ILLINOIS STATE BAR ASSOCIATION

JULY 2019 VOL 26 NO. 1

In the Alternative

The newsletter of the Illinois State Bar Association's Section on Alternative Dispute Resolution

Parting letter from the 2018-19 ISBA ADR Section Council chair

BY SANDRA CRAWFORD

I realize that it is an overused truism that "time flies when you are having fun." I have felt this many times in my life, especially this year as chair of the ISBA's ADR Section. As my term of service comes to an end, I want to thank all of my Section Council colleagues and friends for their hard work, dedication to the law and to alternative dispute resolution. I would also like to bid farewell to one of our departing members, Thomas D. Cavenagh, and tell you about the continuing service of two other members, Jay Schleppenbach and Deborah Soehlig.

First, I ask you to join me in bidding a fond farewell to "In the Alternative" newsletter editor, Thomas D. Cavenagh.

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A farewell from the sudent writers of the 2018-19 issues

[Raine Odom]: "Thank you all for reading the past five issues of Alternative Dispute Resolution! This has truly been an unforgettable learning experience for us all."

[Madeline Derango]: "Thank you to you, our readers, for supporting our hard work and thank you to Dr. Thomas Cavenagh for guiding us as we curated new issues for you all."

[Samantha Hasiewicz]: "We hope you enjoyed reading the content as much as we enjoyed writing it for you."

[Kel Goff]: "Thank you so much for allowing us this wonderful opportunity and the chance to explore ADR and the law further!"

[Reagan Quynn]: "We appreciate, and are so grateful, to have had this opportunity to write for you!"

Sincerely,

Your 2018-2019 North Central College ISBA Editing Team ■

Parting letter from the 2018-19 ISBA ADR Section Council chair

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Tom has served this Section Council as editor for 25 years. Tom has been a member of the faculty at North Central since 1989 and is the Schneller Sisters Professor of Leadership, Ethics & Values and Professor of Law and Conflict Resolution. He directs the Leadership, Ethics & Values Program at North Central College in Naperville, Illinois, and is the founder of and directs the North Central College Dispute Resolution Center. He graduated from Trinity College with a B.A. in Old Testament studies and philosophy, magna cum laude. His J.D. is from DePaul University College of Law. He is the author of Business Dispute Resolution: Best Practices, System Design and Case Management, and the co-author of Alternative Dispute Resolution for Business by West Publishing Company and CyberJustice: A Guide to Online Dispute Resolution for E-Commerce by Prentice-Hall. He has chaired the Illinois State Bar Association Section Council on Alternative Dispute Resolution and has been widely published in a variety of professional journals including Mediation Quarterly. He is the recipient of the North Central College Dissinger Prize for Faculty Scholarship and the North Central College Clarence F. Dissinger Distinguished Teaching and Service Award, and the Academy of Legal Studies in Business Master Teacher Award.

I had the pleasure of working with Tom both on the Section Council and as a part-time undergraduate instructor, teaching Conflict Resolution and Mediation at North Central College. Over his many years as editor of "In the Alternative," Tom has enrolled his NCC students to write for and assist him in editing our newsletter, which has been consistently published five or six times per year. Tom has, on several occasions, hosted the ADR Council meetings at NCC. This allowed ADR Council members to meet with and hear from his students and learn about their interest in law and ADR. Our deep appreciation goes out to all his students

who have served silently over these many years.

Tom, you will be missed. Many thanks for your years of service!

Tom is succeeded as newsletter editor by Jay Schleppenbach (current ex officio, section chair 2017-18). Jay has graciously volunteered to take over the helm of "In the Alternative". So, please keep those article coming that we might continue to honor the legacy which Tom leaves.

Jay has been a member of the Illinois State Bar Association's ADR Section Council since 2012. He has published dozens of newsletter articles on recent developments in the law applicable to arbitration proceedings. He is also a member of the Business & Securities Law

Section Council.

Jay is counsel in the Litigation Department of Seyfarth Shaw LLP's Chicago office. He has extensive experience with alternative dispute resolution, having represented major corporate clients in a variety of domestic and international

In the Alternative

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arbitration proceedings, including a multi-part ICC proceeding in Geneva, Switzerland. Jay also coaches the International Arbitration Moot Court Team at Northwestern Pritzker School of Law.

As a member of Seyfarth's White Collar, Internal Investigations, and False Claims Team, Jay has also worked on a wide variety of internal investigations, including matters involving complex accounting issues, alleged violations of the U.S. securities laws, and the Foreign Corrupt Practices Act. He also has full range of litigation experience, having handled every phase of discovery and several trials for nationally-known companies as an associate and then a partner at another national law firm. In addition, Jay has briefed and argued dozens of appeals, including six before the Illinois Supreme Court.

Thanks much, Jay, for your past service and for agreeing to continue to serve the Council in the capacity of newsletter editor.

Since the Annual Meeting in June in Lake Geneva, I have been succeeded as ADR chair by my colleague and friend, Deborah Soehlig. Deborah and I have worked closely over this year, together with Jay and our Section's Secretary, Missy Greathouse, to restructure the Council's subcommittees. We now have a subcommittee dedicated to working on matters which impact each of the distinct models of ADR – Arbitration, Mediation, Collaborative Process, Restorative Justice and Circle Process.

In addition to her duties as vice chair, Deborah has been the Council's current case law maven (and there has been lots of new case law this year in the arbitration arena) and the Manager of our new Connect Community listserv.

Deborah has been active in ISBA governance for about 10 years, first for 2 terms on the Assembly, and for the last 5 years on the ADR Section Council. In addition to presenting on ADR topics, Deborah also presents at non-ADR Section ISBA events, including this year's Civil Practice Section's Allerton Conference.

Deborah represents clients in both mediation and arbitration matters, both private and court annexed, in probate, commercial, employment, and general business matters. She also serves as a Cook County Commercial Arbitrator.

Please join me in welcoming Deb and pledging to support her work as the 2019-20 ISBA ADR Section Council Chair.

It is "farewell," but not "goodbye," from me. It has been an honor to serve with so many distinguished ADR practitioners – so, for now…

May joy and peace surround you,
contentment latch your door,
and happiness be with you now
and bless you ever more!■

Law students going after BigLaw firms that employ mandatory arbitration agreements

BY SAMANTHA HASIEWICZ

Recently, a group of Harvard law student activists have been going after law firms that require mandatory arbitration for employment issues. This mandatory arbitration means that any incoming associates must sign an agreement waiving their right to sue the company, and instead handle any legal issues regarding their employment through arbitration. At Harvard, students have created the Pipeline Parity Project (PPP) as a way to get these firms to drop their mandatory arbitration agreements. These students banned together to fight mandatory arbitration after a Harvard Law lecturer leaked an agreement at the firm, Munger, Tolles & Olson. So far PPP has gone after Kirkland & Ellis, DLA Piper, and are currently targeting Venable. Students feel as though these agreements are forcing them to sign away their legal rights. The students at Harvard Law are not the only ones who have taken issue with this. All of the T14 law schools have backed Harvard's efforts and sent out requests to nearly 400 firms asking them to disclose whether or not they will make their summer associates sign a mandatory arbitration agreement. Many of the firms that received this demand have declined to respond. Based on the responses and lack thereof, it is clear that not all biglaw firms handle employment issues in the same way. While many still require mandatory arbitration, others may not. Finding out which firms do is necessary for potential associates to be aware of in order to make an informed decision about their employment.

Mandatory arbitration is nothing new. It helps employers and their companies stay protected, and provides a fast route to dispute resolution. At the same time, it bars employees from accessing the courts when they have an issue with their employment. Employees have limited recourse and are bound to the agreement they initially signed when joining the company. Although mandatory arbitration is efficient, companies should be careful when limiting their employees to an arbitration agreement. It can cause issues with potential employees, in addition to problems with their current employees.■

Restorative justice: An overview

BY JANNA M. MILLER MIDURA & ELIZABETH BLEAKLEY

"Restorative justice" is a phrase that comes up in many scenarios these days. One can find it applied in courthouses, schools, workplaces, prisons, and community groups. CNN hosts a weekly series, The Redemption Project, that gives viewers an inside look at restorative justice in action. Judge Sophia Hall recently generously shared with the ISBA Bench & Bar Section Council her extensive knowledge and insights gained from many years of implementing restorative justice principles and practices in the juvenile setting. Annalise Buth, who created and teaches Northwestern Law's Restorative Justice Practicum, served on the Restorative Justice and Safe Communities Committee for Illinois Governor J.B. Pritzker's transition. In 2019, the Illinois General Assembly introduced a bill to amend the Code of Civil Procedure to add a new section on restorative justice practice.[1] But what is restorative justice, does it work, and is it a helpful tool for society?

What Is Restorative Justice?

Restorative justice is a philosophy where wrongdoing or conflict is viewed as a "breakdown of relationships and community."[2] Restorative justice focuses on "repairing harm, understanding the social context surrounding the harm, and empowering those affected so that they can address and repair the harm done."[3] The process brings together those affected by the harm - offenders, victims, and communities.[4] Since restorative philosophy is based on the belief that conflict and crime are the result of a breakdown of relationships, the idea behind the philosophy is that the resulting harm, whether disruption or damage, should be addressed by those involved and impacted by it. Those individuals or communities have the capacity to identify, address, and resolve their issues and concerns in both an effective and sustainable manner, as defined by them.

Restorative justice is based on the principle that it is the responsibility of a "community" to keep peace and maintain order. The wrong committed is viewed as more of a breakdown of healthy norms of established societal conduct rather than a formal breakdown of written laws.

Development

The development of restorative justice has been fragmented over time and place,[5] and no single era or culture has a claim on its origin. Restorative justice dates back to indigenous cultures that employed its principles to keep peace in their communities. The commonality across time and place is that restorative justice principles have been used to respond to unacceptable behavior within societies by attempting to repair harm and rebuild relationships.

The person often credited with popularizing the term restorative justice is Dr. Albert Eglash, an American psychologist who worked with incarcerated people in the 1950's.[6] Dr. Eglash studied the rehabilitative value to offenders of being held accountable for their behavior that hurt others and of restoring the offenders' humanity by allowing them to make restitution to those they hurt. His studies focused on the benefits to the wrongdoer. Another person to whom the term restorative justice is attributed, and the main person recognized today, is Howard Zehr, a Mennonite and still active restorative justice proponent.[7]

Methods of Restorative Justice

There are many methods to employ the principles of restorative justice.[8] According to the Center for Justice and Reconciliation, "[i]f restorative justice were a building, it would have four corner posts: (1) inclusion of all parties, (2) encountering the other side, (3) making amends for the harm, and (4) reintegration of the parties into their communities."[9] The parties taking part in the restorative justice process may (but need not) be limited to the person who committed the wrong, the person against whom the wrong was committed, and a facilitator. In some methods, all parties affected by the precipitating action, including community members, can take part in the process.

Prevalent restorative justice methods include:

- **Victim-Offender Mediation**. Under Victim-Offender Mediation (VOM), the parties are not considered disputants and the focus is on the process and on the restorative outcome.[10] VOM is one of the most well-known and commonly used contemporary restorative programs, especially in North America and Europe.[11] This method "usually involves a one-to-one meeting between the crime victim and the offender … facilitated by a mediator…who helps the parties to achieve a new perception of their relationship and the harm caused…by providing… an opportunity to talk about the crime in an unthreatening atmosphere."[12] VOM is often used for less serious crimes, such as misdemeanors, juvenile crimes, and property crimes.[13] However, VOM is also used with more serious and violent crimes, including homicide, sexual assault, and armed robbery.[14]
- **Restorative Circle Approach**. The "Restorative Circle Approach," sometimes called "Conferencing," allows the offender and victim, as well as their supporters and members of the community, to take part in the process.[15] The Restorative Circle Approach can be used successfully for offender-victim meetings, and also for

the vast number of instances in which there is a conflict that is likely to benefit from a restorative approach.[16] The content of the discussion is confidential and the participants can decide, in cases where a judge is involved, whether or not they want to tell the judge what was discussed. While there may be a judge in a criminal or other matter, many (perhaps even most) cases will not have a judge involved. What the parties may want to discuss is whether they want their agreement or solution put in writing. The process can take anywhere from two to eight hours and the parties can come back for additional circle encounters, if they agree that doing so would be beneficial.

- **Community Panel Model**. An approach that can be successful with crimes involving youth is the Community Panel Model. In this approach, "young people [are] offered the chance to participate in a panel composed of members of their community who [are] trained in listening skills, working with youth, and making appropriate referrals to resources. The victim is invited to share his or her experience of the crime and to contribute to a plan for the young person who caused the harm."[17] The panel recommends a contract for the young person in need of direction and guidance, which may include regularly attending school, making amends to the victim, and connecting to the community. A member of the community panel will need "to agree to work with the young [offender] on a regular basis" in order to help the offender and community build a better relationship during the contract period."[18]

Various forms of the methods described above are implemented in the application of restorative justice, depending on the place and the needs of the parties, but one thing that is common among all of them: restorative justice should not be implemented as part of a structured, cookie cutter program. The beauty of restorative justice is that it facilitates the free flow of communication between the parties. Attempting to put the process in a box ruins the ability of the parties to let the process be taken wherever the parties choose to go with it and, in doing so, to introduce innovative solutions to problems during the discussions.

Example of Process Using Restorative Circle Approach[19]

Under a Restorative Circle Approach (or "Conferencing"), the offender, victim, their supporters, and members of the community may take part in the process.[20] A "Circle Keeper" administers the process, which often involves significant preparation. Prior to the meeting, the Circle Keeper meets with the parties and identifies the problems the participants would like to see addressed by the circle. The Circle Keeper explores the backgrounds of the people involved, as it seems relevant to the problem the parties wish to address, and asks about other matters, such as whether there are additional people who should be included in the process.

When the meeting takes place, all participants sit in a circle. The circle has a beginning or an "opening," which could be a story or almost anything that may be relevant to what the parties need or want to accomplish. The parties then introduce themselves. There is almost always a "talking piece," a physical object held by the speaker, which denotes the party who has the "floor" and gives speakers time to say what they want to express at their own pace.

The Circle Keeper asks the participants to select values that are important to the circle, such as honesty, respect, safety, and equality and gets agreement from the circle members that these values will govern the process. Once the values are established, it is the Circle Keeper's function to get the discussion started. The Circle Keeper may encourage the parties to participate and continue the discussion and may also participate in that discussion by asking questions about the issues being explored by the parties.

The Circle Keeper will have no role in the solution to the problem or conflict that brings the parties to the circle, but will guide the parties to discuss how they wish to resolve their issues, when the time seems appropriate, and how to move forward. At the conclusion of the process, there is a "closing ceremony," which can be a story, a reading, a poem, or even a fun physical exercise of some sort to relax the participants who participated in the circle for an extended time.

Example of a Real Life Success Story[21]

In Minnesota, a man's house was entirely trashed by neighborhood youth. When the man came home and found what they had done, his approach in dealing with the situation centered around the application of restorative justice principles. The juveniles were charged with a criminal offense, but the man encouraged a restorative approach, based on his belief that there was something missing in the community. The juveniles' actions were, in part, because there was no longer a sense of community in the neighborhood. Following a Circle Approach, the youth offenders agreed to help clean up the man's house. On top of that, the man and the kids organized a block party that helped give the neighbors a sense of connection that was missing. The philosophy inherent in the approach the man took was restorative justice in action - where parties strive to make and restore human connections.

Strengths of Restorative Justice

Many who have participated in the restorative justice process claim tremendous benefits from engaging in it.[22] The victims of the wrong can have questions answered such as "why and how did you pick me as the victim of the crime?" and can have the opportunity to tell the offender "this is how what you did hurt me" and "now my life has change this way because of what you did."[23] On the flip side, the process can give perpetrators some peace of mind, allow them to apologize, and help them to assuage their guilt.

The process can also provide an avenue for parties who do not have an instance involving a crime, but merely a conflict or situation that needs a thorough discussion or work through in a circle atmosphere.

"All part[s] of a person - physical, mental, emotional, and spiritual - become out of balance when a harm occurs, and restorative justice seeks balance and wholeness."[24] Not only can the application of restorative justice practices provide help to parties on all sides of the process on an individual level, it can also benefit communities and society as a whole by bringing neighborhoods together, cutting down on crime, and in some instances, being more cost-effective than the application of the criminal process alone.

Studies

Some studies have shown the benefits of restorative justice. For example:

- In two studies conducted in London, analyses showed that post-traumatic stress symptoms ("PTSS") scores were significantly lower among victims assigned to restorative justice conferences ("RJC") in addition to criminal courts.[25] There were overall 49% fewer victims with clinical levels of PTSS and possible post-traumatic stress disorder ("PTSD").[26] Further, victims of crime who participate in restorative justice efforts have greater levels of satisfaction with the justice process (Campbell-Strang 2013, Latimer 2005).[27]
- Some studies have found strong evidence that restorative justice in the criminal system reduces recidivism (Campbell-Strang 2013, Latimer 2005, Sherman 2015, Sherman 2007)."[28] Additionally, "[o]ffenders who participate in restorative justice appear more likely to comply with restitution requirements than those who participate in the traditional justice system (Latimer 2005)."[29]
- Other studies have found the application of restorative justice to be cost effective. One such United Kingdom experiments found a ratio of 3.7-8.1 times more benefit in cost of crimes prevented than the cost of delivering RJCs.

The first few examples above involve studies of the use of restorative justice in more serious cases, while the later example would involve circle conferencing.

Limitations of Restorative Justice

Despite its many potential benefits, restorative justice does not solve all problems and has its limitations. While restorative justice may be a helpful tool in the toolkit, it does not work in every situation. Not every perpetrator will care about the harms caused. Not every victim, offender, or community will want to engage in a restorative justice process.

According to Judge Martha Mills,[30] who was instrumental in the application of restorative justice principles in Chicago, the process may not work or be effective when:

- one party has a mindset that is not open to change,
- someone engages in the process because of someone else's desire for them to do so,
- one party insists on maintaining their "rights" instead of acknowledging their responsibilities, or
- someone is limited mentally or by the use of controlled substances.

The parties involved must want to engage in the process on a completely voluntary basis.

Some have raised concerns that a limitation of restorative justice is that it is a time-consuming process, involving trained facilitators and producing results that are not guaranteed to be positive or to have a quantifiable impact on the parties involved. Others respond that although some restorative conferences may be time consuming, many are not, and that is rarely something that can be determined in advance. There is generally agreement that good circle keepers need to be carefully trained to serve in a role that can be more complicated than traditional alternative dispute roles because of the difficulties of preparing for and being keeper of a circle as a participant with a role, but with no role in fashioning the result. Results are not guaranteed, to be sure, and quantifiable impact should be studied, although it may be difficult to determine.

Studies

Some studies have shown a lack of benefits from the application of restorative justice principles in a criminal setting. For example:

- Some studies have found that "there is insufficient evidence to support the view that there are inherent benefits in the restorative justice process that provide victims of sexual assault with a superior form of justice."[31]
- Further, while some studies have found that "the overall result of restorative justice methods employed reduced the likelihood of reconviction over the next two years, the results were not statistically significant."[32]
- These same studies have found that, in terms of reconviction studies, there were no significant differences between the groups employing restorative justice methods and control groups.
- Other studies in Australia, New Zealand, the United Kingdom, and the United States have found that while these countries' populations are among those with the highest incarceration rates, as well as the most widespread use of restorative justice, there is little evidence that restorative justice has served to reduce prison populations.[33]

According to the studies cited above, it is difficult to quantify any measurable positive results from the restorative justice process.

Appropriate Applications of Restorative Justice

There are questions that need to be asked and answered about the use of restorative justice:

- When is the use of restorative justice appropriate?
- Is it of benefit in all situations with all offenders or are there some types of crimes and certain groups of people to whom the concept is just not beneficial?
- If the crime is violent, like murder or rape, or if it involves domestic

violence or sexual predation of a child, does it really help to have the families of the murder victim, or the victims of a violent assault, confront the wrongdoer in a face-to-face meeting?

These are questions that those who wish to apply the principles of restorative justice must tackle on a case by case basis.

One author who has explored the application of restorative justice to gendered violence situations questions the extent to which due process safeguards and standards must be incorporated in restorative justice applications in those scenarios.[34] In her study of various types of applications of restorative justice in different countries involving gendered violence, she comes to the conclusion that "questions of range and questions of standards cannot be dealt with in isolation, and that the wider the range of offences and offenders restorative justice deals with, the more it may merge with formal criminal justice"[35] Her conclusion is based on her findings that those who advocate for the application of restorative justice in these hard cases see it as effective justice while those who argue against its application in such scenarios see it as diversion.[36]

When applying restorative justice in cases involving extreme antisocial wrongs, the anticipated value to the person who was harmed must be strongly considered. If an additional confrontation with the wrongdoer may cause more trauma and angst, or if the person harmed may not be fit to handle the meeting, then is it best to let traditional criminal justice methods take their course? Such questions are the types that those seeking to apply restorative justice must consider.

Restorative Justice in Chicago

Chicago has been fortunate to have many leaders in the application of restorative justice principles. There are many places in which the concept has been applied.

One such place in the Circuit Court of Cook County is with Judge Sophia Hall, the presiding Judge of the Juvenile Justice and Child Protection Resource Section ("Resource Section"). The Resource Section was established in 1995 as the outreach arm of the court to communities, agencies, organizations, and businesses that are concerned about making a difference in the lives of young people and their families.[37] The Resource Section plays a significant role in supporting the expansion of the use of restorative justice principles in programming for juveniles throughout Chicago, Cook County, and the State of Illinois.[38] In Judge Hall's presentation to the ISBA Bench & Bar Section Council on May 10, 2019, she emphasized that "restorative justice is not a program; it is a philosophy, and it is a philosophy that can be a part of everything that you do."

In North Lawndale, Judge Colleen Sheehan uses restorative justice practices in the Restorative Justice Community Court, where the focus is on nonviolent offenders between the ages of eighteen to twenty-six. Through restorative practices such as peace circles and community conferences, offenders, victims, their families, and community members determine what steps are needed to repair the harm done.[39]

Retired Judge Martha A. Mills, another pioneer in the practice of restorative justice in Chicago, graciously sat for an interview for this article.[40] Judge Mills embraced the principles of restorative justice in family law when she presided over and introduced a Pilot Restorative Justice Project for the Parentage and Child Support Court of the Circuit Court of Cook County.[41] She offered restorative circles to help resolve issues involving parents and children. The children participated when both parents agreed and the child was mature enough to participate. Parties had the opportunity to address whom the children should reside with and when, as well as timing, school and visitation issues, transportation, and other conflicts. Sometimes, the children themselves suggested solutions that the parents were not likely to come up with on their own. The parties involved were under no obligation to tell the judge what happened in the circles, but sometimes they wanted a court order to manifest their agreement in writing. Other times they were so pleased with the results of a restorative circle that they wanted to inform the judge of their success. The circles presented opportunities for conflict resolution that simply were not present in the typical court scenario.

Restorative Justice Hubs ("RJ Hubs") have also been established in the city's communities. Three such RJ Hubs are: Precious Blood Ministry of Reconciliation in Back of the Yards, The Urban Life Skills program that is part of New Life Centers of Chicagoland in Little Village, and Lawndale Christian Legal Center in North Lawndale.[42] Through the hub model, which is often developed through a faith-based organization, "community sites…offer effective violence prevention and intervention strategies for court and gang-involved youth and families, providing structures and supportive atmosphere that promotes healing and pro-social development."[43] These hubs, which allow for the unique needs of each community, are directed by a leadership circle that provides support to the hubs, allows for the creation of a replicable model, and encourages coordination between the hubs.[44] These proactive models help Chicago residents interact with their communities and each other in ways the normal criminal and civil justice system cannot.[45]

Restorative Justice Elsewhere

Communities in other parts of the U.S. and in other countries have also implemented restorative justice models. Looking to our closest neighbor first, many restorative justice proponents view the state of Minnesota[46] as a model for restorative justice techniques.[47] Restorative justice practices have been implemented in about half of the state's school districts. In one Minnesota elementary school, the number of acts of physical aggression recorded per year dropped from 773 to 153 over 3.5 years as a result of the application of restorative justice principles.[48]

New Zealand is a leader in the implementation of restorative justice and has adopted two main types of conferencing in the criminal justice setting, namely the New Zealand family group conferencing model and the Wagga Wagga police-led conferencing model.[49]

"The Family Group Conferencing (FGC) model first emerged in New Zealand as a response to the overrepresentation of Maori people in the criminal justice system."[50]

New Zealand enacted a law that "required that conferencing involving the extended family, community representatives, and professionals be used in decision-making in juvenile delinquency and child protection cases (Levine, 2000)."[51] Except for cases of murder and manslaughter, all crimes can be referred to the FGC model in New Zealand, given how embedded the process is in the legal system.[52] Internationally, the use of FSGs has been extended to Australia, Canada, the U.S., South Africa, the U.K., Norway, Sweden, Israel, France, Belgium, and the Republic of Ireland."[53] The FGC Model has undergone various adaptations in its implementation in these different countries and communities.[54]

The Police-led conferencing model, implemented in Wagga Wagga, "differs from the family group conferencing in four ways: (1) the conference is carefully scripted, (2) the offender and the offender's network speak first, (3) there is not "private time" allocated to the families during the formal part of the conference, and (4) officials representing the "authority" actively facilitate the process."[55] The structure of this model is more formal, which differs from the unscripted nature in the application of the philosophy.

There are as many types of conferencing as there are crimes, harms, or cultures. Restorative justice's philosophy can be implemented in many forms, as long as the basic principles are applied.

Conclusion

As an alternative to other processes that focus on punishment of offenders and do not address reparation to victims, restorative justice promotes the dignity of both victims and offenders. Restorative justice can also be helpful in non-criminal scenarios for resolution of problems involving various types of groups in different settings. Critical to a successful implementation of the restorative justice process is a respect for the process by the parties engaging in it. In the criminal setting, the end goal of the process is to repair the harm caused between the parties, but there is also a broader societal goal. The purpose of the process is the betterment of a community where an offender can understand the harm caused by his or her actions and the victim can participate in the healing process from the wrongful act. The principle relies on the assumption that a community is responsible for the well-being of its members and that by engaging in restorative justice practices there will be less of a possibility of further misdeeds. In the non-criminal setting, restorative justice can help provide an avenue for solutions to problems that could not easily be solved through other means. At the heart of this action-oriented response to (mis)behavior is the desire to make things right, which is the best we humans can strive to do.■

Janna M. Miller Midura is a senior associate of Bleakley Law LLC.

Elizabeth Bleakley is the founding principal of Bleakley Law LLC.

1. The proposed legislation provided generally that communications received by a party in preparation for, during, or after a restorative justice practice would be inadmissible in court unless the privilege is waived by the party or parties about whom the communication concerns. HB 1458 filed by Rep. Emanuel Chris Welch on 1/29/19 and re-referred to the rules committee on 4/12/19.
2. Annalise Buth and Lynn Cohn, *Looking at Justice through a Lens of Healing and Reconnection*, 13 NW. J. L. & Social Policy. (2017) at 3, https://scholarlycommons.law.northwestern.edu/njlsp/vol13/iss1/1.
3. *Id* at 3-4.
4. Judge Sophia H. Hall, *The Reality of Restorative Justice, The Community Restorative Justice Court*, 32 CBA Record (Jan. 2017) at 34; https://incarcerationreform.com/wp-content/.../03/restorative.hall_.2017.01.cba_.pdf.
5. Bluth and Cohn, *supra* note 2.
6. *Id.;* Lorenn *Walker, Restorative Justice & Other Public Health Approaches for Healing; Transforming Conflict into Resiliency, Albert Eglash & the history of restorative justice*, July 27, 2008, https://www.lorennwalker.com/blog/?p=117; Eglash's paper is reportedly the first time the term restorative justice was used.
7. Howard Zehr, *A New Focus for Crime and Justice: Changing Lenses* (Herald Press, Scottsdale, PA, 1990); Howard Zehr, *Changing Lenses: Restorative Justice for Our Times, Revised and Updated* (Herald Press, Scottsdale, PA, 2015).
8. Other less serious criminal restorative justice processes, as well as others where there is an "offender" (criminal or non-criminal, such as school bullying where there is really an offender and a victim), but not other situations where restorative justice may be an excellent way of proceeding, but there is not a particular wrongdoing, offender or victim. Those latter civil kinds of conflict are for anyone—schools, offices, workplaces, religious or social groups, families—whatever configuration of people need or want restorative justice. The care with which the preparation and meeting of the parties is done relates to seriousness.
9. Centre for Justice & Reconciliation; A program of Prison Fellowship International, Tutorial, Lesson 1: What Is Restorative Justice, https://www.restorativejustice.org/about-us/.
10. Estelle Zinsstag, et. al., *Conferencing: A Way Forward for Restorative Justice in Europe*, European Forum for Restorative Justice, v.z.w. 2011 at 41; https://www.antoniocasella.eu/restorative/Zinsstag_2011.pdf.
11. *Id.*
12. *Id.*
13. Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 Journal of Conflict Resolution 1, available at https://cardozojcr.com/issues/volume-5-1/note-1/.
14. *Id.*
15. *Id.* at 311
16. Judge Martha A. Mills was a significant contributor of information for this article. She is a retired circuit court judge of Cook County and as such started a pilot restorative justice project in a branch of the family court. She was also an early civil rights attorney in the south. Among other details, she provided significant information regarding her experiences with the restorative Circle Approach.
17. Bluth and Cohn, *supra* note 2 at 6.
18. *Id.*
19. Mills, *supra* note 16.
20. *Id.* at 311.
21. Story credit of Judge Martha A. Mills, to the best of her recollection of having seen a videotape regarding this instance.
22. Zinsstag, *supra* note 10.
23. *Id.*
24. Bluth and Cohn, *supra* at 2, citing Kay Pranis, et al., *Peacemaking Circles: From Crime to Community* (2003) at 4.
25. C.M. Angel, L.W. Sherman, H. Strang, et al. *Short-term effects of restorative justice conferences on post-traumatic stress symptoms among robbery and burglary victims: a randomized controlled trial*, Journal of Experimental Criminology (2014), https://doi.org/10.1007/s11292-014-9200-0.
26. *Id.*
27. https://www.whatworksforhealth.wisc.edu, accessed 06/01/19.
28. *Id.*
29. *Id.*
30. See also the Restorative Justice in Chicago section in this article.
31. Annie Cossins, *Restorative Justice and Child Sex Offences: The Theory and the Practice*, 48 The British Journal of Criminology 359-378, http://doi.org/10.1093/gjc/azn013.
32. www.justice.gov.uk/publications/research.htm.
33. William R. Wood, *Why Restorative Justice Will Not Reduce Incarceration*, 55 The British Journal of Criminology 883-900, https://doi.org/10.1093/bjc/azu108.
34. Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, , 42 The British Journal of Criminology 616-634 (2002), https://doi.org/10.1093/bjc/42.3.616.
35. *Id.*
36. *Id.*
37. http://www.cookcountycourt.org/ABOUTTHECOURT/JuvenileJusticeChildProtection/JuvenileJusticeChildProtection-ResourceSection.aspx.
38. *Id.*
39. Bluth and Cohn, *supra* at note 2, at 14-15.
40. Zinsstag, *supra* note 10.
41. Judge Martha Mills, et al., *Restorative Justice Pilot Project at the Parentage and Child Support Court of the Circuit Court of Cook County*, 8 DePaul Journal for Social Justice (Winter 2014), accessed 06/10/19 at https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1100&context=jsj.
42. Other hubs include Circles and Ciphers in Rogers Park, Alliance of Local Service Organization in Humboldt Park and Logan Square, and Target Area Development Corporation in Auburn Gresham, Little Village Urban Life Skills, Adler University Institute on Public Safety and Social Justice, Kenwood Oakland Community Organization, Austin Coming Together, the Community Justice for Youth Institute and the Juvenile Justice and Child Protection Resource Section, Circuit Court of Cook County. https://rjhubs.org/.
43. Bluth and Cohn, *supra* not 2, at 10-11.
44. *Id.*
45. *Id.*
46. Victim offender mediation is explicitly addressed in Minnesota's statute (Ch. 611A.775).
47. Judy C. Tsui, *Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques into Chicago's Juvenile Justice System*, 104 J. Crim. L & Criminology 635 (2014).
48. Marilyn Armour, Restorative Justice: Some Facts and History, Charter for Compassion 2017, https://muse.jhu.edu/article/469534/pdf.
49. Zinsstag, *supra* note 10 at 60
50. *Id.*
51. *Id.* at 53.
52. *Id.* at 56.
53. *Id.* at 57.
54. *Id.* at 57.
55. *Id.* at 58.

U.S. Supreme Court holds class arbitration cannot be ordered absent an express agreement

BY JAY SCHLEPPENBACH

The United States Supreme Court has long recognized that, in arbitration cases, the primary task for courts and arbitrators is to give effect to the intent of the parties.[1] In keeping with this principle, the court in 2010 held that a court may not compel arbitration on a class-wide basis when the arbitration agreement is silent about the availability of such arbitration.[2] Recently, the court extended that rationale further, concluding in *Lamps Plus, Inc. v. Varela* that class arbitration cannot be compelled where the arbitration agreement is not silent but rather ambiguous about the availability of such arbitration.[3]

The parties in Lamps Plus, an employer and its employee, had an arbitration agreement that was arguably ambiguous about the availability of class arbitration.[4] On the one hand, the agreement referred to arbitration of disputes the employee (singular) might have against the company as opposed to claims all of its employees (plural) might bring as a class.[5] On the other hand, the agreement described the claims to be arbitration in broad terms that could include class actions, such as "any and all disputes" and "any and all lawsuits or other civil legal proceedings relating to my employment."[6] The Ninth Circuit determined that this ambiguity should be construed against the drafter (the employer) and therefore concluded that the employee's interpretation permitting class arbitration should be given force.[7]

The Supreme Court reversed the Ninth Circuit's decision with five justices joining in the opinion, concluding that interpreting ambiguity to allow for class arbitration was inconsistent with the Federal Arbitration Act's fundamental principle that arbitration is a matter of consent.[8] Relying on its past decisions, the court made clear that class arbitration "fundamentally changes" the nature of "traditional individualized arbitration" envisioned by the Federal Arbitration Act in several ways, including by making the process slower, more costly, and "more likely to generate procedural morass than final judgment."[9] Thus, the parties' consent to arbitration, without more, could not be read as a consent to class arbitration.[10] Like silence about class arbitration in an arbitration agreement, "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreed to sacrifice the principal advantage of arbitration."[11]

Interestingly, the court in *Lamps Plus* expressly declined to decide whether the availability of class arbitration was a "question of arbitrability" that is presumptively for courts, rather than arbitrators, to decide.[12] Because the parties had not disputed whether a court could decide the availability of class arbitration, the Supreme Court concluded that question was not before it.[13] So that issue remains officially undecided by the nation's highest court, although circuit courts have concluded that the availability of class arbitration is in fact a question of arbitrability for the courts.[14]

Thus, employers seeking to take advantage of the efficiency and speed of arbitration need not fear that they will be subjected to the complications of class arbitration, absent an express indication in their agreements that they wish to do so.■

1. See, *e.g.*, *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018).
2. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 599 U.S. 662 (2010).
3. No. 17-988, 587 U.S. ___ (2019).
4. *Id.* at 2-3.
5. *Lamps Plus*, No. 17-988 (Kagan, J. dissenting) at 3-4.
6. *Id.* at 2.
7. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672 (9th Cir. 2017).
8. *Lamps Plus*, No. 17-988 at 10-11.
9. *Id.* at 1, 8.
10. *Id.*
11. *Id.* (internal quotations omitted).
12. *Id.* at 9 n.4.
13. *Id.*
14. See, *e.g.*, *Herrington v. Waterston Mortgage Corp.*, 907 F.3d 502 (7th Cir. 2018); *Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016).

Happenings

BY RAINE ODOM

Registration for the 17th Annual Advanced Mediation & Advocacy Skills Institute Open

The American Bar Association is hosting its 17th annual Advanced Mediation & Advocacy Skills Institute on November 15th and 16th of this year. Registration is now available on their website. This is a great opportunity to learn more about mediation and arbitration from some of the leading professionals in the community. The cost for non-members is $725.00. The cost for members is $625.00. The cost for section members is $525.00. There will be seminars that cover seven specific techniques used by mediators as well as unique videos created by Suffolk University Law Professor Dwight Golann. For more information, and to

register, please visit the ABA website here.

Murder Case Goes to Mediation

In an interesting turn of events, Stephen Lott who was on trial for the murder of his wife has just had his case ordered to mediation. The mediation will be presided by Senior District Judge Steve Verby. At this time, Stephen Lott remains in jail with a bond of $1 million. In the state of Idaho, mediation in criminal cases is allowed and sometimes results in reduced charges and agreements on sentencing. The mediation is conducted in private, but once an agreement is made information is made public.

Illinois Cannabis Law and Arbitration

An article by Clare Fowler, managing editor of mediate.com, discusses what arbitration and mediation can do for new cannabis laws. She cites a firm that was established in Canada specifically for resolving disputes involving cannabis titled "Canadian Cannabis Dispute Resolution Centre". This center, at the time, manly dealt with issues involving commercial disputes over property. They expected, though, to start to have to deal with conflicts like securities regulations, zoning, and concerns related to international travel. This article, and others like it, are important to look at in the coming months. With the new market on the verge, it is important to see what opportunities there are for ADR professionals in the field. To read her full-length article, you can go here.

Chase Bank in Trouble After Trying to Sneak in Arbitration Clause

Chase Bank has recently come under fire for sending out an email to their new credit card customers. The email contained a forced arbitration provision and a ban on class actions. The provision stated that all issues had to be solved in binding arbitration. In order to opt out of this, you have to send a letter via snail mail to a P.O. Box that is listed in the email by early August. Many members of the community have called out Chase for conducting an abusive practice.■

Case briefs

BY MADELINE DERANGO, SAMANTHA HASIEWICZ, & RAINE ODOM

Bigger v. Facebook

Illinois District Court (April 2019)

Does notice that arbitration agreements have been signed have to be sent to FLSA potential class members?

Since the decision in *Epic Systems Corp. v. Lewis*, plaintiffs have been trying to come up with new ways to mitigate arbitration agreements in class action cases. Recently, in *Bigger v. Facebook*, the plaintiff, a former client solutions manager at Facebook, contended that her position was misclassified as exempt. This misclassification leads to her losing out on overtime pay, which she contends she is owed under the Fair Labor Standards Act. Facebook responded that she, as well as other parties involved in the suit, had signed arbitration agreements and "should not be provided notice or a period to opt-in as their sole remedy was in arbitration" (Mersol). The court granted the motion for the certification. They stated that the arbitration agreements could be addressed at a later date. District courts in other cases have declared that notice has not needed to be sent to those who cannot litigate their problems due to a binding arbitration agreement. The Bigger case has shed light on the issues of the limited appellate review process for conditional certification orders as well as the most often used strategy by plaintiffs in cases like these.

Certegy Check Services v. Fuller

Supreme Court of Appeals of West Virginia (May 17th, 2019)

Supreme Court Vacates the Order of the Circuit Court Denying the Motion to Compel Arbitration.

Janice Fuller was in Las Vegas, Nevada in early 2016 staying at a hotel. She claims that she paid for her stay with two "convenience checks" that had been drawn from her credit card account and immediately paid the bill in full when she returned home. Certegy Check Services, Inc. has a subsidiary debt collector company called Complete Payment Recovery Systems, Inc. They claim that Fuller did not pay the bill, and tried to collect the payment from her. She sued them in the Circuit Court of Mercer County claiming that they invaded her privacy and the defendant motioned to compel arbitration. The defendant provided paper copies of signed agreements by the plaintiff. The plaintiff contends that she never saw the documents and did not sign them. She states that when she signs checks, she does so on an electronic card reader and alleges that her signature was placed on the documents. The circuit court denied the motion to compel arbitration. The Supreme Court, upon reviewing the case, vacated this order stating that "the circuit court's order appears to have determined that no arbitration agreement was formed and to have determined, simultaneously, that the arbitration agreement was unconscionable and should not be enforced".

Light-Age, Inc. v. Ashcroft-Smith

United States Supreme Court of Appeals for the Fifth Circuit (April 2019)

After the defendant Clifford Ashcroft-Smith was awarded $274,813.57 by an arbitration panel, Plaintiff Light-Age, Inc. petitioned the district court to vacate the award, arguing that the panel was improperly constituted. The district court found that the panel was properly constituted, confirming the award; as a result, the plaintiff appealed the decision. The Fifth Circuit affirmed

the lower court's decision, finding that the plaintiff waived its right to challenge the arbitration panel by failing to object at the time of the arbitration itself.

State ex rel. Newberry v. Honorable Steve Jackson

Supreme Court of Missouri (May 21st, 2019)

Missouri Supreme Court Sustains Motion to Compel Arbitration

Jesse Newberry and Becky Lowrance had been employed by Dollar General for 15 and nine years respectively. In August of 2014, they were prompted to sign an arbitration agreement every time they logged into the company servers. The employees signed them. Once they were terminated in 2016, they filed charges of discrimination against their former employers. In the plaintiff's arguments, they declared that they did sign the agreement but did not "understand" the documents. In January of 2018, the court sustained Dollar General's motion to compel arbitration finding that "no reason the principles of [State ex rel. Pinkerton v. Fahnestock, 531 S.W.3d 36 (Mo. banc 2016),] regarding a 'delegation clause' should not apply to a case with individuals the same as a 'commercial case.'" They held that the agreement was valid. The Missouri Supreme Court found that the plaintiff's arguments were not specific to the delegation provisions and upheld the decision to compel arbitration.

YPF S.A. v. Apache Overseas, Inc.

U.S. Court of Appeals for the Fifth Circuit Court of Appeals May 24, 2019)

Apache sold certain assets to YPF with the agreement that both parties would accept adjustments to the sale prices under the sale and purchase agreement. In addition to this, the two parties agreed that if a dispute regarding the sale prices arose, it would be handled through arbitration. When a dispute occurred and the arbitrator issued a Determination that awarded YPF, Apache complained on two grounds. First about the manner in which the decision was made and second that the arbitrator violated the requirement by failing to describe the "reasoning" that led to the determination. The district court affirmed the determination and rejected Apache's argument. At the fifth circuit, the court deferred to the Federal Arbitration Act, which usually has courts in agreement with the arbitrator unless it is a special circumstance. From this, the court concluded that the arbitrator provided a "reasoned award" because it used the parties' statements and accounting records among other items that were made known to Apache. Due to these factors, the fifth circuit affirmed the judgment of the district court.■

Environmental law column

BY KEL GOFF

While often considered as drastically different fields, environmental studies and law overlap in many crucial instances. Environmental issues affect each and every aspect of our daily lives. Without clean water to drink, fresh air to breathe, and healthy food to eat, no one is able to survive. Instances of environmental dispute that impede one's ability to thrive require the assistance of lawyers well versed in the realms of civil rights, personal injury, and torts. While most often seen as impacting those in poverty or third-world nations, environmental conflicts do not respect borders or social barriers. The use of conflict resolution in finding a solution that benefits both the planet and those in distress is critical in energy and environmental law. Not every case between those involved in an environmental dispute needs to be resolved in court; many alternatives exist that can help both parties reach a beneficial compromise.

Decided Seventh Circuit Court of Appeals Cases

Varlen Corporation v. Liberty Mutual Insurance Corp.

May of this year, the Seventh Circuit Court of Appeals heard a case regarding two industrial sites related to railroad operations that were owned and operated by Illinois corporation, Varlen Corporation. These industrial sites contained groundwater that was heavily contaminated with the chemical, hexavalent chromium at one location and a chlorinated solvent and diesel fuel in the other. Liberty Mutual Insurance Company refused to indemnify the areas, to which Varlen sued in response as the clean-up costs were millions of dollars. Liberty Mutual excludes coverage for any property damage caused by chemical leaks or discharges, unless sudden or accidental. Liberty Mutual sought to strike Varlen's expert witness with both parties also seeking a move for summary judgment at the district court level. The witness' testimony was struck down due to being unreliable and speculative under Federal Rule of Evidence 702. Summary judgment was also granted to Liberty Mutual. Varlen appealed. The Seventh Circuit Court of appeals agreed with the lower court's decision to exclude the witness' testimony and affirm granting summary judgment to Liberty Mutual.

William Liebhart and Nancy Liebhart v. SPX Corp., TRC Environmental Corp., & Apollo Dismantling Services, Inc.

William and Nancy Liebhart own three houses on the same street of Watertown, WI. The rest of the block was once shared with an abandoned transformer factory, previously owned by SPX Corporation. The building was later demolished with the help of TRC Environmental Corporation and Apollo Dismantling Services, Inc. The Liebharts believe that dust and debris from the demolition contained toxic chemicals that traveled onto their properties and

harmed their health, their yards, and their tenants' health. The Liebharts sued under federal statutes that authorize rights of action for environmental contamination. The district court had denied the motion for partial summary judgment for the Liebharts and granted summary judgment to the defendants with costs. The Seventh Circuit Court of Appeals ruled that the district court set the bar too high for the plaintiffs to show a violation of the federal environmental statutes. It went on to vacate the district court's ruling and had the case remanded for reconsideration once more.

LAJIM, LLC, et al. v. General Electric Co.

LAJIM, LLC, *et al.* purchased land near a former General Electric Company manufacturing plant in Illinois. The plant leached toxic chemicals into the groundwater of the surrounding area, prompting the Illinois Environmental Protection Agency (IEPA) to file suit under state law against General Electric in 2004. A plan between the IEPA and General Electric has been used to work on addressing the contamination. In 2013, LAJIM, LLC, *et al.* filed suit under the citizen suit provision of the Resource Conservation and Recovery Act, wanting to order a mandatory injunction for General Electric to have additional investigations into the contamination and ordering the company to get rid of the contaminants. The district court found General Electric liable for the contamination on summary judgment but denied an injunction on LAJIM, LLC, *et al.*'s behalf as they did not offer evidence that indicated a need for injunctive relief beyond what General Electric has already done with the IEPA. The Seventh Circuit Court of Appeals affirmed the lower court's decision.

Environmental disputes can present especially difficult cases that can become long, drawn-out, court battles where the harmed parties may not reach the conclusion they were hoping for. Mediation between the afflicted party and those causing the harm can produce a positive outcome that could lead to beneficial settlements. In instances where individuals are being denied the financial benefits that come with many environmentally destructive behaviors, mediation is an optimal choice for finding a resolution between environmentally concerned parties and those who are seeking financial compensation. While the courtroom environmental case continues to exist, cases involving an environmental dispute can often be resolved with the use of alternative dispute resolution.■

Technology and ADR

BY MADELINE DERANGO

Designing a Website: Web Design and Legal Disputes

First, I would like to begin by thanking my readers for supporting my column. I have spent countless hours finding the best content for my personal column, and I thank everyone who has followed my work over the year. This column has allowed me to combine my interests in ADR with my passion for technology.

Throughout the year, I have found that poor web design has led to unfavorable decisions from courts. Missing hyperlinks, difficult-to-read text, and misplaced web pages containing contracts with arbitration agreements have all led to courts to difficult challenges on how to define in determining reasonable conspicuousness. For example, in Uber's infamous cases, a non-traditional hyperlink (not featuring the usual blue, underlined text) led to a court denying their motion to compel arbitration. While courts have mostly favored simple, traditional webpages, a recent case has shown that a 'clickable' agreement may make a huge difference for companies looking to avoid unfavorable court decisions.

In *Holl v. United Parcel Service, Inc.*, the plaintiff filed a class action complaint against the United Parcel Service (UPS) alleging that the defendant overcharged retail customers; in response, the defendant moved to compel individual arbitration. According to the defendant, the arbitration clause was located in the "My Choice Program" website used to track postal deliveries. In order to access the page, the user would be required to navigate through several webpages, hyperlinks, and documents in order to find the UPS My Choice Service Terms. The district court found that the navigation required to access was reasonable, granting the motion to compel individual arbitration. The plaintiff appealed the decision. The ninth circuit affirmed the lower court's findings, noting that UPS's arbitration clause fell within the "outer limits" of reasonable conspicuousness. But why?

In previous cases I have reviewed, confusing web pages have led to courts denying motions for arbitration; however, what set UPS apart from similar defendants was the design of its agreement. When presented with terms and conditions on UPS's website, users are presented with a "clickwrap" agreement. This type of agreement usually contains a statement such as "I Agree" along with a clickable box. When such a box is checked off by the user, they can proceed to the next page. Such tools can be used to assure users to acknowledge contracts. In contrast, a "browsewrap" agreement—featuring a clickable hyperlink containing a contract—does not necessarily require the user to access a webpage. In Uber's case, the presence of a "clickwrap" agreement was enough to make their contract binding. According to the court, ""where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must

click on—without more—is insufficient to give rise to constructive notice." Despite the effectiveness of the "clickwrap" agreement in UPS's case, businesses should still be careful to design simple, accessible web pages to assure that contracts are binding.

Recent ADR Cases

Greenway Health, LLC, and Greenway EHS, Inc. v. Southeast Alabama Rural Health Associates (May 17, 2019) - Alabama Supreme Court

Greenway Health, LLC and Greenway EHS, Inc. (the Greenway Defendants) are companies that specialize in practice-management software for medical providers. Sunrise Technology Consultants, LLC, and Lee Investment Consultants, LLC (the Sunrise Defendants) provided software and technology to the Greenway defendants. Southeast Alabama Rural Health Associates (SARHA), a nonprofit corporation which provides medical assistance to rural members of Alabama, filed a complaint against the Greenway defendants alleging that the defendant stored patient records within its medical-records database. In 2009, the Greenway defendants and SARHA entered into an agreement to store a backup copy of SARHA's medical records electronically on Greenway's database-providing services, as required by Alabama law. As part of their contract, the defendant agreed to provide medical records if, for any reason, files were corrupted or ruined. Between May 2016 and August 2016, both SARHA's primary and secondary hard-disc drives failed, preventing SARHA from accessing records. SARHA alleged that they requested records from Greenway but never received a restorative copy. Greenway disclosed that it was unable to restore the medical information due to not having a viable backup. SARHA sued Greenway and Sunrise, and the defendants moved to compel arbitration. The court denied both motions; as a result, both Greenway and Sunrise appealed. The Alabama Supreme Court found that Greenway failed to provide a contract containing an arbitration provision. The Sunrise group attempted to use an intertwining-claims theory to compel arbitration; however, the Court found the argument unconvincing, affirming the trial court's denial of the motion to compel arbitration. Remanded. ■

Social justice column: Justice for Vets

BY REAGAN QUYNN

Justice for Vets is a non-profit organization based in Alexandria, Virginia working to reconstruct the way the justice system encounters veterans. The organization is committed to changing the way the justice system treats veterans by offering training and other assistance to support both the veterans and their communities. The goal is to keep veterans out of prison, and make sure they are connected with treatment and support they may need to navigate mental health disorders, including substance abuse and trauma.

Justice for Vets is part of the National Association of Drug Court Professionals, and was created in 2010. Since its creation, it has helped countless veterans through veteran treatment courts, veteran mentor boot camp trainings and other mentorship programs, as well as through serving as advocates for veterans during difficult encounters with the law. While Justice for Vets does not itself provide legal or mental health services, it can help veterans get connected with resources that can offer the appropriate support.

Justice for Vets is providing essential support to our nation's veterans. The work they are doing is changing the narrative of the criminal justice system to better serve and support those who have served and supported our country. The organization is only helping to better the lives of veterans who are struggling. Through Justice for Vets, veterans can access treatment and services they need, rather than being sent to prison. There are already over 200 veterans treatments courts, with over 3,000 trained staff. Hopefully those numbers will continue to grow as the work and message of Justice for Vets spreads. ■