

ADR Times

Mediation. It Works!

The Center for Alternative Dispute Resolution Newsletter, State of Hawai'i Judiciary

SPRING 2009

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CADR Training Schedule

*(Classes are open to state and county employees
attending on work-time.)*

March 4 – Beyond Basic Facilitation
Prerequisite: Completed Facilitation 101

**March 25 – Handling Difficult Situations
in the Workplace**

April 9 – Negotiation Skills

May 26 & 28 – Facilitation 101
(Better meeting management)

**June 17 – Handling Difficult Situations
in the Workplace**

Legislation Update: Bills Related to Mediation

Legislative bills that include mediation provisions or may affect mediation were introduced this session. The Center is tracking and testifying on some of these measures. Click on the links to view the full text of each bill.

[H.B. 782](#) and [S.B. 120](#), relating to the Uniform Mediation Act (UMA). Adopts the UMA and provides rules for mediation. Among other provisions, these bills establish a privilege that provides confidentiality of mediation communications in later legal proceedings. Both measures passed out of their first hearings with amendments.

[S.B. 359](#) and [S.B. 1192](#), relating to district court, small claims division. Increases the jurisdictional limit from \$3,500 to \$5,000 (S.B. 359) and \$3,500 to \$7,000 (S.B. 1192). Increasing the jurisdictional limit could significantly increase the number of small claims cases referred to mediation, before the case is tried. S. B. 1192 passed out of the Senate Committee on Judiciary and Government Operations with amendments on February 6.

[S.B. 1328](#) confers owner-occupants of residential real property with the right to participate in mediation to help homeowners and lenders prevent foreclosures, and establishes notice requirements.

[H.B. 1792](#) establishes an office of evaluative mediation for certain condominium disputes. The bill was deferred after a joint hearing by the House Committees on Judiciary, and Consumer Protection and Commerce.



2009 Statewide Peer Mediation Conference

The 22nd Statewide Peer Mediation Conference (PMC) will be held at the Ala Wai Golf Clubhouse on Friday, March 6, 2009. Representatives from three schools and peer mediation supporters from various alternative dispute resolution organizations convened a planning meeting on October 17, 2008. The group reviewed past conferences and brainstormed ideas for the 2009 PMC. At the request of the student representatives, this year's PMC theme is *Relationships: Making Them Work*.

New this year in conjunction with the PMC is the *Star Poets: Poems for Peace* poetry contest. Carol Catanzariti (mediator with the Federal Mediation and Conciliation Service), and Libby Young (Windward Community College [WCC] professor and Star Poets Coordinator) established the *Poems for Peace* contest on the theme of peace and conflict resolution. The contest was open to all Hawaii students, grades 3 - 12. Winning entries will be posted on WCC's website in May 2009.



FORUM: Investor-State Arbitration January 20, 2009



Professor David Caron



The increasing importance of international investment led to the rapid development of a new and cutting-edge field of international law that defines the obligations of host states to foreign investors and creates rules and procedures for resolving disputes arising out of those obligations. Professor David Caron, from the University of California at Berkeley, discussed the history, present practice and future implications of arbitration between foreign investors and host states, authorized by multilateral and bilateral investment treaties (BITs).

Historically, foreign investors had few rights or avenues of redress when the host country took acts that affected the investment, such as nationalizing the property or other governmental act that would normally amount to a breach of an obligation or an unlawful taking (under United States law). For example, when Castro took control of Cuba in 1959, his first acts were to close the largely American-owned casinos in

Havana and to nationalize huge international businesses, such as Coca Cola and United Fruit.

Initially, protection of foreign investments was dominated by the British Empire through “gun-boat diplomacy” and the post-WWII United States, which used its influence and might to insist upon “full compensation” for the taking of property. The United Nations Commission on International Trade Law then entered the field and promoted the development of BITs and ultimately the formation of the International Center for the Settlement of Investment Disputes (ICSID).

A BIT is an agreement between States/Countries establishing the terms and conditions for private investment by nationals and companies of one state in the state of another. These BITs are designed to encourage investment from abroad by guaranteeing foreign investors legal protection beyond that provided by the host country’s laws. They typically require resolution through arbitration, allowing the foreign investor to avoid the local courts when such disputes arise. These arbitrations are frequently conducted through the ICSID, which is a neutral institution affiliated with the World Bank.

Currently, there are more than 2,500 BITs in force, involving most countries in the world, which has led to an explosion of investor-state arbitrations in the past decade. One of the big questions is the role for Hawaii in this growing ADR field.

FORUM: Why Americans Hate to Negotiate January 22, 2009



Dr. Peter Adler, the Center's first director, used movie clips to illustrate *Why Americans Hate to Negotiate*. First, he showed cartoons from *The Far Side* and *The New Yorker* to emphasize some extreme negotiating styles. One style is "winner take all," using the dogma that winning is not enough and ultimate success only comes when your counterpart loses.

Adler challenged the group to think about six points of resistance that Americans, and perhaps others, display when negotiating. They perceive negotiation as:

- ✦ Unmanly--A clip showing John Wayne in Western, *The Man Who Shot Liberty Valance*, made the point. Confrontation is the technique of choice, with winning ALL as the goal. This illustrates the zero-sum game.
- ✦ Evil--A very presidential Harrison Ford in *Air Force One* takes a moral tone when he states: "We will never negotiate." This view demonizes the "other" and is imbued with the moral high ground.
- ✦ Trickery--The illusion of willingness to "sit down at the table" turns to a pre-emptive strike in *The Fifth Element*, which Peter describes as a good B movie. [Others may disagree.]

- ✦ Base--A sobering scene from *Schindler's List* was used to illustrate how "haggling" can be perceived as a negative "Old World" habit.
- ✦ Dirty--Who better than Tom Cruise in *Jerry Maguire* to challenge common notions of honesty and high purpose in business dealings?
- ✦ Embarrassing ("I'm going to look stupid!")--The "heroes" in *Ghostbusters* are themselves pretty tacky, but even they can be embarrassed when faced with negotiating a contract.

Throughout the presentation, audience members contributed other examples. Helpfully, some members shared ideas about how a mediator might deal with these prototypical mindsets to help the parties find solutions.

Adler noted that there may be psychological resistance to negotiation because people may be unwilling or afraid to take responsibility for their own actions. From a neuroscience viewpoint, the decision whether to negotiate may be part of our hard-wired "flight-or-fight circuitry."

Next Free Public Brown Bag Forum

February 19 – WHY ROCK THE BOAT?

Restorative Justice & Domestic Violence in New Zealand
(presentation by Anne Hayden)

Noon to 1:00 pm, Aliiolani Hale (Supreme Court Building)
417 S. King Street, Room 101

To reserve a seat call 539-4ADR (4237)

For more information visit our website at:
<http://www.courts.state.hi.us/cadr>

Important
DATE!