any force for change invites resistance, and the lawyer who decides to mediate a divorce should prepare himself or herself carefully for this new and challenging role. The lawyer should consider some of the benefits, as well as the risks: for the appropriate couple, the process is more efficient, functional, cheaper and less painful. For the mediator, the process can be more satisfying, and if properly conducted, can be economically sound for him or her as well as the couple. Mediation can be adopted with skill to fit in as part of an overall family law practice, although some family lawyers have preferred to become full-time mediators.

In order to provide lawyers guidance in deciding whether to mediate a divorce or other family dispute, and to enhance their likelihood of success if they do, I offer in the rest of this article an amalgam of suggestions which I believe addresses the ethical issues and also help to formulate a creative and useful process, for which all participants should be grateful. In the development of these ethical guidelines and other suggestions, I am in debt.

A Proposed Code of Ethics and Guidelines

1. A mediator should have good listening and verbal skills, a sense of fairness and a temperament suited for being in the middle. He or she should have creative problem-solving talents, a non-judgmental attitude and much patience.

Comment: All the training available will not make a person who lacks these qualities into a good mediator. Personal qualities are not often elevated into ethical standards, but these ingredients are the sine qua non of an effective mediator and deserve first mention.

2. The mediator should spend time with the couple at the outset, carefully explaining the process.

3. The mediator should assist the couple in deciding whether the mediation process is suitable for them.

Comment: Mediation is not suitable for couples who cannot communicate, or cannot cooperate with each other on any significant decision, or insist on fighting over any issue, or fail to trust one another to make a full and fair financial disclosure, or have no important common stake in a peaceful resolution of the conflict, or suffer from an imbalance of power so great as to make a relatively fair or equitable agreement impossible. However difficult it may be for the mediator to evaluate a couple in the early hour of a mediation, there is much merit in the process of self-selection. As a couple learns about the mediation process, they will sense whether it will work for them or not.

4. Full and fair financial disclosure must be made, prior to any discussion of finances, by each to the other and to the mediator.

Comment: Unwillingness to make such disclosure, or to trust the other to do so, is a sure sign that mediation will not work.

5. The mediator cannot represent either party at any time in conjunction with the divorce.

Comment: This stricture is critical to the success of mediation. In his or her neutrality lies the ultimate reason he or she is hired. Deviation from this restraint not only thwarts the basic contribution he or she can make, it also runs afoul of Canon 5. Thus, no one can mediate a case in which he or she has represented either party in the past.

The prohibition against representation of either means the mediator does not act as counsel for either spouse. This role does not prevent him or her from giving legal information to the couple, so long as it is done in the presence of both. The New York City Bar opinion is emphatic on the need for both people to be present during such discussion. Some examples include posing and answering these questions: What issues have to be resolved? What solutions are within a predictable range of acceptability by a court? What are the tax consequences of various alternatives? What are some acceptable ways to resolve issues of valuation of pension plans, or a closely held corporation, or a professional practice? In his or her neutral capacity, the provision of such legal information is consistent with the role of mediator.

In helping the couple to answer these questions, the mediator may refer them to other experts, including their own counsel. To the extent the mediator feels...
qualified to provide basic information in any of these areas, there is nothing inherently partial or unethical about doing so.

6. The mediator must make sure each person is informed of his or her right to seek independent legal counsel at any time during the mediation process, including the period before any decision is made to begin mediation.

Comment: One school of thought prohibits the mediator from accepting a mediation unless both parties have counsel from the beginning. Other mediators recognize the right of people to represent themselves, and do not require such representation. In any event, the obligation to inform each party of his or her right to independent legal counsel of his or her own choice, and to allow each the opportunity to act on that choice at any time, is a minimum requirement.

7. The mediator may refer either or both parties to specific attorneys on request, provided he or she gives them a choice of more than one counsel.

Comment: There is an ample supply of competent domestic relations counsel in Massachusetts, many of whom are familiar with mediation and not inclined to undermine agreements carefully developed in a thoughtful process. The role is very difficult, however, and the "back-up lawyer" must be careful in deciding to what extent he or she will require basic evaluation of all financial and other factors entering into the ultimate agreement presented to him or her, to what extent he or she will require renegotiation of substance, and to what extent he or she will avoid passing on the fairness of the agreement, confining his or her analysis to the language of the proposed agreement. For these reasons the Boston Bar opinion recommends that counsel for the parties be involved early in the process, both for continuing consultation and for the assurance of having them willing to perform the task expected. The New Hampshire Bar Association considers it a risk for the mediator to recommend specific attorneys.

8. The mediator should promote resolution of all necessary issues and exclude consideration of issues irrelevant to such resolution.

9. The mediator may, upon request, draft a proposed separation agreement for the parties, but should avoid preparation of pleadings, filing of court papers and other activities associated with the court.

Comment: The Boston Bar opinion does not prohibit the mediator from drafting a proposed agreement, particularly when it will be reviewed by independent counsel. Parties who choose to present such agreement to the court without review by independent counsel are not placing the mediator in an unethical position, although the risk of subsequent criticism may be increased by its absence. The criticism may be aimed at the failure to explain fully legal rights, or legal responsibilities, or alternatives to the solutions developed during the mediation. It may suggest the agreement is more vulnerable to subsequent attack or modification on the ground that the plaintiff was not represented by counsel and thus incomprehending of what he or she signed. The question, however, is whether the mediator is unethical if he or she permits the couple to pursue the course pro se: since the law allows the approach, one may wonder why an ethical standard would eliminate it. The more sound approach appears to require a thorough discussion of the alternatives with each couple, and to leave it to each lawyer mediator to use his or her own judgment as to how much he or she should insist on individual representation in a given case.

10. The mediator should inform the couple of his or her opinion of the fairness or unfairness of their agreement, or a particular aspect of it.

Comment: The mediator is more than an amanuensis, simply recording an agreement of others. He or she has his own views of its fairness, and should at some appropriate point use his or her unique position as confidant of both to guide them away from a solution he or she considers unfair. It is not inappropriate or unethical to inform a couple that they will have to present their agreement to a judge for review, whether or not it is examined by independent legal counsel, and that an agreement falling far outside the accepted bounds of fairness, or failing to provide adequately for the needs of children or either party, may possibly be rejected by the court. If they insist on their own distorted solution, the mediator is in a difficult position best resolved by insisting that the person being treated unfairly consult with his or her counsel before signing the agreement.

11. The mediator should retain in confidence all communications made during the mediation.

Comment: Although no lawyer-client privilege is present, and the husband-wife privilege does not obtain in the presence of a third person, one can consider such communications as offers of compromise and therefore inadmissible in evidence. Many Massachusetts judges recognize the need to protect the privacy of communications made by parties in mediation, and resist the threat to subpoena the mediator if litigation ensues.

12. The mediator should maintain knowledge of current professional information related to the services he or she provides.

Comment: The Ethical Principles of Divorce Mediation developed by the New Jersey Council on Divorce Mediation require the mediator to participate in continuing legal education and other

---

"Any force for change invites resistance, and the lawyer who decides to mediate a divorce should prepare himself or herself carefully for this new and challenging role."

---

"It is safe to predict that a movement of such importance will spawn its own resistance. All the more reason, then, for lawyers interested in mediation to insist on ethical principles."
professional programs to remain informed of developments affecting marital dissolution, living arrangements and other family matters. Participation in supervision and other peer-review programs is of great importance to the effectiveness of the mediator, and to the growth of mediation in a professional manner.

**Conclusion**

An open-minded advocate of the use of mediation is Professor Frank Sander of the Harvard Law School, who believes the legal profession has an obligation to make use of various forms of mediation as an alternative to the adversary process and to experiment with those which appear most likely to be useful to families under stress. Professors Sander and Silberman agree that mediation should be developed, but they urge upon us the adoption of standards sufficiently strict to prevent the type of abuse which causes Richard Crouch and other commentators some legitimate concern.

It is safe to predict that a movement of such importance will spawn its own resistance. All the more reason, then, for lawyers interested in mediation to insist on ethical principles, mandatory or exhortatory, to guide them clear of predictable problems. If the risks are worth taking, and they are, it is good advice to minimize them.

**Notes**

1. At the 1982 meeting of the Family Law Section of the American Bar Association, mediation was the primary subject reported by the Bureau of National Affairs. The article quotes New York practitioner and mediator Adriane Berg as saying mediation is here to stay, and none of the commentators quoted appear to disagree. 8 Family Law Reporter 2642, August 31, 1982. Nor do any of the approximately 25 newspaper articles I have come across or received in the mail in the past two years. It is worthy of note that the 1982 meeting of the International Society of Family Law was devoted entirely to alternative methods of resolving family disputes. Recent meetings of the American Bar Association and the Association of Family and Conciliation Courts have focused solely on the advantages and disadvantages of divorce and family mediation.


5. See note 3, p. 27.


7. "Arbitration Times," published by the American Arbitration Association, Summer 1982, p. 3. Similar remarkable statistics appear in a study of custody mediation by Dr. Jessica Pearson and Dr. Nancy Thoennes showing approximately 70% of mediated results are satisfactory to the participants, as opposed to approximately 50% of adjudicated disputes, and 77% of those who tried mediation reported satisfaction with the process, as opposed to 42% who were satisfied with the court process. "Custody and Mediation in Denver: Short and Longer Term Effects," The Center for Policy Research, Denver, Colorado, March 1, 1982.

8. "Mediation and Divorce: The Dark Side Is Still Unexplored," Richard Crouch, 4 Fam. Adv. 27 (1982). He considers this quote from a respected lawyer as the best answer he has heard so far to the grave problems he sees attendant upon the mediation process. If the only other choice is "defensive practice," he prefers the mediation process as an honest effort to find needed alternatives. For one view of how to go about commencing mediation, see "An Enthralling Introduction to Divorce Mediation," John A. Fiske, Boston Bar Journal, December 1981, p. 15.

9. The Committee on Professional Ethics of the Connecticut Bar Association issued an informal opinion in September, 1982 approving mediation in which both parties are represented by counsel. 8 F.L.R. 2734 (October 12, 1982).

10. The Proposed Final Draft of the American Bar Association Commission on Evaluation of Professional Standards ("the Kutak Commission") holds an attorney may act as an intermediary between clients after disclosure and obtaining each client's consent to the common representation. Rule 2.2. The comment suggests the role could not apply in a divorce or other marital dispute, where litigation may be imminent or even ongoing. The concept of representation becomes quite confusing when introduced into the concept of mediation: the roles and functions must be regarded as quite separate and distinct.

11. The suggested ethical principles and guidelines are drawn from various sources, including:

a. *Ethical Principles of Divorce Mediation*, published by the New Jersey Council on Divorce Mediation in May, 1982;


c. Various bar association ethical opinions, with particular attention to those of Boston and New York City; and

d. the Linda Silberman and Richard Crouch articles addressing the ethical issues and common concerns about the mediation process.


g. Suggested ethical principles developed by Wayne Soini, Esq., a Boston attorney interested in mediation.


13. See generally Silberman, supra; also relevant is the thorough New York City Bar Association opinion. 7 F.L.R. 3097 (October 13, 1981).


16. Professor Sander is quoted to this effect at the 1981 meeting of the Association of Family and Conciliation Courts in 8 F.L.R. 2131 (January 5, 1982).
Mitigating Litigating: An Analysis of the Use of Mediation Within Small Claims Courts

by Karen Falkenstein Green

Ms. Green is presently an associate with the firm of Hale and Dorr in Boston. She received her B.A. in Sociology in 1978 from Harvard University and in 1981 received her J.D. from Harvard. The following is a portion of her third year paper written in 1981.

The possibility that any given problem might be handled in more than one way does not constitute a liability. Rather, it is a form of competition among, for instance, means of settling a dispute. . . . Each method of dispute settlement constitutes a different product — of differing utility to different consumers — some clearly more suitable than others for certain situations. The Justice Industry has an obligation, not simply continuously to refine one product — but to deliver new and competing products to serve the varied needs of the consumer.1

The past five years have witnessed a general movement within the United States toward the development of alternatives to adjudication for the resolution of minor2 disputes.3 In 1976, the American Bar Association, the Judicial Conference of the United States, and the Conference of Chief Justices co-sponsored a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in the United States (the Pound Conference) to investigate the major problems confronting the courts. This conference was followed in 1977 by a special task force report which recommended the development of "Neighborhood Justice Centers," defined as facilities that would "make available a variety of methods of processing disputes, including arbitration, mediation, referral to small claims courts as well as referral to courts of general jurisdiction."4

Since then over 100 programs, including three experimental projects sponsored by the Department of Justice and the National Institute of Justice, have been established across the country to provide parties with the option of having their disputes mediated rather than litigated. The mediation programs dealing with civil matters vary widely in terms of the range of dispute resolution processes they provide, referral sources, organizational affiliations, and staff characteristics. To date, however, most have focused almost exclusively upon cases involving disputes among parties having continuing relationships. They also have tended to be established outside the courts. Very few programs have been implemented within the courts for the express purpose of providing the alternative of mediation to small claims litigants.

The reluctance to extend experimentation with the use of mediation to the small claims context is perhaps understandable. Small claims courts themselves are designed to provide litigants with an alternative to traditional court processes. Moreover, it generally has been thought that small claims litigants would be less willing to compromise than other types of litigants. Many small claims cases involve disputes over purely economic matters, such as the nonpayment of bills, between business litigants and private individuals. Usually, these parties have no on-going relationships. Much of the literature on mediation, meanwhile, has emphasized the importance of continuing relationships for the encouragement of compromise between parties. It also has reflected a general concern that disputes between individuals and large organizations may be inappropriate for mediation, since large organizations enjoy greater bargaining power than individuals, and therefore have little incentive to compromise.

The reluctance to extend mediation to the small claims context, as well as much of the concern about continuing relationships and unequal bargaining power in the mediation process, may be misplaced. Providing mediation as an alternative to adjudication is one way by which the small claims court may more nearly achieve its historical objectives at the same time that it responds to some of its modern problems. Even in small claims cases involving disputes between individuals and large organizations and/or parties having no continuing relationship, mediation can be an efficient, just, and satisfactory alternative method of dispute resolution.

The Original Reform: Small Claims Court

Small claims courts were established in the early twentieth century in response to a perception that technical procedural requirements of litigation in the United States were operating to deny justice to the poor.5 The basic problem was that cumbersome court machinery resulted in unreasonable delays and high costs in lost wages, attorney fees, and court fees.6 While rich litigants could afford to shoulder these costs, the poor and others having claims of small monetary value could not.

The establishment of small claims courts was first proposed by Dean Roscoe Pound in an influential article on "The Administration of Justice in the Modern City" in 1913.7 Pound advocated the creation of "people's courts" in which procedures would be simple and informal, lawyers would be unnecessary, and judges would assume more active roles than those they played in regular civil sessions. He wrote:

In petty causes there ought to be no expensive advocacy. One side or the other, unless the game of litigation is played for pure pleasure, cannot afford it. . . . Hence the judge cannot be a mere umpire. He must actively seek the truth and the law, largely, if not wholly, unaided . . . . The alternative is a judge.
who represents both parties and the law, and a procedure . . . that will help parties assert and secure their rights, and to get away from the involved and overmechanical procedure which has become a means afforded each party of hindering the other in his search for justice."

In their attempts to devise the uncomplicated procedures envisioned by Pound, the architects of the earliest small claims courts were influenced by the model provided by the conciliation courts of Norway and Denmark. Nikolay Grevstad wrote in the *Atlantic Monthly* in 1891 that the Norwegian Conciliation Court was a "forum of common sense unfettered by legal fictions and technicalities", which had helped to "cultivate among the people a broad, liberal spirit of fair dealing and proper regard for the equitable rights of others."12

Under the Norwegian model, all civil litigants were required to appear before a conciliation court to try to resolve their disputes with the help of third party mediators before contesting claims in the regular law courts. The conciliation sessions were private and lawyers were rigidly excluded from them.13 They were presided over by two lay persons, a "chairman" and a "clerk," who were elected to their positions by members of their communities "with a particular view to their fitness as peacemakers."14 The officials would attempt to settle disputes in a quick, fair, and nonlegalistic manner by enlisting the cooperation of both parties.

If the parties to a dispute reached a settlement during conciliation, their agreement was recorded and could be enforced as a final judgment. If no settlement was reached, the plaintiff was given a certificate which permitted him to file an action in the regular civil courts. Nothing said by either party during the conciliation session could be used against him later at trial.11

America's first small claims court, the Conciliation Branch of the Municipal Court of Cleveland was established in 1913. It was patterned closely after the Norwegian model. Parties were encouraged to tell their sides of stories in their own words, no set procedures governed the hearings, and conciliation or "mediation," as it is now called, was attempted in every case. The Cleveland Court modified the Norwegian model in some very crucial respects, however. First, lawyers were only discouraged, not prohibited, from participating in conciliation proceedings. Second, judges, not elected laypersons, mediated the cases. Finally, and perhaps most significantly, the two-staged conciliation/trial procedure followed in Norway was collapsed into one stage in the Cleveland Court. That is, if the judge's mediation efforts did not result in a mutually agreeable settlement between the parties, the judge would then impose his own judgment in the case, based on the substantive law.14

Between 1913 and 1923, the small claims court movement spread rapidly throughout the United States. "Small Debtor Courts" were organized in three Kansas cities in 1913. Between 1915 and 1920, more courts were opened in Chicago, Minneapolis, and Philadelphia. Massachusetts provided by statute for the first statewide system of small claims courts in 1920. Within three short years, other statewide systems were in operation in California, South Dakota, Nevada, Idaho, and Iowa.15

These early courts were not all based upon the same procedural model. Nevertheless, they shared the same basic purpose: "to provide a friendly forum where the citizen without means, or of limited means, [might] present his claim or defense with a minimum of confusion, delay, and expense, with or without the aid of a lawyer, and without forbidding court formality, and be assured of a prompt decision according to law — a judgment in time to enjoy it."16 They also had subsidiary goals in common, including: (1) providing a forum to interest groups who, while not necessarily poor, had legitimate claims of limited value; (2) relieving congested dockets in the regular civil courts; (3) avoiding the alienation of large segments of the population; and (4) securing the integrity of judicial institutions.18

Moreover, by 1923 a more or less standard small claims process for fulfilling these objectives had begun to emerge. Its essential features were as follows:19

1. The adversary model of litigation or adjudication was retained in most places. But lawyers were discouraged and, in some jurisdictions, prohibited from participating in small claims hearings in order to reduce litigation costs.

2. To compensate for the absence of lawyers, judges were assigned the role of active investigator rather than passive referee. It was their responsibility to extract all relevant testimony from both parties.

3. Judges were also given wide discretionary powers. Only the broad outlines of procedure were specified. Judges were expected to decide cases on the basis of substantive law. However, they were not bound by formal rules of evidence in the process of doing so.

4. Judges were also empowered to stay the entry of judgment or issue of execution to allow installment payments based on a defendant's ability to pay.

5. In keeping with the goal of removing economic barriers to the courts, court costs were reduced to a minimum.

"[T]he architects of the earliest small claims courts were influenced by the model provided by the conciliation courts of Norway and Denmark."
(6) To enable litigants to appear pro se, clerks were assigned the task of assisting them in the pre-trial preparation of their cases.

(7) A variety of ancillary procedural reforms was also implemented, including the simplification of pleadings, elimination of pre-trial procedures, waiver of jury trials by plaintiffs, and curtailment of appeal rights.

(8) Jurisdiction of the courts was specifically limited to claims of small monetary value.

Taken together, the above features reflect a basic contradiction in the structure of the standard small claims court model. From the moment of its inception, the court was neither fish nor fowl. On the one hand, it was intended to provide a speedy, inexpensive, and informal forum wherein lawyers would not be necessary, the rules of evidence would not apply, and the judge’s role would be transformed from impartial “umpire” to “investigator.” Yet, on the other hand, the resolution of disputes within this forum was to be governed by a judge’s application of the substantive law. At bottom, the reform was, to borrow a term from Richard Abel, an only partial and somewhat confused effort at “delegalization.” The adversary model of adjudication was retained, yet most of its procedural protections were eliminated.

Reform Revisited:
The Problems of the Modern Small Claims Court

During the early sixties, the rise of the consumer justice movement in the United States sparked a renewed interest in the small claims courts. Since then, the courts have been subjected to extensive study and criticism. Numerous studies have shown that while the courts are relatively speedy and inexpensive, they suffer from several deficiencies which prevent them from fully realizing their historical objectives. Rather than being “free of the feeling that he is lost without money or a lawyer to lean upon,” the “average man,” and particularly the poor one, who appears in small claims court today is likely to find it a fearful and frustrating place where the quality of the conveyor-belt justice he receives depends as much on the judge who hears his case as on any substantive principle of law.

“[There is] a basic contradiction in the structure of the standard small claims court model.”

It was not until the early sixties that individuals began to seriously question the practical effectiveness of the standard small claims court. When they did, it became clear that it was not so perfect as its early supporters had supposed. Indeed, it suffered from a number of deficiencies which prevented it from fully realizing its founders’ goals. Eventually, even the small claims court became the subject of demands for reform.

Many, if not most of the problems seem to stem directly from fundamental contradictions in the “stripped down” process of adjudication used by small claims courts to resolve disputes. While the theoretical goals behind this hybrid process, i.e. speed, accessibility, simplicity, etc., are laudatory, it simply does not always work well in practice. What is needed, as several commentators have already argued, is not more tinkering with the small claims process, but rather experimentation with different processes directed at achieving the same goals.

The remainder of this paper is devoted to a consideration of the use of one alternative process, mediation, to resolve small claims cases. Much of its analysis depends on an appreciation of the differences between adjudication and mediation. Hence, a brief explanation of terms is in order.

“Adjudication” has been defined as a “social process of decision which assures the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor.” There are four essential features to the traditional adjudication or “trial-type” process. First, it involves the use of an impartial and competent third party with coercive power. In the small claims court, that party is the judge. Second, it involves the right of parties to participate through specific procedural devices such as entitlement to notice, formal rules of evidence, the opportunity to present proof and to cross-examine witnesses, etc. Third, there is a special requirement that all decisions reached be based on the record, consistent with accepted principles of law and rationally explained. Finally, decisions reached are reviewable by an appellate court.

Adjudication typically involves bipolar controversies and win/lose decisions. The judge rules either for the plaintiff or the defendant. Decisions are based primarily on retrospective determinations of fault. The judge attempts to determine the past acts of the parties, and measures them against societal norms embodied in the substantive law. Finally, adjudicative decisions tend to focus on narrow legal issues as distinguished from the underlying relationship between parties.

Mediation, in contrast, is a process in which a third party, who has no power to dictate the outcome of a case, attempts to assist disputing parties in arriving at a mutually satisfactory resolution of their dispute. I. Fuller defines its central quality as “its capacity to re-orient the parties toward each other, not by imposing rules on them but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.” Fuller’s definition highlights the essential differences between mediation and
Second, the mediation process is future-oriented. The effective mediator encourages parties to go beyond what has happened to them in the past to what is going to happen in the future. Instead of fault-finding, mediation is directed at creative problem-solving.

Finally, mediation is less formal than adjudication. Formal rules of evidence and procedure do not apply. Sessions typically are presided over not by judges wearing black robes, but rather by laypersons dressed in street clothes. Parties do not appear opposite one another and present evidence in a courtroom filled with all of the trappings of the adversary process. Instead, they sit beside each other and a mediator around a table.

They explain in their own words, for as long as it takes them to do so, not only what has happened to them, but also how they feel about what has happened to them. There are no formal restrictions prohibiting the introduction of relational and/or emotional "side issues" which are not directly relevant to the determination of narrowly defined legal questions.

Although early small claims courts were inspired by a mediation model of dispute resolution, that model was significantly changed in the United States. Critical features of the traditional adjudicatory process, including judges with coercive power and decisions based on law rather than mutual agreement, were added to it. Over time, the small claims process has become increasingly more formalized and its adjudicatory features have become paramount. It now appears, for example, that litigants feel a real need for legal assistance with their small claims cases and that lawyers have become a standard part of the small claims process. Meanwhile, some judges are experiencing a conflict in their roles between assisting pro se parties on the one hand, and remaining impartial adjudicators on the other.

The adjudicatory process does not exist in its pure form in small claims court. Lawyers are not required, procedural protections such as formal rules of pleading and evidence are relaxed, and gives them a chance to communicate directly with each other. The process is not only less traumatic and imposing for some inexperienced litigants but, at times, also leads to more effective results. In the mediation of personal conflict cases, for example, parties are sometimes able to resolve their interpersonal problems at the same time that they resolve their legal claims with less disruption of their underlying relationships. In cases in which both parties prefer a specific performance to an award of monetary damages, the parties enjoy the freedom to agree to such a remedy, even though a judge could not impose one.

Third, because the law does not determine outcomes in mediation, lawyers are truly unnecessary. Thus, mediation may be even more accessible and less expensive to litigants than adjudication. If an attorney does appear against an unrepresented party, the pro se party might not be as disadvantaged by the attorney's presence in a mediation session as he would be at trial. The advantages of prior training with the law and experience in the small claims court would probably count for less in a mediation session. Inexperienced litigants would have more time within which to outline their concerns and mediators could more comfortably play active roles in eliciting information from inexperienced litigants than it appears some judges can. Since settlement discussions would be supervised, there would probably be fewer opportunities for an attorney or a more experienced litigant to intimidate or take unfair advantage of a pro se party in mediation than there would be in unsupervised settlement discussions. Finally, even if a mediation did not result in a settlement, it might better prepare an inexperienced litigant for trial.

Fourth, the use of mediation might actually lead to fairer results than adjudication in some cases. As already noted, judges sometimes find it necessary to rule against parties having otherwise valid claims because they have failed to produce sufficient legal proof of their claims. In mediation, however, legal technicalities like the preponderance of the evidence rule do not apply. A party having a valid claim might convince the other party to provide the compensation due him even though a judge could not order that such compensation be paid.
Fifth, mediation might alleviate the problem of imposed compromises within the small claims court. The introduction of voluntary mediation programs within the court implies a separation of the roles of mediator and adjudicator now combined by some small claims judges. Because mediators would be mediating, judges could concentrate on adjudicating. They would know that cases which came to them directly or after failed mediations probably cannot be compromised, and that such cases demand strict adjudications of parties' rights. Judges probably would not experience some of the role conflict they currently experience in small claims court. In addition, they would have more time within which to perform adjudications.

Sixth, mediation might lead to an improvement in the collection of judgments. Because outcomes are determined by mutual agreement rather than by judicial imposition, parties are likely to acquire a greater sense that they are fair and feel more responsible for their payment or satisfaction in mediation. Where a defendant lacks the funds to pay a money judgment immediately, the parties can arrange for a realistic payment plan within the mediation session itself instead of having to rely on supplementary proceedings.

Finally, and perhaps most importantly, offering parties the option of mediation is likely to increase litigant satisfaction with the small claims court. If they were clearly informed in advance of the differences between mediation and adjudication, parties would know what to expect from each process and would be able to make their choices of forum in accordance with their own particular needs and interests. Parties having cases involving particular problems of legal proof or interpersonal conflict, for example, could take advantage of the greater opportunities to deal with these problems provided in mediation. Meanwhile, parties whose principle goal is to "show the other side" by obtaining a finding of fault against him, could take advantage of adjudication. In any event, it would be less likely that a party would go to court for an adjudication, expecting a decision based on the law, only to receive an imposed compromise.

"The introduction of voluntary mediation programs within the court implies a separation of the roles of mediator and adjudicator now combined by some small claims judges."

The Mediation Alternative in Practice: A Case Study of the Harvard Small Claims Mediation Program

The Harvard Small Claims Mediation Program (hereinafter "HSCMP") provides small claims litigants at the East Norfolk District Court in Quincy, Massachusetts the alternative of mediating their small claims instead of litigating them. The program was founded by the author and Ms. Susan Theil largely in response to the problems and considerations outlined above. It was and continues to be an experiment designed to test the effectiveness of mediation in the resolution of small claims cases.

In designing the HSCMP, our primary goal was to design a cost-effective voluntary program for the mediation of small claims which would fulfill the historical objectives of the small claims court at the same time that it responded to some of its modern problems. Another goal was to further the implementation of a Massachusetts statute which already provided for the mediation of small claims cases.

In 1978, the Massachusetts legislature passed a law entitling small claims litigants in the district courts to submit their cases to clerk-magistrates for mediation and resolution prior to trial. M.G.L. c. 218, § 22 (1978). As of early 1981, however, the law still had not been implemented in most of the district courts. It was hoped that if the HSCMP experiment proved successful, it could be assimilated by other district courts in the Commonwealth.

In order to acquire funding and an organizational base for its mediation activities, the HSCMP was established as a student organization in February of 1981.

The Quincy District Court was chosen as the location of the HSCMP experiment for three reasons. First, it had one of the largest backlogs of small claims cases in the state. Second, it was run by a presiding justice, Judge Albert Kramer, and a chief administrator, Mr. William McPhee, who were receptive to the mediation idea. And finally, the courthouse was easily accessible to students by public transportation.

Our review of the literature on mediation had made us particularly sensitive to three potential problems in introducing mediation to the Quincy small claims court. First, we were concerned that mediation might not work in cases involving parties who had no continuing relationships upon which to build compromises. Many writers had emphasized the importance of continuing relationships in the mediation process. Yet, most of the small claims cases we had observed involved disputes between business litigants and consumers who had no on-going relationships, over purely economic matters such as the non-payment of bills.

Second, we were concerned that disputes between strangers of unequal bargaining power, i.e., individuals and large organizations, tenants and landlords, represented parties and pro se parties, might be inappropriate for mediation on the theory that those enjoying greater bargaining power would have no incentive to compromise. Finally, we were also troubled by the assumption in some of the literature that mediation is unlikely to be effective in urban American settings in which people lack the shared values and informal social controls provided by strong community networks.

Among the questions we hoped the HSCMP experiment would answer were:
1. Can mediation be effectively used to resolve small claims cases?
2. If so, what kinds of cases are appropriate for mediation?
3. What kinds of cases are inappropriate for mediation?
4. How important is a continuing relationship between parties as an incentive to compromise in the mediation process?
5. In the absence of a continuing relationship, what other incentives to compromise exist within the small claims context?

6. What factors influence a litigant's decision to mediate a case rather than to adjudicate it?

7. What effect, if any, will the introduction of voluntary mediation programs have on small claims court caseloads?

8. How do those litigants who participate in the mediation process feel about the experience?

9. Do parties comply with agreements reached during mediation?

10. Finally, what are the advantages and disadvantages of offering the mediation alternative inside, as opposed to outside, of small claims court?

The HSCMP is jointly sponsored by Harvard Law School, the Phillips Brooks House, and the Harvard Negotiation Project. Twenty-three volunteers serve as mediators in the Harvard Small Claims Mediation Program. Fifteen of the mediators are students at Harvard Law School. Seven are undergraduates at Harvard-Radcliffe College. One is a graduate of the University of Vermont Law School.

The mediators were selected from a pool of 47 applicants on the basis of their prior mediation training and experience, interpersonal skills, and/or knowledge of and experience with small claims courts. Twelve of the law student mediators had completed an intensive workshop course in negotiation and mediation at the time of their selection. Others had had prior mediation experience outside of law school. Meanwhile, all of the undergraduate mediators had served as lay advisors to small claims litigants through the Small Claims Advisory Service of the Phillips Brooks House.

All of the mediators received 25 hours of intensive training in negotiation and mediation prior to their entry into the Quincy District Court. The training was conducted by the author and Mr. William Lincoln of the National Center for Collaborative Planning and Community Services. It consisted of lectures on negotiation, mediation, the drafting of agreements, and the small claims court process, and several role-playing mediation exercises. The mediation exercises confronted students with problems they would actually encounter in small claims mediations and forced them to apply the various negotiating and mediating techniques they were taught to realistic situations. Students' performances were critiqued by the trainers as well as by their fellow students.

Since the opening of the mediation program, the training of the student mediators has continued. Students fill out a "Mediator Self-Evaluation Form" after each mediation. The form contains questions designed to get students to reflect on the problems encountered and techniques employed by them during the mediation and to think about ways they might have made the mediation session better. The forms are submitted to the coordinator of the program who uses them to monitor students' performances, to assist students having particular difficulties, and to plan bi-monthly discussion seminars at which special problems and techniques for dealing with them are discussed in greater detail by the entire group with experts on mediation like Professor Roger Fisher.

At the call of every small claims list, a clerk makes a general announcement that parties have the option of submitting their cases to mediation for resolution prior to trial. If both the plaintiff and defendant agree to take advantage of this option, the case file is referred to a mediator who immediately escorts the parties to the courthouse library or an empty office where the mediation session takes place.

Generally, each case is handled by two mediators, at least one of whom is a law student who has had, in addition to the special HSCMP training, prior training in negotiation at Harvard Law School. All cases in which a party is represented by a lawyer are mediated by law students on the theory that they are in a better position to effectively deal with attempts by lawyers to "legalize" the mediation process and/or intimidate unrepresented parties.

At the beginning of each session, both mediators introduce themselves to the parties. One mediator fills out a brief intake summary on the case which is used later to follow-up on cases. Meanwhile, the lead mediator explains the mediation process to the parties.

The lead mediator typically begins by explaining that mediation is a process by which parties try to resolve their own cases. He and his partner are not judges and have no power to dictate the outcome of the case. They are only there to help the parties resolve their own problem.

The mediator explains that he is going to ask each party to explain what has happened to him. First, he will ask the plaintiff to do so, then the defendant. The only ground rule will be that no one interrupts while another is talking. After each party has told them what happened, the mediators will ask to speak to each party privately in an individual caucus for no longer than five minutes. He explains that a "caucus" has two purposes. First, it gives the parties an opportunity to tell the mediators things about the case that they did not feel comfortable telling them in front of the other side. Second, it gives the mediators a chance to ask questions and to clarify anything they did not understand about what the parties told them during the joint session.

Next, the mediator tells the parties that everything said in the mediation session is confidential and cannot be later used against them at a trial, if there is one. Additionally, he will not disclose anything that a party tells him not to disclose to the other side during a caucus.

The mediator explains that if the parties reach an agreement during the mediation session, it will be written down and entered as an enforceable, non-appealable judgment of the court. Each party will receive a copy of the agreement. If it calls for the payment of money and the payment is not subsequently made, a party may return to court for a supplementary process hearing, where the only issue will be why the judgment was not paid. If the parties do not reach an agreement, their case will be referred back to the judge for a trial.

"In order to acquire funding and an organizational base for its mediation activities the HSCMP was established as a student organization in February of 1981."
on the same day. Finally, the mediator emphasizes that if either party is uncomfortable with anything that takes place in the mediation session at any time, he is free to end it and have his case immediately referred back to court for a trial.

After the mediators answer any questions the parties have, the mediation process begins. HSCMP mediators rely heavily upon an application of the Harvard Negotiation Project Method of negotiating to their mediations. In accordance with this method, they strive to:

1. Separate the people involved from the problem
2. Focus on the parties’ interests, not positions
3. Invent options for the parties’ mutual gain and
4. Insist on the use of objective criteria to settle differences of interest.

During the opening session of the mediation, the mediators try to determine the nature of the parties’ relationship by asking questions like “How long have you known the other party?” and “Will you be seeing him in the future?” If it turns out that the parties do have a continuing relationship, the mediator may use this relationship later to encourage compromise between the parties. Next, they try to elicit all of the facts of the case and to obtain a sense of the parties’ perceptions of the problem which brought them to court.

The mediators encourage both parties to tell their stories fully and do not balk if a party occasionally strays from the facts to vent his frustration or unhappiness with his situation. If one party becomes abusive, the mediators try to separate the people from the problem by rephrasing his hostile remarks in a neutral or positive manner, and by redirecting the parties’ attention to the problem at hand. Occasionally, they simply separate the parties by caucusing early.

As the parties explain what happened, the mediators listen carefully and make special note of any statements which they do not understand or which seem a bit overblown. They also make a special note of all clues to what the parties’ real interests, as opposed to positions, are.

Throughout the opening session, the mediators are constantly thinking — about what the points of agreement and disagreement between the parties are; how both parties’ interests might be satisfied in a negotiated agreement; who they will ask to caucus with first; what questions they will ask the parties in individual caucuses; and how they will phrase their questions to get parties to view the problem from the other side’s perspective and to loosen up their positions without being offensive or accusatory.

After both parties have finished, the mediators ask to caucus privately with one party. They ask the other party to think about a particular problem while he is waiting, i.e., “What are some ways we might resolve this case today to be fair to everybody?” This is done to keep the waiting party from getting bored and also to let him know that he is not being shut out of the process. The five minutes are designed to give him time to think about what he would like to say in his individual caucus as much as it is to caucus with the other side.

The first part of the individual caucus is generally spent testing the reality of statements made by a party during the joint session and bringing a party’s expectations into line with reality through questions. The mediators, referring to their notes, question the party in as openended and neutral a manner as possible about any inconsistencies in his earlier presentation as well as about facts and considerations brought out by the other side.

“All cases in which a party is represented by a lawyer are mediated by law students [who] are in a better position to effectively deal with attempts by lawyers to ‘legalize’ the mediation process. . . .”
If such questions were successful in loosening up the parties’ positions and helping them to understand the other side’s position, the mediators would try to go behind the parties’ positions by asking them directly what they really wanted from the mediation session. The mediators would then search for some objective criteria upon which to base a settlement.

Throughout the mediation process, the mediators encourage parties to go beyond looking solely at who was “at fault” in the past to how they are going to resolve their problem in the present for the future. He encourages each party to consider what his best alternative to a negotiated agreement (otherwise known as BATNA) is and to consider all settlement proposals in light of that alternative. The mediator does this primarily by asking questions like, “What will you do if you do not reach an agreement today?”; “What do you think the other party will do if you don’t reach an agreement?”; “What will you do if the other side rejects your settlement proposal?”; “How do you think a judge would decide this case based on everything you’ve heard so far?”; “Do you want to end the mediation session now and let the judge decide this case at trial?”

Lawyers are not excluded from mediation sessions. However, mediators are trained to assume more active roles in sessions in which lawyers face a pro se party. Generally, the mediator begins a session with a lawyer by emphasizing that mediation is an alternative to a negotiated agreement and going to court. If, however, the mediator takes no position on how the statute will be applied in the particular case. His job is to insure that a party is aware of and realistically considers the law as one more factor in his decision to either accept a proposed settlement or go to trial. How the law affects the decision is for the parties, not the mediator, to decide based on their first-hand knowledge of the facts of the case.

If the parties arrive at an agreement, the mediator drafts its terms clearly and specifically on a “Mediation Memorandum.” The Memorandum is a standard form which was prepared by the Chief Justice’s Office for use by clerk-magistrates mediating under Massachusetts’ small claims mediation statute. The form itself only includes terms relating to the payment of monetary damages. If parties agree to some specific performance, in addition to or in lieu of damages, HSCMP mediators draft the terms of that agreement to be sure that it is complete and signs it. The mediator also signs the agreement and gives copies of it to both parties. The original is referred back to the court, where it becomes a binding enforceable judgment which may not be appealed from by either party. The mediator congratulates the parties for resolving their problem on their own and the mediation session ends.

If the parties do not reach an agree-

“[T]he mediators encourage parties to go beyond looking solely at who was ‘at fault’ in the past. . . .”

...
ly conducted eight days of mediations. Hence, it is still too early to draw any definitive conclusions regarding the program's effectiveness. Nevertheless, an analysis of the cases mediated to date suggests that much of the emphasis upon the need for continuing relationships and concern about unequal bargaining power in the mediation process may be misplaced. Even where parties lack a continuing relationship and/or one is a business organization and the other is an individual, mediation can be an effective process for the resolution of small claims cases. Meanwhile, responses to the follow-up surveys which have been conducted so far suggest that parties are extremely satisfied with the mediation program, its mediators, the mediation process, and the outcomes of their cases. They also reveal a high rate of compliance with agreements reached during mediation.

Incentives to Compromise

There are several incentives to compromise within the small claims court context which may induce parties to settle even in the absence of continuing relationships. For many litigants, and especially for business litigants and attorneys, time and immediacy of payments are important factors. As already noted, parties often have to wait for hours in the small claims court for a judge to hear their cases. Even after hearings, many judges take cases under advisement and thereby delay judgments for weeks. Once judgments are rendered, a substantial proportion of them go unpaid. Mediation sessions, in contrast, begin immediately after the call of the small claims list. Judgments agreed upon in mediation are often fulfilled on the same day. When defendants are unable to fulfill agreements immediately, installment payment plans are generally devised which not only increase the likelihood of payment but also decrease the chances that both parties will have to suffer the inconvenience of supplementary proceedings. Overall, some litigants feel that they can save time, which they can more productively spend elsewhere, and obtain a greater proportion of their judgment by compromising their claims. The fact that the amounts at issue are relatively small makes the saving of time even more of an incentive.

For other litigants, the sheer unpredictability of small claims court judgments is the incentive. Many litigants who compromise their claims have been in small claims court before. Some, and especially business litigants, have had the experience of not receiving a full recovery from a court within the time they felt they were entitled to under the law.

Sometimes the prospect of a small claims trial provides the incentive to compromise. For some litigants, the experience of having to appear before a judge in an adversary proceeding is traumatic. They simply decide it is worth it to them to compromise their claims in order to avoid the experience.

Still another incentive to compromise is provided by the greater flexibility of remedies in the mediation setting. As already noted, the judge in small claims court is limited in imposing judgments for monetary settlements. Yet sometimes plaintiffs value the opportunity to vent their frustration, to vindicate a principle and/or to obtain specific performances in a mediation session more highly than money. Some defendants, on the other hand, value money more highly than the specific performances.

There also seemed to be certain cultural values which contributed to parties' willingness to compromise in the mediation process. Although most of the litigants who participated in mediations were morally diverse strangers who did not live in tightly organized communities, most nevertheless seemed to share a general respect for "fairness" and rationality which could be effectively used to stimulate negotiation and compromise. They also seemed to share some very basic conceptions of "fairness" in common. The author found, for example, that parties could generally agree that the following general principles were "fair":

1. One should only pay for what he obtains.
2. One should only be compensated to the extent that he actually has been harmed.
3. In determining the extent to which one has been harmed and/or benefitted, one should look to objective measures instead of being driven by pure will.

Finally, the law itself often served as an incentive to compromise. In Massachusetts, there are a number of laws designed to protect those traditionally viewed as "weaker" parties in standard relationships such as the tenant in a landlord-tenant relationship and the consumer in a merchant-consumer relationship. Many of these laws provide for the award of treble damages for their violation. As a practical matter, the damage provisions are rarely enforced by the courts. Yet they provide powerful incentives to compromise to landlords and merchants and actually tended to equalize the parties' bargaining power within the mediation forum. The landlord who refused to compromise in mediation knew that a judge at least had the power to impose a treble damage judgment against him in court. Meanwhile, the tenant knew that if he did not like the settlement proposed by the landlord, he always had the option of trying for treble damages in court.

One might be concerned about those cases in which parties are not aware of their rights under such protective statutes and therefore cannot use them to their full advantage in the mediation session. Indeed, some have suggested that the use of mediation in such cases results in an unfair sacrificing of parties' rights. We certainly worried about that problem in designing the HSCMP. As a practical matter, however, the problem has not turned out to be as great as it seemed in theory.

Many parties to mediation sessions came to them with some familiarity of the law governing their cases. Even when they did not, almost all parties were very
much convinced that they were right and the other side was wrong. As a result, the parties were fully capable of deciding on such things as time, money, practicality, rationality, etc. If they thought settlement proposals were unfair or the other parties were being unreasonable, they ended the mediation sessions and went to trial.

This is not to say that cases never arose in which HSCMP mediators wondered whether one party was taking advantage of another’s ignorance of the law or general negotiating weaknesses. On a few occasions, they did. Yet even on those occasions, the mediators were not helpless. They sometimes convinced the “stronger” party to back down by asking him directed questions in a private caucus which, while not being offensive or judgmental, nevertheless forced him to consider how a judge might view his case if the “weaker” party terminated the session and to seriously question in his own mind the fairness of his proposals. They sometimes got the “weaker” party to take a stronger position or at least to thoroughly consider the action he was taking by reminding him that he had the right to terminate the session at any time. If these steps did not work, the mediator could always end the mediation session himself. Once a mediation session ended, he could refer the party perceived to be weaker to the Small Claims Advisory Service or some other social agency created to assist parties in asserting their legal rights.  

The HSCMP has not placed restrictions on the types of small claims cases it will accept for mediation. Nevertheless, it seems mediation generally has been most successful in cases involving multiple issues in which both parties have engaged in some behavior which they themselves considered to be fault-worthy.

The use of mediation within the small claims court context is an idea whose time has come. The experience of the Harvard Small Claims Mediation Program suggests that in many cases, mediation can more effectively serve the small claims court’s objectives of speed, informality, accessibility, and understandability than can the standard adjudicatory process. Mediation programs cannot totally replace small claims trials. However, they can go a long way toward increasing litigant satisfaction, improving collections, and reducing backlogs within small claims courts.

**Future Directions**

There are at least two ways in which the mediation alternative might be provided in other small claims courts. First, court systems might hire mediators or train regular court personnel, such as clerks, to mediate cases. The advantage of such a system is that it would force court systems to assume responsibility for reforming their own operations.

As a practical matter, however, some court systems may be unwilling to hire new personnel in the face of cutbacks in state spending and the withdrawal of federal funds from the 1980 Dispute Resolution Act. Additionally, as in some Massachusetts courts, regular court employees simply may be unwilling or unable to take on mediating responsibilities in addition to their regular responsibilities.

If that is the case, court systems might recruit and train volunteer mediators from the community. Alternatively, local law schools might sponsor student mediation programs as Harvard Law School has done. Students could be trained and authorized to mediate cases as part of their formal legal training as they are currently authorized and trained to litigate cases through clinical education programs, legal aid societies, and public defender programs.

By sponsoring clinical education programs in mediation, law schools could train future lawyers to mediate and negotiate effectively, while demonstrating their commitments to the public interest. The advantages of student mediation programs over court-sponsored programs are fourfold. First, law school sponsorship would likely mean that mediators would obtain better and more comprehensive training than they would obtain in court-sponsored programs. In the Harvard Small Claims Program, we have found that mediators need more than just an intensive 22 hours on the mechanics of mediation. They also need a theoretical framework within which to fit their practical experiences. Generally, those student mediators who had taken Harvard Law School’s Negotiation Workshop Course tended to be even better mediators than those who had not.

Second, the use of student volunteers would be more cost-effective than the hiring of additional court employees. As already noted in Chapter Three, the Harvard Small Claims Mediation Program has been able to operate quite effectively on a budget of approximately $1,000, largely by drawing upon resources already in existence at the school.

Third, student mediation programs are likely to be more resistant to the tendency toward bureaucratization which tends to plague many government-sponsored programs. Students, who are still somewhat idealistic, bring a special enthusiasm and commitment to mediation sessions. Because they operate from a smaller organizational base, they tend also to accept and adapt to change more quickly than most court bureaucracies do. This consideration is particularly relevant when one considers how long it has taken the Massachusetts District Court System to implement the state’s small claims mediation statute.

Whether small claims mediation programs are staffed by court employees, community volunteers, or student volunteers, they should conduct their mediation activities at the courts so that “weaker” parties may take advantage of the greater bargaining power provided by the forum, if necessary. Participation within the programs also should be purely optional. Requiring all litigants to participate in mediation sessions as a

```````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````
`````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````````
mandated first step to getting their cases adjudicated is likely to waste the parties’ time as well as that of the mediators. Like the changes made in the conciliation model upon which the original small claims courts were based, it is also likely to strip the mediation process of much of its utility as an “alternative” to regular court processes.

Notes

2. The term “minor,” as used here, does not refer to the complexity of a dispute but rather to its monetary value.
3. A number of factors have contributed to this movement. The growth of government combined with the waning of traditional institutions for adjusting grievances such as the family, church, and neighborhood have placed increasing pressures on the courts.
4. American Bar Association, Report on the National Conference on Minor Disputes Resolution, (1978) at 2. Increases in the sheer number of cases brought to the courts, in turn, have resulted not only in delays, but also in hurried hearings, litigant frustration, and a growing disenchantment with the increasing complexity and remoteness of traditional court processes. Ibid., at 2.
5. American Bar Association, Report of the Pound Conference Follow-Up Task Force, August, 1976, p. 1. D. McGillis & J. Mullen, Neighborhood Justice Centers: An Analysis of Potential Models, (1977), at 29. The task force, which was chaired by former Attorney General Griffin Bell, was appointed to insure that the reforms discussed at the Pound Conference would be considered more fully.
11. Id.
12. Id.
13. Id.
14. T. McFadgen, supra note 9 at 69; R. Smith, supra note 3 at 63.
15. T. McFadgen, supra at 13.
17. N. Cayton, supra note 7 at ___.
19. B. Yngvesson & P. Hennessey, supra note 5.
21. Indeed, one author has gone so far as to recommend the abolition of small claims courts. J. Frierson, Let’s Abolish Small Claims Courts, 16 JUDGE’S JOURNAL, Vol. 4, p. 18 (1977).
22. N. Cayton, supra note 7 at ___.
23. T. McFadgen, supra at p. 166.
24. See, e.g., J. Frierson, supra; Gould, David S., Staff Report on the Small Claims Court, submitted to the National Institute of Consumer Justice, August 1972; T. McFadgen, supra; B. Yngvesson & P. Hennessey, supra.
26. R. C. Cramton, Id.
27. Sander, supra at p. 115.
28. L. Fuller, Mediation: Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971) (“Judgments of law are directed toward acts; it is acts, not people, that are declared proper or improper under the relevant provisions of law.”).
29. See Sander, supra at p. 115.
30. L. Singer, Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor, 13 CLEARINGHOUSE REV. 569 (December, 1979) at p. 570.
31. L. Fuller, Mediation: Its Forms and Functions, supra at p. 325.
33. M.G.L. c. 218, § 22 was passed as part of the Massachusetts Court Reorganization Plan of 1978. The statute provides in relevant part:

At the commencement of an action . . . the plaintiff shall be informed that such action may be submitted to the magistrate for mediation and resolution at the request of either party and with the agreement of both parties. The magistrate shall make appropriate note of any agreement so reached and entry of judgment shall be made by the court. Any action which is not resolved by agreement may, at the request of any party, be heard by a justice under the preceding paragraph.

34. Mediation is now available to litigants by appointment on Wednesday evenings also. Parties are notified of the mediation option at the time they file their cases. If they choose to exercise it, mediation sessions are scheduled within two weeks. The obvious advantages of this system are that it reduces the usual delay between filing and hearing and allows parties to appear without having to take time off from work. It is hoped that the system will encourage parties to try mediation and will decrease defaults.

35. We decided to use two mediators per session because we have found quite simply that “two heads are better than one” when it comes to listening closely to what parties have to say, picking up on clues to parties’ perceptions and interests, and generating as many options for resolving a case as possible. One mediator, usually the law student, takes the lead in each mediation session. But the two mediators really work as a team. See R. Fisher and W. Ury, How to Negotiate Successfully (forthcoming).

36. HSCMP mediators are trained to phrase as much of what they say during the mediation session as possible in the form of questions to avoid the appearance and the reality of pre-judging the parties’ positions or assuming facts that simply do not exist.

37. The undergraduate mediators are familiar with landlord-tenant and consumer statutes which are commonly used in the small claims court from their experience as lay advisors in the Small Claims Advisory Service. All of the mediators from the college and the law school received training in some of the most common laws applied in small claims actions as part of their training. Some mediators have felt that they would like even more training in the law in the future.

38. Some evidence of the pervasiveness of the notion of fairness among litigants in the Quincy District Court is contained in the follow-up surveys which have been collected to date. The most frequent response given to the question asking people why they settled on the terms they settled for was because they were “fair.”

40. Mediators in the HSCMP are not only free to take such action but are actively encouraged to do so in those extreme cases where it appears warranted.
The Boston Municipal Court Mediation Project

by Pattie Fowler

The Crime and Justice Foundation (CJF), in cooperation with the MBA (Massachusetts Bar Association) Task Force on Alternative Dispute Resolution and with the support of numerous law enforcement agencies and private philanthropies, has established a mediation program with the Boston Municipal Court (BMC). The project is solely concerned with referrals made by either the justices at arraignment or criminal complaint session or by the clerk-magistrates of the Court during application for a civil complaint or at a show cause hearing. However, rather than picking up the cases initially cast aside by the judicial process, the BMC/CJF project handles cases which the Court would actually try itself.

The project accepts criminal and civil cases, regardless of type of charge, within the jurisdictional guidelines of the BMC (however, no prostitution, drug, auto theft or other crime which would normally be sent up to Superior Court). Eligibility for mediation rests upon a combination of several factors including (1) the existence of two or more clearly identifiable parties who have a prior or continuing relationship as a basis for negotiations and (2) their voluntary consent.

Neil Houston, Executive Director of the Crime and Justice Foundation, emphasizes that the success of the program rests largely on the continuing support and cooperation of the nine BMC judges, especially in the early days of the project. “We were able to go at whatever pace... we [felt] we could afford to take.” The project handled approximately 400 referrals in its first year and a half existence (BMC’s annual case load approximates 15,000 of these types of complaints alone), and still has on its roster 43 of the original 46 attorneys who volunteered their services as mediators. Additionally, while no statute protects the confidentiality of the mediation process, the BMC judges recognize, as most judges do, the need to maintain confidentiality and will usually disregard any references to the substance of what transpired during a mediation session.

The fact that mediation has been attempted, however, is brought to the Court’s attention and if an agreement is reached between the parties, the Project’s convenor requests a 90-day continuance in order to allow the parties to carry out the terms of their agreement.

CJF trains their attorney-mediators through a structured 22 hour program and informally through actual sessions with an experienced CJF mediator. The most pressing concern of the CJF staff is the possibility of a forced settlement imposed on the parties by the mediator. To safeguard against the normal desire of the lawyer to settle despite the unreconcilable differences of the parties, the CJF staff takes several precautions. Prior to the mediation session, the lawyer-mediator is only given the names of the parties and the alleged offense so as not to enable the mediator to form an opinion prior to learning the facts from the parties themselves. During the actual session, the CJF convenor is outside the room with one of the parties while the mediator meets separately with the other party and/or considers the case on his own. The convenor pays particular attention to the reactions of the parties, as to the ongoing process, and can usually identify signs of discontent. The staff later scrutinizes the resulting agreement, again looking for indications of arbitrariness by the mediator. During the 90 days following the settlement, the staff of CJF contacts the parties to determine if and how the terms are being carried out.

Mr. Houston emphasizes that while the sessions are informal, without the rules and protocol of a courtroom (the agreements are written in simple declarative sentences rather than formal legal jargon), the entire process maintains a professional and structured format.

Some of the many benefits to resolving criminal and civil disputes in this manner are the long range rehabilitative effects on the parties. The disputants have an opportunity to participate in the outcome, and have usually responded with a sense of fairness and an attitude of good will. The resolution process is more adaptable to the outside pressures these parties deal with on a day-to-day basis and incorporates the prior relationship leading up to the alleged incident.

In general, mediation of civil and criminal complaints has brought to the judicial system the ability to deal with problems arising out of the human experience in a more effective manner than the judicial constraints of time and economy of the courtroom allow.
The Massachusetts Bar Association's Fee Arbitration Board: An Alternative Dispute Resolution Mechanism

By Alex Moschella, Esquire
Assistant Executive Director
Massachusetts Bar Association

I. Introduction

The Fee Arbitration Board was established in 1974 by the Massachusetts Bar Association (MBA). The Board is a standing committee of the MBA and consists of eighteen members and a Chairman. The President appoints the Board. The Board's rules require that there be at least one representative from each county in the Commonwealth.

The chief administrative officer of the Board is the Secretary. The Secretary is an attorney and member of the MBA staff and is assisted by a Hearings Coordinator in managing the day to day operation of the Fee Arbitration Board program. An essential component of the day to day function is the screening of a large number of phone calls and questions on the subject of attorney fees.

The fee arbitration process serves an important function in the operation of a state bar association. In establishing the Fee Arbitration Board the MBA recognized the public service nature of resolving fee disputes. Fee Arbitration is an alternative dispute resolution mechanism that builds communication and trust amongst the disputants.

Experience has proven that the arbitration process touches the heart of the attorney-client relationship — two way communication. The subject of legal fees is troublesome to many practitioners. Some lawyers feel uncomfortable discussing fees with their clients or once discussed, will dismiss the subject until a final bill is rendered. It is common for fee disputes to arise when little or no communication takes place and regular itemized bills are not submitted by the attorney.

II. Overview of Past Hearing Year

One hundred and thirty-six (136) petitions were filed by either lawyers or their clients during the past year to resolve ongoing fee disputes.

In response to a growing number of applications for arbitration involving amounts in controversy significantly less than $500 and "disputes" which were spurious or otherwise did not warrant arbitration, the Board initiated two (2) new practices. The first is a filing fee of $15.00 to accompany all petitions for arbitration and the second is an expanded intake system to screen inquiries and applications.

These efforts, in part, have led to a 35% decline in applications. The petitions which were filed were of a "higher quality" in which the areas of dispute were more carefully defined and were of the type which required a three member panel.

The petitions filed in the past year represented a generally higher range of amounts in controversy: from $1,000 to $80,000. Fee disputes of less than $500 are heard by a single arbitrator.

In 40% of the petitions submitted, the Respondent refused to arbitrate and the petition was dismissed for lack of jurisdiction. The Board fosters the voluntary and binding nature of fee arbitration and is offering mediation services to a number of Respondents who do not wish to be bound by an FAB award.

The type of fee disputes submitted to the Board during the past hearing year are as follows:

<table>
<thead>
<tr>
<th>Case Type</th>
<th>No. of Petitions</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contracts/</td>
<td>12</td>
<td>9%</td>
</tr>
<tr>
<td>Collections</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corporation/Labor</td>
<td>11</td>
<td>8%</td>
</tr>
<tr>
<td>Bankruptcy/Tax</td>
<td>10</td>
<td>7%</td>
</tr>
<tr>
<td>Criminal/Domestic</td>
<td>12</td>
<td>9%</td>
</tr>
<tr>
<td>Relations</td>
<td>11</td>
<td>8%</td>
</tr>
<tr>
<td>Municipal/Education</td>
<td>14</td>
<td>10%</td>
</tr>
<tr>
<td>Probate</td>
<td>15</td>
<td>11%</td>
</tr>
<tr>
<td>Real Estate</td>
<td>15</td>
<td>11%</td>
</tr>
<tr>
<td>Tort</td>
<td>11</td>
<td>8%</td>
</tr>
<tr>
<td>Total</td>
<td>136</td>
<td>100%</td>
</tr>
</tbody>
</table>

III. The Uniform Arbitration Act for Commercial Disputes: M.G.L. Chapter 251

The binding jurisdiction of the Board is derived from the Rules of the Legal Fee Arbitration Board and M.G.L. c. 251, the Uniform Arbitration Act for Commercial Disputes.

Arbitration of a fee dispute becomes possible only after both parties to the dispute agree to submit the matter to the jurisdiction of the Board and be bound by its decision. Once both parties have completed and executed their respective Petition for Arbitration of a Fee Dispute and the Respondent's Agreement, an agreement to arbitrate has been entered into and such an agreement is valid and enforceable in the Superior Court. A copy of the Petition is attached as Annex I to this article.

The appointment of the arbitration panel is set forth in FAB Rule 13.1 and conforms with M.G.L. c. 251, § 3. The panel is authorized to exercise its powers by majority rule unless modified by Chapter 251 or the FAB Rules. A three member panel hears all disputes over $1,000 with a Chief Arbitrator, who is either a present or past member of the Board, in control of the hearing and empowered to make evidentiary rulings if necessary. Single arbitrators hear all
disputes under $500 and, where the parties consent, those disputes not in excess of $1,000.

Chapter 251, § 5(a) allows for notice to be provided by agreement of the parties. Such notice is set out in the Petition for Arbitration of a Fee Dispute and the Respondent’s Agreement. The parties are provided notice of the date, time, and place of the hearing by telephone and notice is confirmed by mail.

The FAB Rules set forth the conduct of the hearings and the rights of the parties to challenge, without cause, not more than two (2) members of the arbitration panel.

Subpoenas are for the production of evidence and/or the attendance of witnesses are allowed and the Board has its own mechanism for issuing subpoenas.

Upon the completion of an arbitration hearing, a panel will reach its decision and issue an award within five business days unless exigent circumstances warrant a longer time frame.

A disputant may vacate or modify the award of arbitrators within thirty days of the award's delivery. If the application is predicated upon corruption, fraud, or other undue means, it must be made within thirty days after the grounds are known or should have been known. The Court may only vacate an award if it feels that the award was obtained by corruption, fraud or undue influences; prejudice of an arbitrator; misconduct of an arbitrator; or an arbitrator acting in excess of his/her powers; or the improper conduct of the arbitration hearing. If the award is not vacated, and there is no motion for modification of the award pending, the Court is required to confirm the underlying award. In the Board’s eight year history, few motions to vacate have been filed and the Court has confirmed the Award of Arbitrators in all such instances.

The Act also allows for application to be made by motion for the modification or correction of an award. Such motion will be allowed if there has been an evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to in the award; the award issued upon a matter not submitted for arbitration and the award may be corrected without effecting the merits of the decision upon the

issues submitted; or the form of the award is imperfect which does not affect the merits. After such disclosure is made, the Chief Arbitrator asks the parties if they have any objection to the arbitrator sitting on the panel. If there is an objection, the Chief Arbitrator makes a ruling as to whether or not the arbitrator should withdraw. If he/she so feels, the arbitrator will be excused for that hearing and the Chief Arbitrator will have the Secretary of the Fee Arbitration Board sit as a replacement if acceptable to the parties.

In the event that one or both parties object, the parties shall be informed that a continuance shall be granted and the matter shall be rescheduled as quickly as possible. If disclosure has been made prior to or during the hearing, and the parties do not elect to challenge the arbitrator(s), any objection shall be deemed to be waived, and it shall not be grounds for vacating the award.

When the disclosure process is completed, the Chief Arbitrator sets forth the basic objectives of the fee arbitration process:

(1) That the purpose of the hearing is to determine what the fair and reasonable fee shall be for legal services rendered by the attorney to the client.
(2) The parties are informed that the Fee Arbitration Board panel does not have the authority to adjudicate any matter which relates to the improper or unethical conduct of an attorney, or any issues dealing with legal malpractice.
(3) The parties are informed that the Board will give both sides ample time in which to present their individual issues. They are also informed that the panel will seek to limit all discussions to matters which help to illustrate the reasonableness of the fee.

The Chief Arbitrator has a certain amount of flexibility as to how to proceed with a hearing, but the following process is usually followed:

The parties are informed that the panel has read and analyzed the written submissions and that the presentation should be limited to providing the arbitration panel with additional information.

The Petitioner should be allowed to proceed first. After his/her presentation, the Chief Arbitrator should allow the Respondent to question the Petitioner either directly or by channeling the questions through the Chief Arbitrator. The panel is then given an opportunity to ask any additional questions they deem relevant.

The Respondent is then given the opportunity to present his/her case.

Each side is then given the opportunity to make their closing remarks without restating past testimony.

The disputants are informed that members of the panel will be allowed to interrupt their presentation to ask questions. They are informed that this process is a dispute resolution mechanism and not an adversary proceeding. Therefore, the parties should refrain from "prosecutorial" behavior, and the hearing should not turn into a trial court atmosphere.

Conciliation of the parties is as important an element of the proceedings as the actual resolution of the fee dispute. The attorney should be pleased with the fairness of the proceeding and the fee arbitration process as a means of resolving outstanding bills which clients believe to be unfair. The client should likewise be pleased with the fairness of the proceeding and the role of the MBA in providing a necessary service to the community. The usual fee arbitration dispute arises between an attorney and a person who does not have dealings with an attorney on a regular basis. Experience has

"It is common for fee disputes to arise when little or no communication takes place and regular itemized bills are not submitted by the attorney."

23
proven that an effective fee arbitration hearing results in fostering a wholesome attitude towards the state bar association by the public and bar.

V. Guidelines in Reaching a Decision

The arbitration panel first determines whether or not a fee contract exists, either express or implied. If there is an express contract for the provision of legal services between an attorney and client, the panel's initial duty is to determine the objective meaning of the contract. If in writing, this is readily ascertainable. If the fee agreement was not in writing then the nature of the agreement is determined on the basis of the testimony of the parties or other extrinsic evidence. The determination of the oral express contract is within the scope of the arbitrator's powers.

After determining the parameters of the express contract, the panel looks to see if there has been performance of its terms by the attorney. If there has been substantial performance of the contract by the attorney, the award of the arbitrators reflects the contracted legal fees.

If the attorney has failed to substantially perform the terms of the fee agreement, the panel determines what fees may be owed based as much as possible upon the terms agreed to in the agreement. If there is an implied contract for the provision of legal services or if there is any discussion as to legal fees, regardless of lack of certainty or no discussion at all, the panel is to arrive at a decision as to what services were contemplated by the parties and then what the reasonable fees for such services should be. Such a figure is based upon the extent of the services actually rendered and the fair value of these services.

Rule 3:07 DR 2-106 of the Rules of the Supreme Judicial Court sets forth an eight point framework for consideration in the determination of attorney's fees:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) Whether the fee is fixed or contingent.

The amount of time which an attorney spends on behalf of the client is a major factor in arriving at the reasonable fee for his/her service. The panel looks to time records which should be produced and analyzes the amount of time in light of their experience. If the attorney was required to spend time representing the client at times other than normal hours (e.g., evenings, weekends or holidays) such time is valued accordingly.

The attorney's usual legal fees for like work, together with community standards for legal fees are an important basis in determining the reasonable value of the legal services rendered. Among other considerations are the following:

(1) The urgency of the initiation and/or completion of the legal activity which was undertaken on behalf of the client.

The Award of Arbitrators contains a very simple finding. For example,

In the above referenced matter the undersigned Arbitrators unanimously find as follows: That a fair and reasonable fee for legal services rendered by the Respondent to the Petitioner is $1,000.00, which includes disbursements made, of which $250.00 has been paid. Further, the Petitioner is ordered to remit to the Respondent $750.00.

Rule 16.2 of the Rules of the Fee Arbitration Board provides that "The arbitration decision shall be made by a majority of the arbitration panel. The award shall be made in writing and signed by the members concurring therein. It shall state only the amount of the award, if any, and the terms of payment if applicable." Arbitrators are not bound to go into particulars, and assign reasons for their award. Their duty is best discharged by simple announcement of the result of their deliberation."
In some cases, the facts of a particular matter are such that the arbitrators feel compelled to include some basic findings of fact upon which to justify their award. If such a matter arises, the arbitrators are extremely cautious in making such finding as they may be used to impeach an otherwise valid award.

VII. Decision Continuity

It is accepted in arbitration practice that no arbitration decision be binding precedent upon another. However, in order for fairness to the parties and credibility for the fee arbitration process to be achieved, it is imperative that some element of continuity be established to provide for a uniform basis in rendering decisions.

Different panelists place different values on the particular aspects of an arbitration matter. The Board evaluates the respective merits of a case on the basis of established criteria, such as SJC Rules 3:05 and 3:07, as well as relevant case law and any other material with which the arbitrator is familiar. Uniformity of analysis by varying arbitrators and arbitration panels increases the efficiency of the fee arbitration process, but also insures the credibility of fee arbitration upon bench, bar and the general public alike.

The Board recently published the second and revised edition of A Guidebook For Arbitrators which contains detailed sections on decision making, hearing guidelines and relevant case summaries on the law of attorney fees. The Guidebook along with regular case discussions and presentations at each meeting of the Board insure a high degree of information sharing and decision making continuity.

VIII. Conclusion

Those lawyers who have generously devoted their time and vision over the years to shape the Fee Arbitration Board as a valuable public service program of the MBA have made an invaluable contribution to their profession and the public.

In addition, lawyers who serve as arbitrators recognize the unusual educational experience that is derived from listening to a fee dispute between attorneys and their clients. The arbitral function and inherent decision making that results is viewed as an exceptional and practical learning experience that would serve the profession well if more lawyers had the opportunity to serve on a panel.

As a dispute resolution mechanism the Fee Arbitration Board is a well accepted component and activity of the MBA. The return on the initial investment in establishing the Board has been substantial.

"An effective fee arbitration hearing results in fostering a wholesome attitude towards the state bar association by the public and bar."

Notes

1. Mr. Moschella in his capacity as the Assistant Executive Director of the Massachusetts Bar Association has also served as Secretary to the Fee Arbitration Board. He has sat as an arbitrator on a number of matters and as Secretary to the Board has participated in over 150 hearings. Mr. Moschella is a 1974 graduate of the evening division of the Law School and received an A.B. degree from Villanova University in 1969.
2. Richard Bryan Kramer, J.D. 1982, Suffolk University Law School functions as the Hearings Coordinator for the Fee Arbitration Board.
4. A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy arising between the parties shall be valid and enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract; M.G.L. c. 251, § 1.
5. C. 251, section 12.
7. C. 251, section 14.
8. Trustees of B & M Corp. v. MBTA, 363 Mass. 336, 294 N.E.2d 340 (1973). Additionally, the annotations to the Uniform Arbitration Act in general, and specifically with regard to section 8, indicate that "this chapter does not require that arbitrator give statement of reasons for decision, setting forth findings of fact and conclusions of law".
The Rabbinic Court: An Alternate Forum

by Jane Leiken

In our increasingly litigation-oriented society, considerations of time and justice have created a need for alternative forums for dispute resolution. One such alternative is the bet din ("house of law"), the rabbinic court, which is both an ancestor and a contemporary of today's civil court system, and whose potential for resolving non-religious issues is once again being explored.

The origins of the bet din are traceable to biblical times when Moses established a judicial hierarchy in the desert, delegating authority to the tribal chiefs, to "able men, such as fear God, men of truth, hating unjust gain" (Exodus 18:21), "wise men, and understanding and full of knowledge" (Deuteronomy 1:13). These judges were charged to "hear the causes between you and your brethren and judge righteously between every man and his brother, and the stranger that is with him," to "hear the small and the great alike; fear no man, for judgment is God's" (Deuteronomy 1:16-17). The bet din originally had jurisdiction over all matters; a panel of three dayanim, or judges (usually rabbis), was required for civil issues, including matters of personal status, such as marriage. Twenty-three judges were needed to resolve criminal cases.

Legislative and administrative functions as well as national issues were addressed by a court of seventy-one dayanim. Decision by a majority vote necessitated an odd number of judges. In addition, special courts focused on temple ritual and civil matters concerning the priestly group, the rabbis. During Roman times, alternate arbitration courts and various other lay tribunals arose, in which litigants chose representatives, most often laypeople unversed in law; also chosen was a chairman, usually a rabbi, to act as an impartial mediator. Such courts endured during periods of Jewish history when the rabbinic courts were destroyed; today the functions of mediation, arbitration and conciliation have been absorbed by the rabbinic court.

A discussion of the bet din's history must include an examination of the court's underlying religious and philosophical foundation. The endurance of the rabbinic court throughout the turbulent Jewish history is itself a tribute to the universality of its founding ideals of conscience, equity, and human dignity. Both the existence and the purpose of the bet din are rooted in scripture, and the law reflects God's just and merciful character, the uniqueness of His revelations and their impact upon daily living. The substance of these laws, matter of evidence, judicial procedure, real estate, commerce, civil and criminal law, to name but a few, are embodied in our present judicial system. Equally significant concepts are due process of law, self-incrimination, double jeopardy, arbitration and conciliation, which have all been studied by generations of Talmudic scholars.

Roman times saw the destruction of the rabbinic court, although as mentioned, arbitration courts survived. During the Middle Ages, the bet din was not only revived, but it also became the symbol of Jewish autonomy. Indeed, throughout their history, the Jews' commitment to their own law was so extensive that their captors and political rulers

---

**Christian Conciliation Service**

If your brother sins against you, go and show him his fault, just between the two of you. If he listens to you, you have won your brother over. But if he will not listen, take one or two others along, so that 'every matter may be established by the testimony of two or three witnesses.' If he refuses to listen to them, tell it to the church; and if he refuses to listen even to the church, treat him as you would a pagan or a tax collector.

Matthew 18:15-17 (N.I.V.)

This passage from the Bible, and several others like it, have provided the impetus for various Christian groups and institutions to look for resolution of disputes outside our established judicial system. The Christian Legal Society, based in Oak Park, Illinois, has established the Christian Conciliation Service. This Service has set up local programs in Albuquerque, Seattle, Washington, D.C., Los Angeles, and other cities.

The Christian Conciliation Service maintains a list of volunteer mediators or arbitrators, including ministers, Christian lawyers and businessmen, and other laymen, from which the parties choose. Once the parties have met, been informed of their choice of processes and advised of the significance of the proceedings, they choose either mediation, arbitration or mediation/arbitration (the latter to follow automatically if the first process fails). A small fee is paid to the Service and the parties then choose a mediator or mediating team. A prepared Bible study precedes the actual session, which study helps the parties assess their goals and relationships in light of Biblical themes.

Although the framework of the mediation sessions is similar to other kinds of community mediation projects, this process is distinctly different in one respect. The parties commit themselves to Christian principles as they read the Bible together, pray, and listen to each other. They have in common not just a vague sense of what is fair, but a commitment to Christ-like love, acceptance and self-sacrifice as illustrated in the scriptures. A Christian conciliation attempts to not only settle the immediate dispute between the parties, but to mend their relationship as well. It is a ministry of healing in a most complete sense, bringing peace to the parties, the mediators/arbitrators, and the church universal.

Our source of information was Buzzard and Eck, Tell It To The Church (1982) which contains an excellent annotated bibliography on Christian conciliation.

F.M.L.
"[I]t is as a court of arbitration or mediation that the *bet din* holds greatest promise as an alternate forum for dispute resolution."
often allowed them to maintain their separate judicial system. The Talmud not only imposed an affirmative community obligation to create a bet din; it also demanded a rejection of Gentile courts, even when that court's substantive law was the same, for to turn away from the bet din was a denial of God and of the Torah, an excommunicable offense. Eventually each community developed its own traditions regarding the bet din; these local courts continued to exert considerable influence until the late 1800's, when the Jewish population began to depart the ghettos and integrate into western society. This period also saw an improvement in the quality of the secular state courts. Since the rabbinic court lacked an enforcement mechanism beyond community pressure, especially for disputes between Jews and Gentiles, the court's jurisdiction was gradually restricted to interpretation of halacha, (Jewish law), ritual and family matters.

Most rabbinic courts today function within that limited scope, and are most often sought out by the Orthodox segment of the Jewish population. A few courts have expanded their jurisdiction and, in their desire to both preserve tradition and cope with change, have reached out to the community at large to address controversial social and political issues. The most notable pioneer in this area has been the Rabbinical Court of Justice of the Associated Synagogues of Massachusetts in Boston. It is the state's one permanent court, comprised of a minimum of three judges, all Orthodox rabbis. No legal training per se is required, although currently at least one rabbi is also an attorney. Expertise is acquired through a rigorous apprentice system. The court convenes on a weekly basis (or in special session if necessary), and performs four basic functions. First, it addresses the administrative task of issuing identifications, of determining who is considered a Jew. Second, the bet din issues pronouncements, explanations or interpretations of Jewish law. Third, the court may issue a get, or divorce, to a couple. Fourth, the judges resolve contract disputes. Inquiries are answered by the court in the form of responsa, and a written decision, reflecting a vast literature of case law precedent (although many documents were lost in the Holocaust), is issued to the parties involved.

It is as a court of arbitration or mediation that the bet din holds greatest promise as an alternate forum for dispute resolution. It offers the advantage of cost and time efficiency to all parties. In the unusual event that a settlement is not reached, litigants need not be represented by an attorney, and their controversy is speedily adjudicated. Disadvantages exist in the lack of an affirmative enforcement mechanism and in the fact that the rabbinic court may decline to exercise jurisdiction where litigation is pending in civil court or where subject matter is deemed inappropriate for review. The philosophical outlook governing the entire judicial process, most especially that of arbitration, is mishpat shalom ("judgment of peace"), a process based on Jewish law and common sense which adjudicates without fault or blame. Since contenders can never render strict justice, compromise is necessary; neither should be labeled winner or loser. These ideals had their most striking application in a 1968 case, which exemplifies the court's potentially expanding role in contemporary American communities, both Jewish and non-Jewish. The case, which involved a bitter dispute between a Jewish landlord and his non-Jewish tenants, had strong racial overtones and threatened community stability. Since no acceptable judicial state authority existed to resolve the matter, the parties submitted themselves to the binding arbitration of a five member panel at the Boston bet din. A formal agreement reflecting Talmudic principles regarding real estate, leasing of property, landlord-tenant relations and contracts was hammered out. The document has since been adopted as a model agreement by several district courts, and the case has been frequently cited by the Supreme Judicial Court of Massachusetts. The bet din's advocacy of a permanent community landlord-tenant relations court is largely responsible for the establishment of the Massachusetts Housing Court.

The 1968 landlord-tenant case is but one example of the bet din functioning as an activist court, willing to tackle important social and political issues beyond its usual limited domain, and it clearly indicates the viability of the rabbinic court as an alternate forum for dispute resolution.
Teaching Alternate Dispute Resolution

by Professor Bernard Ortwein, Professor of Law, Suffolk Law School

"The notion that ordinary people want blackrobed judges, well-dressed lawyers and fine paneled courtrooms as the setting to resolve their disputes isn't correct. People with problems, like people with pains, want relief and they want it as quickly and inexpensively as possible."

This statement uttered by Chief Justice Warren Burger of the United States Supreme Court is certainly no divine revelation. Who among us has not heard the comment that ours has become a litigious society? Among our citizens, adjudication in court is generally perceived as the primary method of resolving disputes. There are available, however, a full range of alternatives to adjudication as a method of resolving conflicts which in many cases are more appropriate.

For a number of years, sociologists, psychologists, anthropologists and professionals in a wide range of disciplines have devoted considerable time to the study of the theory and practice of various dispute resolution processes which might offer more appropriate alternatives to courtroom adjudication. The central focus of those involved in this area has been that dispute resolution is a comprehensive system with the court as only one of a number of viable alternatives.

Ironically, the lawyer, a central character in most disputes among individuals, is perhaps the slowest to respond to a need for alternative methods for resolving those disputes. This is not meant as a criticism, for lawyers are generally trained to perceive themselves as advocates in an adversarial adjudicative process. The origins of the case method approach to the study of law are generally traced to Harvard Law School circa 1870. It was at that time that Christopher Columbus Langdell began organizing appellate court cases and assigning them to his students for study. It was Langdell's theory that for purposes of teaching law "all the available materials . . . are contained in printed books."

As to qualifications essential to being a good law teacher, Langdell is reported as stating: "What qualifies a person to teach law is not experience in the work of a lawyer's office, not experience in the trial or argument of causes — not experience, in short, in using law, but experience in learning law . . . ." Indeed, Langdell might have further opined that the prime function of lawyering is advocating a client's interest before an appellate court. Obviously, training in this fashion colors a student's perception of lawyering not only in the sense that it excludes all methods of dispute resolution short of adjudication, but also because it even further narrows that perception to only one aspect of adjudication — the judicial decision-making process.

While it is true that Langdell's case method of law study is no longer universally accepted as the sole pedagogical

"[T]here are more than a dozen colleges and universities in the Boston area which currently offer course work in the field of conflict resolution."
This would appear to indicate that a need for this type of course in the law school curriculum is recognized. However, identifying a need to present offerings of this nature in the law school curriculum is in many ways only begging the real questions, such as: where in the curriculum should such a course be offered; what type of teaching methodology should be used in presenting the subject?; can large numbers of students be accommodated in courses of this nature, and if so, how?; what type of materials should be utilized?; what types of testing vehicles are appropriate?

Of course, there are no simple answers to these questions, and the best that can be hoped is that over a period of time, through experimentation and exchange of ideas, meaningful responses will emerge. The point is that unless the initiative is taken there will not be an opportunity for development.

Over the past nine years, this author has been engaged in the teaching of a course on Negotiation at Suffolk University Law School. While this experience does not provide answers for all of the questions posed above, and while it obviously centers upon only one alternate form of resolving disputes, nevertheless, some personal perceptions might be useful in illustrating the feasibility of presenting such subject matter in the law school curriculum.

Negotiation, like other dispute resolution methods, lends itself to presentation in a variety of different contexts. It can easily be integrated into either basic courses on Contracts or Civil Procedure or elective courses on Professional Responsibility or Legal Process, to name a few. In addition, it can easily justify separate treatment. While it is necessary to explore the subject in terms of pure theory, nevertheless, major emphasis should be on practical application. Student interest is heightened when there is involvement in realistic situations where theoretical constructs can be tested. Simulation is particularly useful for this purpose as it offers maximum flexibility without relinquishing complete control.

The nature of the subject and the necessity of total involvement by both the students and the instructor requires an enrollment limitation when courses of this nature are offered as separate electives.

While there is generally a lack of organized materials readily available on alternate methods of dispute resolution, nevertheless, with a modicum of initiative an instructor can compile more than enough material from a range of disciplines.

Perhaps the most important lesson that this author has realized in teaching a course which offers an alternative to traditional adjudicative means of resolving disputes is that it allows for a large measure of creativity on the part of both the instructor and the students. It affords the instructor the opportunity to devise methodology and materials with relatively little outside influence to color perception; for the student it offers an opportunity to explore the multifaceted aspects of lawyering and to develop an awareness of alternatives for dealing with clients' problems.

"[Such a course gives the student] an opportunity to explore the multifaceted aspects of lawyering and to develop an awareness of alternatives for dealing with clients' problems."

"[The Code] . . . clearly emphasizes the lawyer's role as advocate over that of counselor or negotiator."
with clients’ problems. Exposure to the reality that there is more than one way of resolving a dispute, and some working understanding of what those other ways are and how they can be applied, can only operate as a benefit to both the student-future lawyer and the potential client. Furthermore, in the long run it can only reflect favorably upon the legal profession as a whole.

It would appear that one of the greatest challenges which the legal profession will face over the remainder of this decade is to create processes apart from adjudication which can resolve disputes between individuals with both fairness and credibility. Lawyers will maintain their instrumental roles in educating people to the existence of these alternate dispute resolution methods as well as identifying and referring problems to the appropriate method of resolution for their particular dispute. Lawyers will be called upon to monitor these alternate processes and modify them when the need occurs. In order to provide effective representation in this context, lawyers will have to be familiar with existing processes and innovative enough to create new ones when the demand is present. Whether the legal profession can meet this challenge depends to a large extent on the responsiveness of law schools. It is imperative that legal education recognize the importance of this issue and react accordingly if it is to fulfill its primary responsibility.

Notes

2. Methods for resolving disputes apart from adjudication can take any number of different forms. The range can extend from self-help and voting to more traditional concepts such as arbitration, conciliation, fact finding, mediation, and negotiation. The one general similarity among the alternate methods is that they depart from litigation in the courtroom as the ultimate objective. Two excellent sources which contain bibliographies of the literature on dispute-setting systems are: Abel, A Comparative Theory of Dispute Institutions in Society, 8 LAW & SOC. REV. 217, 336-347 (1973); Felstiner, Influences of Social Organization on Dispute Processing, 9 LAW & SOC. REV. 63, 89-94 (1974).
3. Indeed, if one reviews the American Bar Association’s Code of Professional Responsibility, one would discover that it clearly emphasizes the lawyer’s role as advocate over that of counselor or negotiator.
4. Obviously, this is a broad generalization. Certainly most lawyers are keenly aware of some of the more common alternative dispute resolution methods. Lawyers negotiate resolution of disputes on a daily basis. In addition, the lawyer who concentrates his/her practice in the field of Labor Law, becomes intimately familiar with factfinding, conciliation, mediation, and arbitration, as methods for resolving disputes.
6. Id.
7. Id.
8. A listing of the schools with a brief description of each course is contained in The Dispute Resolution Directory, a pamphlet published in October 1982 by the Negotiation Project and Dispute Resolution Program at Harvard Law School. Further information may be obtained from the Harvard Negotiation Project, 500 Pound Hall, Harvard Law School, Cambridge, MA 02138.
9. The law schools and the courses referred to are as follows: Boston University Law School, Varieties of Dispute Resolution, Professor Eric Green, Instructor; Harvard Law School, Alternate Methods of Dispute Resolution, Professor Frank Sander, Instructor; Harvard Law School, Interdisciplinary Approaches to Dispute Settlement, Professor Frederick Snyder, Instructor. In addition, Harvard Law School, New England Law School, and Suffolk Law School offer specific courses in Arbitration, Negotiation and Mediation. See Dispute Resolution Directory, supra note 8.
10. Pamphlet distributed by the American Association of Law Schools, entitled Workshop on Negotiation/Alternative Dispute Resolution (October 1982).
The Connecticut Lemon Law: Lemon-Aid for the New Car Buyer

by Frederick J. Watson

On June 4, 1982, Connecticut Governor William A. O'Neill signed into law a measure which proponents hope will put the “squeeze” on automobile manufacturers who market “lemons” — automobiles which fail to meet minimum standards of quality, durability, safety and performance — to the consumer public.

John J. Woodcock 3d, Democratic state representative from the 14th District and a 1973 graduate of Suffolk University Law School, is the author and sponsor of Connecticut’s so-called “Lemon Law.” What prompted Woodcock to introduce the consumer legislation were the many complaints he heard as a private attorney from clients who bought lemons. Upon investigating their claims, he realized the remedies under present Connecticut law and under the state’s Uniform Commercial Code were inadequate to the consumer, yet insulated the manufacturer. If a consumer was bold enough to initiate a law suit, the legal burden was placed upon the consumer to prove the newly purchased automobile was in fact a lemon, according to Woodcock.

One consumer who decided to sue was Anthony Conte. In March, 1970, Mr. Conte purchased a new Lincoln Continental, which proved to be a lemon. After returning the vehicle eight times over a 14-month period for repairs of numerous defects, he told the dealer and the manufacturer to keep it, and refused in May, 1971 to take the auto back. He then filed a lawsuit against both the dealer and the manufacturer.

After five long and frustrating years of litigation, the Connecticut Supreme Court rendered a final decision. Although the dealer was obligated to take back the auto, the manufacturer — the party responsible for the defects — was not. The State Supreme Court had, in Woodcock’s words, “put a wall between that consumer and the manufacturer of his car.”

When Woodcock was elected to the Connecticut House of Representatives in 1980, he endeavored to improve the climate of frustration. In July, 1981, Woodcock learned of a lemon law being considered by the California Assembly, and he requested a copy of the legislation. Consequently, in January 1982, Woodcock filed a similar piece of legislation with the Connecticut legislature to “merely create dialogue” on the subject. “I did not think the bill would go anywhere,” he frankly recalled.

However, the bill did go somewhere when the local news media began reporting on the measure. Once the public became aware of it, there was an outpouring of support for the measure as evidenced by the hundreds of letters and phone calls Woodcock received from frustrated and angry consumers who recounted their “horror stories” concerning lemon ownership. Many of these consumers later testified in favor of the lemon law at committee hearings considering the measure. Woodcock credits their testimony to the overwhelming support the committee members displayed in getting the bill out of committee and onto the floor of the House of Representatives by a 13 to 2 vote.

Although the state’s Registry of Motor Vehicles strongly opposed the legislation and the auto industry labored vigorously to defeat the measure, their lobbying efforts failed as the Connecticut House adopted the lemon law by a 5 to 1 margin. The bill’s toughest test however, was the state senate, where auto industry lobbyists, according to Woodcock, have more influence over the smaller 36 member body. The freshman legislator acknowledged that it was difficult to convince the senators of the lemon law’s merits. In an attempt to make the lemon law more palatable to the senate leadership, Woodcock offered to compromise by amending the bill and inserting a subsection requiring consumers to attempt to settle their differences through an informal dispute settlement mechanism before suing the manufacturer for a refund or replacement. This political maneuver resulted in the senate unanimously approving the lemon law. Woodcock is particularly pleased with the subsection because it incorporates the guidelines enunciated by the Federal Trade Commission (FTC) relative to informal dispute resolution mechanisms and thus adds credibility to the lemon law as a statute which promotes rather than prohibits out-of-court settlements between consumers and automobile warrantors.

Simply stated, the lemon law defines a lemon as a vehicle (automobile, van or truck) which has either had the same defect, which substantially impairs the vehicle’s use or value, repaired by the manufacturer four or more times or has been out of service due to repairs for 30 or more calendar days. The law applies to new vehicles sold in Connecticut, and only applies during the term of an express warranty — usually 12 months or 12,000 miles, whichever occurs first. If either of these two tests are met by the consumer, states Woodcock, “then the legal burden of proof is on the ‘manufacturer’ to prove the vehicle is not a lemon, thus shifting the burden of proof from the consumer to the manufacturer.” If the vehicle is deemed to be a lemon, then the consumer is entitled to either a replacement vehicle or a full refund, less an allowance for consumer use.

“"I did not think the bill would go anywhere. . . ."
Since adopting the lemon law, the state of Connecticut has commenced a program, in cooperation with the head of its Consumer Protection Division — Mary Heslin, to inform the public of the lemon law’s impact and importance to consumers. This is being accomplished through a statewide public relations campaign, including pamphlets, consumer action groups and public service announcements over radio. “It is one thing to know of the law, but it is quite another to know how to work with it so as to be prepared to deal with an industry with tremendous resources,” cautions Woodcock.

The Connecticut lemon law, as well as its author/sponsor, have received their share of media exposure lately. Representative Woodcock himself has participated in well over 150 television, magazine and newspaper interviews, while legislators from the other 48 states have formally requested copies of the law with the intention of sponsoring similar lemon law legislation in their own states. In Massachusetts, Representative William Robinson (R-Melrose) recently filed a lemon law, which will be considered by the House of Representatives during the 1983 legislative session. The measure, which has not yet been assigned a bill number, is substantially similar to the Connecticut Lemon Law.

Although the filing of a lemon law in the Massachusetts legislature appears to be a certainty, its passage may not be. Certainly Massachusetts is considered by many to be one of the most consumer-oriented states in the country. The Massachusetts Consumer Protection Statute, designed to protect consumers from “unfair and deceptive acts and practices” employed by merchants is indicative of this liberal attitude. However, it can be argued that a Massachusetts version of the lemon law is unnecessary given the broad remedial measures under 93A; especially since the law deems it to be “an unfair and deceptive act or practice to fail to perform or fulfill any promises or obligations under a warranty.”

One individual who believes a lemon law would be unnecessary in Massachusetts is Nat Shulman, the owner of a Chevrolet dealership in Hingham and head of Mass. Autocap, an association of auto dealers that mediate consumer complaints. “The Connecticut lemon law doesn’t really do any more for any consumer than we already have in Massachusetts. I think we’ve had enough regulation . . . we’ve had enough overregulation. Let’s get to the people and tell them: ‘you have these rights, now use them,’” he stated.

Notwithstanding those who oppose a Massachusetts lemon law, there are others who react positively to the prospect. Joseph McEttrick, Professor of Law at Suffolk University Law School, who teaches a course on Consumer Law, believes the lemon law is a “good idea” because “you don’t know where you stand without it.” McEttrick praised the four or more repairs and 30 days out of service standards as a “good concept” since they provide clear “bench marks” to a judge in rendering a judicial determination on whether or not a particular vehicle is a lemon. The professor also appreciates the lemon law because it would not “in any way limit the rights or remedies which are otherwise available to a consumer under any other law.” Thus, a Massachusetts lemon law would not alter consumers’ rights and protections under 93A or the UCC, according to McEttrick.

Representative Woodcock is obviously pleased with the national attention his lemon law has generated, yet he readily admits it will be several months — possibly until spring of 1983, before the lemon law can be judged a success or failure. One early indication of the law’s impact, according to Woodcock, is the fact that all the major American automobile manufacturers (GM, Ford and Chrysler) are “scrambling” to develop arbitration programs in Connecticut.

Ever since the Connecticut lemon law was signed into law on October 1, Woodcock has been aware of efforts to amend or repeal the measure, and he intends to oppose those efforts now that he has been elected to a second term. In the meantime, Woodcock believes the
"It is one thing to know of the law, but it is quite another to know how to work with it so as to be prepared to deal with an industry with tremendous resources. . ."
This KATZ Got More Than Nine Lives

By Jeremy Silverfine

"Am I in the right place?" is a question countless numbers of (if not all) law students have asked themselves, at one point or another, while enrolled in law school. It is a question that Professor Milton Katz had asked himself some 50 years ago, as well. During his first year at the Harvard Law School Milton Katz had many doubts. "I went through a long period of uncertainty," he recalls. "I found the attention to old books and what seemed to me nitpicking detail quite trying and troublesome." It is his biographical sketch that is now packed with details.

Born in New York City, Milton Katz received his A.B. from Harvard in 1927. Katz had concentrated in anthropology as an undergraduate. Upon graduation he received the Shaw Fellowship, the terms of which were that he should travel for a year. One of his former teachers was heading an expedition to Africa. That seemed to be a better way to spend a year than just traveling around. So, he spent that year crossing central Africa on an anthropological expedition for the Peabody Museum.

When Katz returned from Africa a year later, he found himself feeling restless. He also felt wretched and rather miserable. He had picked up a few tropical diseases. Originally, Katz had wanted to go into some form of electronic engineering after graduation. But feeling physically run down and wanting to do "something in which the play of forces would be between me and other people," Katz took the advice of his father. His father, a manufacturer, with whom he had a very close, warm relationship, suggested that Milton try the law.

Professor Katz believes that among his classmates there was a group that came to Harvard Law School because they had made up their minds to be lawyers. There was another group who came because they had a general sense that they wanted to work in the public sector and they thought the legal profession was the most practical way. The third group was in law school because they did not know what they wanted to do. "I have a feeling," Katz mentioned, "that's still substantially true."

The admission process at Harvard Law School was slightly different when Professor Katz entered than it is for a student today. "Speaking roughly and perhaps with some exaggeration, but not much," Katz maintained, "you presented evidence that you graduated from a college and they felt you to see if your body was warm." The actual admissions process took place at the end of the first year. According to Katz, "one-third of each entering class was flunked," at that time.

Professor Katz notes that it is presently much harder to be accepted at the Harvard Law School. The failure rate is negligible. There is a much more rigorous selection process at the outset. The most conspicuous single difference between his first year at Harvard Law School and today's first year student, according to Katz, is that the students no longer have the constant fear of flunking out.

Following his graduation from Harvard Law School, Professor Katz served as law clerk to U.S. Circuit Judge Julian W. Mack and then entered government service, working as an attorney in the Reconstruction Finance Corporation, as Executive Assistant to the Chairman of the Securities and Exchange Commission, and as Special Assistant to the U.S. Attorney General. He was invited to return and teach at the Harvard Law School in 1939. Katz was very uncertain whether to accept the appointment. "I was worried that I might be
going into an ivory tower and I’d lose touch with ‘real life’. ’’ He discussed his reservations with an older and more experienced confidant. The friend predicted that by the time Katz was 40 years old, presuming he was a “successful” attorney, he would be dealing only with an extremely small section of the society. His contact with people would be limited to those individuals whose situation in life was very similar to his own.

Indeed, it is the diversity of his students that Katz, who was appointed Lecturer in Law at Harvard in 1939 and Professor of Law in 1940, has enjoyed the most about teaching. “It’s absolutely fascinating,” he crow, “to watch the changes” in society manifest itself in the students. As an example, Professor Katz animatedly pointed out that when he teaches a course he becomes accustomed to the fact that at a certain section the students will be terribly interested and also quite combative. They do not understand what the Professor is saying. The students do not see the points. The next year Professor Katz reaches that part of the curriculum and there is no reaction. Not a word. He might try and stir up the students. But the students still have no reaction.

Recalled to government service in 1941, Katz served as the Solicitor of the War Production Board and the U.S. Executive Office of the Combined Production and Resources Board (United States-United Kingdom-Canada) in 1941-43. After a period of service with the Office of Strategic Services (O.S.S.) in 1943-44, he served as lieutenant commander in the U.S. Navy in the Mediterranean and European theatres (1944-46). He received the Legion of Merit and Commendation Ribbon.

At the conclusion of his naval service, Professor Katz returned to Harvard as the Byrne Professor of Administrative Law.

In 1948, Professor Katz was appointed General Counsel for the Economic Cooperation Administration in Europe which was then headed by Averell Harriman. Subsequently, he became Mr. Harriman’s Deputy Chief; and in 1950-51, he succeeded Mr. Harriman as the United States Special Representative in Europe with the rank of Ambassador Extraordinary and Plenipotentiary. As such, Katz was chief of the Marshall Plan in Europe.

When describing the atmosphere in Europe and America during the time of the Marshall Plan, Professor Katz’s eyes light up like a young boy’s who is about to receive a piece of his favorite candy. “Our relations with the people in Europe were very exciting and heart-warming.” It is clear to the Professor that Americans had a deep, strong conviction and believed in what they were doing. The Marshall Plan was a rare opportunity to rebuild a culture, to rebuild a society, to make it possible for other people to live again. There is an old photograph propped up on a shelf behind Professor Katz. A young, vibrant man wearing a trenchcoat appears to be stepping off a passenger ship (onto European shores perhaps?) ready to conquer (or rather to assist in rebuilding) the world.

Repeatedly striking his right hand on the wooden desk top to emphasize his points, Professor Katz explained the important lessons of the Marshall Plan. America was working together with the European nations. Momentarily adopting a Brooklyn accent, Katz stated that, “we were not in Europe as guys telling ‘em what to do.’’ Mutual aid and self-help were the guiding themes of the Marshall Plan. Before there was even a remote chance of success there had to be mutual trust, mutual confidence, a mutual analysis of what was wrong, a desire by the Europeans for American help and a willingness on the part of the Europeans to help themselves.

His greatest challenge, muses Katz, was to accomplish the purpose of the Marshall Plan with the spirit of mutual cooperation and within the terminal date that was set. He compared this to a small investment where you invest a certain sum of money. You allow a designated amount of time for the sum to grow or else you cut your losses. Either way, at the end of that time limit it was appropriate to withdraw. Similarly, at the terminal date it was time to “let the Europeans go out and paddle their own canoe.”

Professor Katz contends that valid foreign policy serves the fundamental interests and aspirations of the American people and is believed by the American people to serve their fundamental interests and aspirations. Katz emphatically declares that it served fundamental American interests to have a healthy, vigorous, democratic Europe. The Marshall Plan represented a true national government policy. The President, Congress, various other government departments and the American people had an opportunity to make up their minds. All of them backed the Plan. A healthy Europe would enhance America’s military security, economic security, and opportunities for intellectual, social and cultural development. Professor Katz flatly rejects the Revisionist approach, which holds that American big business rebuilt Europe because they wanted a market. To the Revisionists he responds, “that in your description of what has happened I simply don’t recognize anything that I lived through.”

Professor Katz noted the absence, over the last decade or so, of the fundamental lessons of the Marshall Plan in American foreign policy. In terms of government policy, Vietnam was a “perfect illustration of what you should not try to do.” There was no declared war. There was no national policy. “Without a declaration of war (leaving the technical legal aspects of a declaration of war to one side),” Katz claimed, “the President was going ahead without any real support from his own people.” Professor Katz was also unimpressed with the way the Reagan administration was handling the issue of trade with the Soviet Union. Instead of working together with the Europeans on trade sanctions, the United States adopted the “we’re telling you what to do” attitude.

In 1951-54 Professor Katz left government service to become Associate Director of the Ford Foundation. He returned to the Harvard faculty in 1954 after a six year absence. He was appointed the Henry L. Stimson Professor of Law and Director of Harvard’s International Legal Studies Program (a position he retains today - emeritus). During the last twenty years, Professor Katz has served on numerous academic, national, and world-wide committees. He has authored several books and written dozens of articles.

Milton Katz is a Distinguished Professor of Law at Suffolk University Law School and President of the American Academy of Arts and Sciences. His credits are long. Milton Katz certainly seems to have answered the question he asked himself some 50 years ago. He has landed on his feet and in the right place.
Looking for Mr. Defense Bar: Interview with Alan M. Dershowitz

by Gary A. Modafferi

Alan M. Dershowitz, at the age of twenty-eight, became the youngest full professor in the history of Harvard Law School. He was born and raised in the Boro Park section of Brooklyn and attended Brooklyn College and Yale Law School. Professor Dershowitz clerked for United States Court of Appeals Judge David Bazelon and United States Supreme Court Justice Arthur Goldberg. In 1979, Time magazine selected him as one of its "50 Faces for the Future." Professor Dershowitz ended his recently published book The Best Defense with this thought, "The late Supreme Court Justice Felix Frankfurter once commented that he knew of no title more honorable than that of a professor of the Harvard Law School. I know of none more honorable than defense attorney."

Q. Mr. Dershowitz, would you agree that most of your students, as typical in most law schools, never want to become involved in a criminal case?

A.D. Oh, no . . . I don’t believe that at all. I do think that very few of my students will become full-time criminal attorneys but many will become involved in criminal law in one of many capacities. Tragically . . . statistically many will become criminal defendants or will themselves have to avoid criminal liability. Law is a dangerous and vulnerable profession, so that is one area where criminal law comes in very handy. Secondly, many of my students, and students in law schools generally, will become active in politics. I have had innumerable experiences where students who thought they never would want to practice criminal law call me in five or ten years asking for advice as to where to find information maybe for mandatory sentencing, capital punishment or the insanity defense. Students who have done this range from Stuart Eisenstadt, Chief Counsel to President Carter, to United States Senator Larry Pressler, to various judges on courts of appeal, district courts, state courts, and attorneys general. Students often get appointed to in forma pauperis cases, or their firms do pro bono work. So, even though very few will become full-time criminal attorneys, the majority need to know criminal law at some point in their career.

Q. What motivational forces would you hope to instill in a budding criminal advocate?

A.D. Several . . . One, zealousness . . . the idea of being a zealous criminal advocate who is constantly willing to challenge the system. A lawyer who is client oriented and always willing to defend his client’s interests. Whether the client be a defendant or the government, I like zealous attorneys. . . . Fairness, a high sense of ethical standards and a notion that money isn’t everything. That is very important. You can have a lot more fun in the practice of law if money isn’t everything. Money is impor-
"You can have a lot more fun in the practice of law if money isn't everything."

tant ... but you can do both good and well in the practice of criminal law if you don't focus too much on the big bucks.

Q. In your book, The Best Defense, you express an animosity toward plea bargaining. Is that the law school professor or the defense attorney speaking?

A.D. (Laughing) The law school professor primarily. Theoretically, you just can't justify it. By the way, that's a very good question ... . It's like putting a sign on the courthouse door saying, (Mr. Dershowitz raises his hands in exclamation) "Reward for waiving your constitutional rights," the reward being money, life, liberty, or punishment for raising your constitutional rights. In practice, of course, it has to be done and as a defense lawyer I am always trying to plea bargain my defendants to an advantageous situation, especially when they're guilty. I think there is a way out. You can never eliminate plea bargaining completely ... we've had it since the beginning of time. What we can do is cut down on its necessity by streamlining the criminal law. We just have too many crimes today. The courts are far too crowded with unnecessary prosecutions and that puts pressure on prosecutors and courts to plea bargain.

Q. Do you have any feelings toward the Supreme Court's recent interpretations of the Fourth Amendment, as exemplified by such cases as: United States v. Ross1 and Rawlings v. Kentucky?2

A.D. Well, I think the current majority of the Supreme Court is personally unsympathetic to the exclusionary rule (the legal rule disallowing the introduction of illegally seized evidence) and various aspects of the Fourth Amendment. It is a very prosecution court. It's a court with no real understanding of the way the criminal law functions. It is interesting to note that there is no single member of the current Court who has ever had an extensive criminal law practice with the possible exception of Thurgood Marshall, who had some appellate practice. Most of the justices are very naive, they don't understand how criminal justice operates. [Chief Justice] Warren Burger is constantly saying that half of the criminal lawyers in the country are incompetent. He may be right, but how the hell does he know? When was the last time he's been in a district court? Why doesn't he talk about the one-half of the judges that are incompetent? That he should know about since he is a judge and reads the appellate records. He has no basis for his criticism of trial lawyers . . . he does not know . . . he does not go to trial courts. He himself has not been a trial lawyer for years, and years and years.

Q. Do you think we are witnessing an irreversible regression in the protection of our Fourth Amendment rights?

A.D. No, No . . . Thank God! Regressions by the Supreme Court are never irreversible. We see the pendulum swing in both directions and this is obviously something of a reaction to the Warren Court. I think we will see a reaction to what I call the Nixon-Burger Court . . . because that's what this Court is, it's the legacy of Richard Nixon. Warren Burger is the most suitable legacy of Richard Nixon. They're two peas in a pod.

Q. Along those lines, how would you assess the performance of Justice O'Connor thus far?

A.D. (Responding quickly) Mediocre at best . . . insensitive. She does not seem to have an open mind. I supported her nomination very strongly. I thought it was important to have a woman on the Court and I expected more of her than we've gotten. The lack of an open mind is what upsets me, she seems to be very certain in her views. Her positions on capital punishment, alien children's rights, and education are just close minded views which are quite surprising.

Q. Some of your critics have asserted that it's much too early in your career to be publishing your "memoirs." How would you respond to that?

A.D. Well, I'll publish them later on too! I have two other books planned, one more serious book about the future of criminal justice and another book of cases. I had ten years of fairly extensive experience between early 1972 and 1982 . . . . I thought it was an appropriate time to sit back and reflect on those experiences. These are very tentative conclusions . . . they're not definitive. I don't think that one should put off 'till tomorrow what can be done today. It was in my system, I had to get it out.

Q. Paul Martin Wolf, (a Washington D.C. based attorney), in a commentary of The Best Defense (Legal Times, 8/16/82, p. 9), stated that your handling of the Snepp case boiled down to the fact that, "when the chips were down, the Constitution went out the window as long as the book royalties kept coming in." This raises the vexing question of a defense attorney's allegiance in

"[The current Supreme Court is] a court with no real understanding of the way the criminal law functions."
First Amendment cases; is his allegiance to the client or the Constitution?

A.D. I didn't read that review. I don't understand the criticism. In the Snepp case my exclusive concern was with Frank Snepp, not the Constitution. In fact, in the book, I describe how I pushed Frank very hard toward making sure he was protecting his own interests. It was Frank who was more interested in the Constitution than his own wealth. I've always had an important rule of thumb in litigating a case. To paraphrase Vince Lombardi, the client isn't everything, he's the only thing. When I take a case I put on absolute blinders and I go forward with my client's interests solely at heart. I am not interested in my causes. I am not interested in whether it hurts or helps the Constitution. In deciding whether to take a case I might be interested in those issues but once I take a case it's client first, client second, client third.

Q. How has your book been received by the legal establishment? Have you received any feedback?

A.D. Oh, sure. About 90% of the reviews have been very favorable. For the most part, the unfavorable reviews have been from the legal establishment, from judges and prosecutors, and that doesn't surprise me. . . . It's an indictment against judges and prosecutors and I wouldn't expect those indicted to plead guilty.

Q. Would you put a defendant, who you know was about to lie, on the stand?

A.D. I personally wouldn't do that. That's a very hotly disputed issue now, as to whether you can put such a defendant on the witness stand. I think, for the most part, it's bad tactics to do that. I have never done it and have no intention of doing it. I don't think I could effectively question a witness whom I believed was lying. I would feel myself to be part of the lie. . . . I just couldn't do it.

Q. Would you agree that the ethics code and canons are basically useless to a criminal attorney?

A.D. (Without hesitation) No . . . they are worse than useless. They are inconsistent . . . they don't reflect reality. They are written from a pro-prosecution bias. If they were just useless I wouldn't complain, but they're perverse.

Q. To whom or what, then, would you advise a young criminal attorney to turn to for assistance?

A.D. I have several rules that guide my own practice. When I have an ethical dilemma . . . first, I think it through. I write it out as much as I can and try to see whether I can justify to myself my own conduct. Then I turn to two or three highly ethical people in the profession, whose judgment I regard as beyond reproach. If after that I can justify what I'm doing, I go ahead and do it. Obviously, . . . prudentially I also look to the canons . . . I don't want to be disbarred, but I don't take my ethical guidance from the canons. I regard the canons the way I regard some criminal laws . . .

Q. Do you still have problems getting the folks back at Boro Park to believe that "getting-off" a guilty defendant isn't grounds for lynching the defense attorney?

A.D. (Laughing) Forget about Boro Park . . . it's the hardest issue to explain to lawyers and

"If they were just useless [the ABA Canons of Ethics] I wouldn't complain, but they're perverse."

"[T]he client isn't everything, he's the only thing."
laymen . . . I mean criminal lawyers understand it but many lawyers just don’t.

Q. Finally, have you any recent word concerning the fate of Anatoly Shcharansky?

A.D. Yes, I was in Paris last weekend (10/25/82) speaking with a man who had just seen the family of Shcharansky and the word is very bad, at this point in time. He is on a hunger strike. We think he is being force fed but we’re not sure. We know from a cellmate of his what the procedure is in force feeding . . . how they deal with people on hunger strikes and it’s brutal. There is just every reason to believe that the Soviets are not listening; they’re not sympathetic.

Right now, the situation between the United States and the Soviet Union has deteriorated to such a low point that we have very little leverage in trying to get people out. Our basic function at this point is just keeping Shcharansky alive, in the hope that the climate will change.

Notes
1. United States v. Ross, 50 U.S.L.W. 4580 (1982). (The Supreme Court upheld the warrantless search of a closed container in a motor vehicle, upon an after-the-fact showing of probable cause.)

2. Rawlings v. Kentucky, 448 U.S. 98 (1980) (legal ability to raise a Fourth Amendment unreasonable search claim is lessened).

3. Frank Snepp, an ex-C.I.A. agent, was taken to court by the government for not complying with an agreement which would allow the Agency censorship rights to his book, Indecent Interval. See the book review of The Best Defense in this issue.

4. Mr. Shcharansky is a Soviet dissident who was imprisoned for being an alleged C.I.A. agent. His life was spared by a defense presented by Mr. Dershowitz but he remains imprisoned in a Soviet labor camp. See Book Review in this issue.

ATTENTION ALUMNI

Change of address:
Please return this form if you are changing your mailing address.

Name ___________________________
Address _________________________

Alumni information:
Your contributions to our Alumni Notes section of The Advocate are wanted. Publications, speeches, offices, change of employment, and other information about our alumni are welcome. Please send this information to:

Associate Editor
THE ADVOCATE
Box 122
Suffolk University
Law School
41 Temple Street
Boston, MA 02114
Book Reviews

Gary A. Modafferi

The Best Defense
by Alan M. Dershowitz

Alan M. Dershowitz is great. Everyone knows that. Why then, I queried before reading Mr. Dershowitz’s latest work, The Best Defense, is it necessary for that fact to be reaffirmed in hardcover? Is the author seizing at immortality? Doesn’t the crowd back at Boro Park, Mr. Dershowitz’s Brooklyn stomping grounds, appreciate his stature in this world? Is it something less obvious, like snatching the inside rail on Arthur Miller’s television show before it was nationally syndicated? The Best Defense, however, provides considerably more than one might suspect on first impression. Professor Dershowitz takes the reader by the hand and through the looking glass into the contradictory world of criminal defense work. His candor and insight should be studied by lawyer and layman alike.

The Best Defense is a compendium of the Professor’s most inspiring and readable casework. His fact patterns read more like John Irving and the outcomes are about as unpredictable. Such is the case of two well-intentioned Utah boys who happen to spring their father from prison. Unfortunately, their dearly beloved father engages in a mass murder spree which eventually costs him his life. The two boys end up on death row awaiting execution on a felony-murder charge, even though they never harmed anyone. Enter Mr. Dershowitz.

Then there is Harry Reems, the well-endowed performer of Deep Throat fame, who is indicted in Memphis for conspiring to transport obscene material. The Professor takes this battle to the Supreme Court of the United States. The words bandied about during oral arguments by the Professor and the Chief Justice are almost beyond belief. The eventual outcome . . . need you ask?

Mr. Dershowitz, by sequencing several legal vignettes, is able to convey a provocative message. In the middle of the book, three cases are discussed under the caption “Disturbing the Peace.” Their progression leads to an inescapable conclusion. Although it may be distasteful and even intellectually revolting to defend “other people’s” constitutional guaranties with necessary vigilance, the absence of such vigilance may someday silence everyone.

The first case is one of intellectual freedom in California, the land of hope and discovery. The Professor was on the campus of Stanford University. At that time Stanford was attempting to digest the aberrant political and scientific thinking of Bruce Franklin and William Shockley. Mr. Shockley, a Nobel Laureate for his work with transistors, was directing his energies to the less than admirable “scientific” quest of proving genetic inferiority. Mr. Franklin, now a New York University professor of literature, seemed to be hell-bent on mounting a leftist siege of San Francisco. Both men undoubtedly had something to contribute to the Stanford learning community, but they were either silenced or squeezed out by moderates. The moderates forced Franklin and Shockley from Stanford because their patience had worn thin. Mr. Dershowitz tells his readers this was a devastating blow to intellectual freedom. I had to think about that.

The case of Frank Snepp followed. Snepp, an ex-C.I.A. agent, had several critical views concerning the evacuation of Saigon before the North Vietnamese take-over. Indecent Interval, Snepp’s book, contained neither secret nor even confidential information; the Government stipulated to that. Mr. Snepp had engaged himself in one of those employment contracts so many equity students fret about. The C.I.A. wanted pre-clearance rights to any manuscript Snepp’s typewriter might produce. In essence, the C.I.A. demanded an opportunity to edit any politically damaging accounts of its operations by former agents. Prior restraint, the scourge of First Amendment loving Brennanites, was to be pitted against the most legitimate of state interests — national security. The Supreme Court, without allowing briefs to be filed or oral arguments to be pleaded, ruled against Mr. Snepp. Mr. Snepp lost. Mr. Dershowitz lost. However, the Supreme Court, by refusing to hear arguments in a manner befitting our adversarial system, ensured that we all had lost. Sadly, a few decided what potentially many might want to know.

The third set of cases found our hero in the Soviet Union. Professor Dershowitz, with some imaginative legal finagling and a hearty dose of conviction, attempted to free several Soviet Jews right before the reader’s eyes. There are several stories to tell, but the most publicized involves the plight of Anatoly Shcharansky. A brilliant scientist and extraordinary chess player, Shcharansky became a key figure among the Helsinki Monitors. This group of Soviet citizens risked life and limb in attempting to report to the world the status of human rights in the Soviet Union. It was not long, of course, until Mr. Shcharansky found himself in prison and charged with being a C.I.A. spy, a crime punishable by death.

The Professor’s first plan of attack was to commute the inevitable death sentence. Using the wiles of an aggressive defense lawyer, Dershowitz approached President Jimmy Carter in an attempt to have the Administration publicly deny Shcharansky’s alleged involvement with the C.I.A. This took some doing because it was State Department policy not to issue such denials, in the absence of a denial the world would assume truth in the many accusations leveled against the C.I.A. President Carter issued the denial and now Shcharansky could not be killed without, in effect, labeling the President a liar. The trial was a farce. Mr. Dershowitz was not allowed to speak for his client. Mr. Shcharansky remains imprisoned within a judicial system diseased by its own silence. However,
The legal profession has long been portrayed in glamorous if not altogether complimentary terms in fiction, cinema and lately in a spate of television series. However, writers have recently seized upon one special ingredient as the focus of such works: the female attorney. In his recent book, *A Rage of Angels*, Sidney Sheldon whose style is somewhat between Harlequin Romances and James Michner, but closer to the former, has followed an oft used formula for mediocre success.

All of the necessary elements are here: the young and beautiful idealistic female attorney, Jennifer (of course) Parker; the handsome, though married, soon-to-be-senator Adam Warner; and, the sinister but captivating young mafioso, Michael (also of course) Moretti. Lesser characters round out the ethnic and political groups: Ken Bailey, a plain red-haired private investigator in love with Jennifer, whose first wife killed herself because he was gay; and, Father Ryan, the homely little Irish priest who sends clients to Jennifer, prefacing all remarks with, “My friend has a bit of a problem...” And, of course, no book about the legal profession would be complete without the ex-boxer, ex-streetfighting, unforgiving, relentless District Attorney, Robert DiSilva.

*A Rage of Lawyers (cont)*

It is with these characters that Sheldon splices a tight if somewhat predictable plot around a spool of legal and emotional obstacles facing his lonely, lovely heroine.

In fact, on her first day as an Assistant District Attorney, Jennifer becomes the pawn in Michael Moretti’s ingenious ploy to escape the clutches of the law by unwittingly delivering a dead canary to the State’s essential singing witness. Her notoriety earns her the nickname “Yellow Canary” and nearly destroys her career before it starts. Yet, before the novel ends, Jennifer’s successes and failures take her through an intricate and occasionally even compelling series of events.

Unfortunately, the author can’t truly decide whether he wishes his heroine to be mistress of her destiny or a victim of fate. Although her eventual involvement in mafia business is made plausible, the transition she makes from champion of justice to perverter of justice is never fully acceptable to the reader. Given the novel’s outcome, one wonders why Jennifer’s career shouldn’t have ended after the “Yellow Canary” incident.

Nonetheless, the plot, although flawed, is well paced and suspenseful. The same cannot be said for Sheldon’s choppy style and overuse of simple declarative sentences, most of them starting with “She.” “She was too nervous to eat.” “She wished she could have slept the night before.” “She wished she were not so tense.” “She wished that this day was over.” Sheldon’s prose is at its best in fast paced scenes, calculated to surprise or jolt the reader. But there is no richness of tone or subtlety of phrasing — the language is strictly utilitarian.

Sheldon has, for the most part, done his homework on legal research, thanks to F. Lee Bailey and Melvin Belli. In one scene, where Jennifer is pitted against the vengeful district attorney, DiSilva, he makes the classic mistake of asking a question of a witness to which he does not know the answer. Questioning the defendant accused of murder, DiSilva picks up a pair of tongs and holds them up the jury. “And you were afraid of this? If the deceased had been able to hit you over the head with it, it might have caused a small bump. What exactly is this pair of tongs, Mr. Wilson?” Abraham Wilson said softly, “They’re testicle crushers”. The jury returns a verdict of not guilty.

On the other hand, Sheldon’s comments concerning divorce law are questionable. Early in the novel, Jennifer refuses to handle divorce cases (although she later defends mafia hit men) because most divorce lawyers have bad reputations... and “[d]ivorce is to the practice of law what proctology is to the practice of medicine.”

*A Rage of Angels* has all the usual best seller qualities and of course is soon to be a major television movie starring another past angel, Jacklyn Smith. The novel will win no literary awards nor will it change the stereotypic image of the legal profession. At least, though, we see that female lawyers do have a place in the system. (Oddly enough, however, no other female attorney is mentioned in the book.) If all attorneys end up like Jennifer Parker, there may be fewer students entering law school next year.
Notes

Alumni Notes

Two Suffolk Law School graduates were recent recipients of the Massachusetts Bar Association’s “Legislator of the Year” Award. State Representative Michael C. Creedon, Class of 1975, and Theodore J. Aleixo, Class of 1968, received the awards at the Annual Membership Meeting of the Massachusetts Bar Association.

Martin L. Norton M.D., a 1979 graduate of Suffolk Law School has been appointed Professor of Anesthesiology at the University of Michigan in Ann Arbor. He also teaches courses in law and medicine at the school.

In May, 1982, Richard (Chip) Nylan, 39, Class of 1979, became the youngest person appointed Commissioner of the Metropolitan District Commission (MDC).

Cambridge District Court Judge James J. Nixon, Class of 1975, was recently nominated to a judgeship in the Superior Court. Formerly in private practice with the firm of Nixon and King, he was appointed to the District Court bench in 1974 and became a full time Justice in that court in 1976.

William J. Tierney, Class of 1963, was nominated to fill a newly created vacancy on the Boston Municipal Court. Tierney was General Counsel and Legal Department Manager to the Chief Administrative Justice of the Trial Court.

Robert A. Mulligan, a 1978 graduate of Suffolk Law School, was nominated as a Superior Court Judge. Mulligan, 39, has been a Boston Municipal Court Judge since 1980 and was formerly an associate with the firm of Jenny and Jenny in Waltham.

Roxbury District Court Judge James D. McDaniel, Jr., a 1964 graduate of Suffolk Law School was recently nominated to the position of Associate Justice of the Superior Court to fill a vacancy created by the resignation of former Superior Court Judge Vincent R. Brogna.

Boston Municipal Court Judge Sandra Hamlin has replaced Superior Court Judge Francis J. Good. Judge Hamlin, 37, has sat on the BMC since 1980. She spent 13 years in the Suffolk County District Attorney’s Office prior to going to the bench. Hamlin is a 1973 graduate of Suffolk Law School.

John H. O’Neil, a graduate of Suffolk Law School, was recently sworn in as an Associate Justice of the Fall River District Court. O’Neil was an attorney with the firm of O’Donoghue and O’Neil.

John Loftus, 32, a 1977 graduate of Suffolk Law School, was interviewed in a recent segment of CBS’s “60 Minutes” relating to his work as a member of the Justice Department in bringing civil suits against alleged Nazi war criminals living in the U.S. Loftus has written a book due for release in September entitled The Belarus Secret, which alleges that U.S. intelligence agencies smuggled more than 300 Nazi war criminals into this country from Eastern Europe at the end of World War II. He now practices law with the firm of Bingham, Dana and Gould.

Faculty Notes

Professors Edward Bander, Jason M. Mirabito and Charles Kindredgan organized the Conference on Law and Computers held at Suffolk Law School on November 6, 1982. The program included both a workshop on law-related uses of computers and an exhibition of the latest computer hardware and software.

Professor Russel G. Murphy was the Director of the 1982 Northeast Regional Council on Legal Education Opportunity (CLEO) Institute held at Suffolk Law School from June 20 to July 31, 1982. The Institute was a federally sponsored pre-law school academic program for 30 educationally and financially disadvantaged students. This was the second consecutive Institute directed by Professor Murphy.

During the month of June, 1982, Professor Marc G. Perlin lectured in New York, Pennsylvania and Massachusetts in the area of Family Law for bar review courses sponsored by Josephson Bar Review Center.

Professor Charles B. Garabedian authored an article entitled, “Why A Trial Brief?” published in August of 1982 in the Section News of the Massachusetts Bar Association’s Civil Litigation Section.

Professor Bernard Ortenwein was recently appointed a member of the Fee Arbitration Board of the Massachusetts Bar Association. The Board sits regularly to arbitrate fee disputes between attorneys and clients.

Professor Ortenwein also participated as a discussion group leader at the Negotiation/Alternate Dispute Resolution Workshop which took place at Harvard Law School on October 8-9, 1982. The workshop was sponsored jointly by the American Association of Law Schools and the Harvard Negotiation Project and was designed to facilitate an opportunity for interchange among those now teaching dispute settlement courses as well as to expose new teachers to the challenges and opportunities in this developing field.

Professor Thomas J. McMahon’s recent activities include attendance at an ABA Law Professor’s Workshop in International Air & Space Law at the University of Mississippi in June; reappointment as Chairman of the Copyright Committee of the Boston Patent Law Association; and appointment as Commanding Officer of LSO Rota (DET) 101a Naval Reserve Legal Unit in Quincy, Massachusetts.

During the past summer Professor Bernard V. Keenan attended an AALS-sponsored “Workshop for Property Teachers” conducted at the University of Virginia Law School. Also, Professor Keenan was recently appointed to serve as Suffolk Law School’s liaison to the Boston Bar Association and authored an article entitled, “The Zoning Act: Constructive Grants of Relief” published in the Real Estate Section of Massachusetts Lawyer’s Weekly, (10/25/82).
New Faces at Suffolk

Two new professors were recently added to the Suffolk Law School faculty: Gwendolyn Y. Alexis and Clyde E. Lindsay.

Ms. Alexis worked as a Legal Affairs officer at the American Embassy in Copenhagen, Denmark from 1976-77. She was an attorney in the Enforcement Division of the U.S. Securities and Exchange Commission and most recently an attorney for the Corporate Finance Section of American Telephone and Telegraph. She received her J.D. from Harvard and is presently teaching a course on securities.

Mr. Lindsay has taught civil procedure, corporations, land financing, land transactions, nonprofit organizations and property at Salmon P. Chase College of Law in Kentucky and at Oklahoma City University. He received an A.B., M.B.A. and J.D. from Harvard. He most recently published an article in the *Harvard International Review* entitled, "Law and Cultural Presumption," (Volume 4, No. 7, May-June 1982).

Cathy Boskey was recently appointed Director of the Suffolk Law School Placement Office replacing Betsy McCoombs who resigned this past summer. Ms. Boskey held several positions in career planning at the University of Virginia before coming to Suffolk Law School. She holds a B.A. Degree in Religion from Goucher College and a Masters Degree in Counselor Education from the University of Virginia.

Obituaries

Nathan Rosenfeld, a Milford attorney for more than 50 years and a former member of the Massachusetts Legislature, died after a long illness on April 1, 1982 at the age of 72. He was a 1928 graduate of Suffolk Law School.

John H. Sullivan Jr., a 1930 graduate of Suffolk Law School, recently died at the age of 74. A lifelong resident of Dedham, where he maintained a law practice from his home for 50 years, Mr. Sullivan was also associated with the Boston law firm of Harrison and Maguire.

Edwin John Donovan, a lawyer who served with a number of governmental agencies, died on July 10, 1982. He was 68.

A graduate of Suffolk Law School (Class of 1940), Mr. Donovan was a special agent for the Federal Bureau of Investigation in five states during his early career.

During World War II, he worked with the Army Counterintelligence School and later became a government attorney, working at various times for the Office of Price Administration, the Army and the Air Force Electronic Systems Division.

Mr. Donovan was also secretary and administrator of the state Commission to Recodify the General Laws of Massachusetts under the late governor Paul A. Dever.

John D. Malone, a 1926 graduate of Suffolk Law School, died on September 20, 1982. A native of Lynn, Mr. Malone was a practicing attorney for 52 years. He was a member of the Massachusetts, Essex County and Greater Lynn bar associations and an Army veteran of World War I.

Francis McDonough, a 1962 graduate of Suffolk who graduated first in his class, died on August 14, 1982. He was 57. Mr. McDonough was a senior attorney on the National Labor Relations Board and investigated and tried many major federal labor cases originating in New England. He was also an Assistant Massachusetts Attorney General on the staff of Atty. Gen. Edward J. McCormack.
Dean DONALD R. SIMPSON recently died. Long associated with Suffolk Law School, Dean Simpson was Professor of Law at Franklin Pierce Law Center at the time of his death. Simpson served as Dean of Suffolk Law School from 1964 to 1972, during which time he led the school to great growth and improvement in the quality of the educational program.

A graduate of Dartmouth College and Boston University Law School, Dean Simpson began his teaching career at Northeastern University Law School. He joined the Suffolk faculty in 1945 and remained until 1972, except for a term of service in the United States Air Force.

One of his early books on landlord and tenant law was considered the leading text on the subject for many years. Later, his Summary of Basic Law became a widely-used book among practicing lawyers. Many a trial lawyer carried this classic to court where the phrase “Simpson said” became the basis of many an argument.

Dean Simpson will be missed by his many friends on the Suffolk faculty and among the alumni. He was a man of strong principles, but kindly demeanor, who influenced everyone he met. He left the world, and especially Suffolk Law School, a better place than he found it.

Miscellaneous

On October 28, 1982, Suffolk University Law School dedicated the E. Albert Pallott Law Library honoring the 1932 graduate and philanthropist who recently retired as president and chief executive officer of the Biscayne Federal Savings and Loan Association in Miami, Florida.

The Pallott Library, located adjacent to the law school’s Stephen P. Mugar Library in the Frank J. Donahue building, contains a basic collection of citation material, including all high court decisions and legal encyclopedias. It also houses three faculty-student conference rooms containing multi-media and video equipment and microfilm.

National Moot Court Team

Congratulations to the National Moot Court Team for a fine performance at the Regional National Moot Court Competition held at the Middlesex County Courthouse from November 3-5!

The Suffolk team, whose members are Mary Ellen Luker, Christine Igo Wetzel and Joseph McDonald, defeated Western New England College of Law, New England Law School and Albany Law School, before losing to Cornell Law School in the semi-final round.

Christopher Storm, President of the Moot Court Board, called the loss to Cornell a “squeeker” and noted that in the semi-final round, the Suffolk team was required to argue the Respondent’s side of the case by a luck of the draw. Respondent’s argument was considered the more difficult, according to Storm. The team’s brief was ranked second among the thirteen briefs submitted by the competing teams. The faculty advisor to the National Moot Court Team is Professor Marc Greenbaum.
SUFFOLK UNIVERSITY LAW SCHOOL

Spring 1983 Continuing Legal Education Programs
for Practicing Lawyers

---

March 12 and March 19, 1983 (Saturdays)

WORKSHOP ON THE HANDLING
OF A PRODUCTS LIABILITY CLAIM
FROM A PLAINTIFF'S POINT
OF VIEW

Faculty
Prof. Thomas Lambert
Prof. Thomas O'Toole
Kerry Choi, Esq.
Edward Swartz, Esq.
Prof. Gary Boland
Frederic Halstrom, Esq.
Patricia Perry, Esq.
Michael DeMarco, Esq.
Paul Sugarman, Esq.
Joseph Swartz, Esq.
Herbert Travers III, Esq.

Tuition — $125
A two-day program

---

May 14, 1983

WORKSHOP ON EQUITABLE
PROPERTY DIVISION
IN A DIVORCE CASE
(includes tax considerations)

Faculty
Prof. Mark Perlin
Monroe Inker, Esq.
Judge Joseph Warner
Judge James Sweeney
Prof. Charles Kingregan
Prof. William Corbett

Tuition — $75
A one-day program

---

For more information call Gretchen Hynds (617) 723-4700 Ext. 107

TUITION Full payment must accompany your registration. Make checks payable to SUFFOLK UNIVERSITY. The registration fee includes course materials, luncheon, instruction costs and coffee.

For more information or to register please write to:

CENTER FOR CONTINUING PROFESSIONAL DEVELOPMENT
Suffolk University Law School
41 Temple Street
Boston, Massachusetts 02114
Resisting a Rest

It was just after the Dallas Bar Association’s Christmas lunch when District Judge J.E. Winters gave these instructions to jurors hearing the case of Joseph Jackson, who had been charged with resisting arrest:

“Ladies and gentlemen, I have just been to dinner and believe I’ve eaten more than I have eaten in my life, and if I go to sleep up here, you whistle at me, will you?”

Later, defense lawyer Stephen Halsey objected to a statement by the prosecutor, saying, “Judge, I’m going to object to that statement. I would ask the jury to disregard it. Judge ... Judge ...”

The exact length of Winter’s nap could not be determined, but the trial resulted in Jackson’s conviction. His attorney appealed to the Texas Court of Criminal Appeals, which let the conviction stand, Winter’s forty winks notwithstanding.

— Student Lawyer

Haste Doesn’t Make Waste

Washington state engineer Alan Jones didn’t dispute that he was traveling 66 miles an hour in a 55 mph zone, however he pleaded innocent in Franklin County District Court in March just so he could speak his peace.

Jones asked the state trooper who stopped him how many miles per gallon he got on his patrol car. The answer was nine to 11, depending on the time of year.

Jones explained to the court that the 55 mph law was passed to save gasoline, and added that he sold his old gas guzzler, which got 17 miles to the gallon, and bought a car that gets between 38 and 42 miles per gallon.

“So I felt I was complying with the intent of the law while the officer who arrested me was wasting gasoline,” Jones said. “I felt they should have arrested the officer.”

District Judge Pete Felsted agreed there was much to Jones’ argument and said that in eight years on the bench he’d never heard a defense like it before. However, Felsted said Jones was still breaking the law and fined him $25.

— Student Lawyer

Joseph Abraham Lehman, 43, who police claim has been practicing medicine without a New York license for four years, was brought into court for arraignment. When he saw the defend- ant, Manhattan Criminal Court Judge Stephen Crane exclaimed, “Why he examined me in 1978!” Crane quickly removed himself from the case.

— Boston Globe

An East German woman divorced her husband because he helped so much around the house she had nothing to do.

The woman, who lives in the town of Luebben, told the court at first she considered him a “dream of a husband” because he did everything perfectly — cooking, baking, housecleaning, washing up, shopping, taking care of the baby, even washing the windows.

“But after a while it drove me mad,” she told the court. “What was left for me to do?”

— United Press International

Now that’s brass: Raymond Hurley broke out of the Wake County Jail in Raleigh, North Carolina, while awaiting extradition to Tennessee. Two days later he phoned to ask jail director Levi Dawson how he could get his personal possessions back. Hurley was told he could have them back anytime — just pick them up in person. But, according to authorities, Hurley said he wasn’t about to surrender and in fact he headed for Florida on a stolen motorcycle.

— Boston Globe

“A taxpayers’ attempt to create some black letter law (bathed perhaps in red light) failed when the Tax Court said, in effect: Madame, the wages of sin are not exempt from taxation!” Blanche E. Lane, 15 T.C.M. 1088 (1956).

— Fundamentals of Income Taxation

Freeland, Lind, Stephens 1981

For ten years, Louise Rose, 79, has swept the streets around her home in Columbus, Ohio, “to make the area look nice.” Now she’s in a battle with the law after getting a ticket from a policeman who said she was endangering herself by standing in the street. She’ll be in a fighting mood when she goes to court Friday. “They don’t scare me,” said Rose, who has won a state award and praise from neighbors for her clean sweeps. “It won’t stop me from cleaning up around here, either.”

— Boston Globe

Bingo! Allergies are Guilty

In Vero Beach, Florida, Indian River County’s allergic judge has added some new taboos to traditional courtroom etiquette: no perfume, spray deodorants or new polyester clothes allowed.

And Judge Graham Stikelether will continue to hold court in the American Legion bingo hall — because he is allergic to the courthouse.

State Attorney Bob Stone said he might not send prosecutors to the “bingo hall of justice” unless forced to by a court order. Courtroom dignity vanishes, Stone said, “when ... a bingo
sign has replaced the seal of the great state of Florida and the noise is so bad that a juror can't hear because somebody was shooting pool and shouting in the next room.

No one disputes that Stikelether and his judicial assistant, Georgine Edwards, are suffering. Stikelether claims formaldehyde and other vapors present after the courthouse was remodeled early last year caused him to become highly sensitive to other fumes. He moved out this spring.

Stikelether told commissioners he is "asking the public in general to cooperate by not wearing perfumes, aftershave lotions that contain various chemicals, hair sprays and aerosols that contain the chemicals that we have become sensitized to."

— Boston Globe

Then there was the lawyer who asked, "What was he painting the barrel with?" "Paint," responded the witness. "How did you know that?" asked the lawyer. "I keep my ear to the grindstone," answered the witness.

Quoting from a decision by a state supreme court justice: "Equity will not relieve one who could not have relieved himself."

And some short takes:
- "Were there any sounds visible?"
- "He was always a hardworking man and so was his wife."
- "Did you keep this in your possession all the time you had it?"
- "Isn't it inferentially obvious?"


Larry Larsen, who owns the Triple K Saloon in Marne, Iowa, hired three go-go dancers last week to spur his business. The dancers slowly removed their costumes down to strategically placed feathers and G-strings. But, alas, they worked up such a sweat that the tape holding strategic parts of their costume gave way, causing the dancers to molt. Larsen was charged with allowing indecent exposure in an establishment. The dancers, Angela Cranston, Debra Handshumaker and Carolyn Turner, were charged with indecent exposure and will be in court soon. Chances are they'll be fully dressed.

— Boston Globe

Courtroom Bloopers*
— Lawyer to witness: "What happened then?"
— Witness: "Let me think."
— Lawyer: "My God, you don't have to think to answer."
— Witness: "Of course I have to think. I'm not a lawyer."

A lawyer speaking to a judge explained, "Your honor, in the first place, as they say, I am going to say it. I was going to say what you said and the reason I am going to say it, is not because you just said it. If you had not said it, I was going to say it first.

Then there was the lawyer discussing a security document. "Well, the first bank is not the first, is it? Actually the first was the second or the third. I can't remember which. But I do know the first wasn't first. It was the second, wasn't it? Am I right?

A lawyer to a witness: "You say you can identify the electric razor by the sprung spring under the cutter head? Well, can you tell a sprung spring from one which is as it was when it wasn't?

Or how about the lawyer who asked the witness, "Is your husband living?" "No," she replied. "Is he dead?" asked the lawyer.

Suffolk Resume Package
When it's important to put your best foot forward . . . the medium is part of the message.

The Single Order: $25.95
50 Resumes
50 Blank Sheets
50 Envelopes

The Double Order: $32.95
100 Resumes
100 Blank Sheets
100 Envelopes

The More-Than-One Paper:
Add for each additional page,
50 Resumes: $14.55
100 Resumes: $15.50

Typesetting Available
* brochures
* flyers
* letterheads
* business cards
* invitations
* tickets and more!

Courting a new career? When
you're not there to make a good
impression in person, your resume
has to do the job for you.
Sir Speedy's exclusive Resume
Ensemble is designed to make you
look great!
First, your resume is skillfully
typed on our IBM Electronic 74
Typewriter. Then it is crisply off-
set printed on Ivory or White Cer-
tificate Royale, a high-quality,
waxed paper, and watermarked bond.
The subtle color and fine tex-
ture of the paper will stand quietly and
tastefully apart from the crowd. Matching envelopes and blank
sheets for your cover letters add
the coordinating final touch.

The Copy Center
Store hours: Monday — Friday
9:00 a.m. to 7:00 p.m.
Saturday 9:00 a.m. to 2:45 p.m.
The Copy Center is located in the Law Library, 4th floor, Donahue Building, 41 Temple Street. Please come in or call 367-0143 x 533 and inquire about all our services.
The Best Start Towards The Best Image: File A Getchell Brief!

DESIGNATED PRINTER OF DECISIONS FOR THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

(Printer of The Advocate)

Addision C. Getchell & Son, Inc.
131 Beverly Steet, Boston, MA 02114
(617) 227-4870
The Lawyer's Printer since 1870